

2008

Glen C. Weiser, an individual v. Union Pacific Railroad Company : Reply Brief

Utah Court of Appeals

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THE UTAH SUPREME COURT

GLEN C. WEISER, an individual,

Plaintiff/Appellant,

Case No. 220080124-SC
(District Court No. 910749302PR)

v.

Nature of Proceeding: APPEAL

UNION PACIFIC RAILROAD
COMPANY, a Utah corporation,

Defendant/Appellee.

REPLY BRIEF OF APPELLANT

On Appeal from Judgment of Dismissal made by the Second District Court
for Davis County, Hon. Rodney S. Paige Presiding

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

This case arises out of Union Pacific Railroad's (the "Railroad") occupation and use of certain property located in Davis County, Utah (the "Property") which is the subject of a land patent conveyed by the United States Government under the Preemption Act of 1841 to Appellant Glenn Weiser's ("Weiser") remote predecessor in interest, George Tomlinson ("Tomlinson"). Tomlinson established his preemption claim in 1869 by entering his Declaratory Statement of Preemption with the appropriate land office, in the Utah Territory, and settling the Property. Title to the Property was also quieted in favor of Weiser's predecessor in 1935 by the District Court of Davis County. The Decree Quieting Title to such Property in favor of Weiser's predecessor, Steenblick, was signed and entered by the District Court for Davis County. In 1870, by act of Congress, the Railroad claims it received a grant of a right-of-way through the public lands (the "Conditional Grant") in what is now Davis County. The 1870 Act required that certain conditions be met within three months of passage of the Act or the conveyance would be void. The conditions precedent required in the grant by Congress did not occur.

In 1982, the Railroad constructed a semi-truck loading facility on the Property. Despite written demand from Weiser in 1987 that it surrender and vacate the Property, the Railroad claimed that the Conditional Grant provided it a 400-foot wide right-of-way, and it refused to vacate and surrender the Property. This case commenced in or about 1991 by Weiser, and culminated in the District Court's judgment against Weiser which dismissed his complaint. This appeal was timely issued January 18, 2008.

Weiser asserts that Tomlinson acquired an equitable ownership interest in the Property by and through preemption of the Property in 1869, which occurred before the Conditional Grant was made. Thus, the Property was not part of the “public lands” for purposes of the Conditional Grant. Because Tomlinson had an equitable ownership interest in the Property, the Property was not subject to the Conditional Grant which was made after Tomlinson’s preemption rights had been established. In response, the Railroad asserts that although Tomlinson acquired a preemption claim prior to the Grant, he did not submit the purchase price for the Property to perfect his claim before the Conditional Grant was made in 1870. However, the Railroad’s argument is misplaced, because once Tomlinson’s preemption claim was established, the Property was not part of the “public lands” and was therefore not subject to the Conditional Grant. Tomlinson completed his performance under the Preemption Act and the United States issued a Patent conveying the Property to him. For this reason and the other reasons set forth in Weiser’s opening brief and this brief, the Court should reverse the District Court’s judgment which dismissed Weiser’s complaint.

ARGUMENT

I. PREEMPTION REMOVED THE PROPERTY FROM PUBLIC LANDS AND WEISER PRESERVED THAT ARGUMENT AT TRIAL.

a. Weiser Preserved His Preemption Argument by Proffering Oral Testimony of the Davis County Surveyor and Presenting Documentary Evidence, which was Approved by the Court as a Proffer.

Weiser preserved his argument before the District Court by proffering his witness and documentary evidence that the Property was not part of the “public lands” at the time of the alleged Conditional Grant because Tomlinson had preempted the Property. At the only trial held before the District Court on December 8, 2005, Weiser appeared before the District Court with his counsel, his witness (the Davis County Surveyor) and other documentary evidence from public records. While Judge Page ruled that the evidence on the issue of preemption was irrelevant, he permitted the proffer of the testimony of Max Brent Elliott, the Davis County Surveyor, and other documentary evidence present at trial so that the testimony and evidence would be preserved in the record. The Hearing Transcript reflects this event, in part, as follows:

Mr. Call: -- make proffer with Mr. Elliott now?

The Court: You may

Mr. Call. Because we don't want to have to come back, your Honor, we just think that Mr. Elliott has gone through this in great detail, and if we could go through and put this evidence on the record, then it would be there for further review.

The Court: I'll allow you to proffer it in that respect. . . .

Hearing Transcript, Bench Trial, dated December 8, 2005, page 20. The proffer continued through most of the trial. *See* Hearing Transcript, pages 20 to 50.

In addition to the proffer of oral testimony, Weiser proffered numerous exhibits which the Court received and permitted as a proffer. The District documented the receipt of the proffered evidence in the Court Docket as follows:

Plaintiff's Witness 1, Max Elliot, is sworn and testifies. Plaintiff's Exhibits, 1, 3, 36 and 4 are received with no objection. Mr. Call requests to allow the witness to proffer history of dealing with the land. The Court sustains Mr. Devashrayee's objection for relevance, but will allow it to be proffered by the witness for purposes of the record only. It will not be considered in the Court's ruling. Entry of the following of Plaintiff's Exhibits are refused as evidence to decide the issue today but are only received and retained as part of the record for the purposes of proffer of the history: Plaintiff's Exhibits 2, 6, 7, 8, 9, 12, 19, 20, 32.

See District Court Docket, page 30.

b. The Property Was Not Subject to the Conditional Grant.

The 1870 Act of Congress (the "Grant" or "Conditional Grant")¹ specifically provides that the Railroad's right-of-way goes only through the "**public lands.**" The United States Supreme Court has defined the phrase "public lands" as used in such context as those lands that are "subject to sale or other disposal under general laws." *Union Pacific R. Co. v. Harris*, 215 U.S. 386, 388 (1910). Therefore, the issue before the Court is whether Tomlinson's actions in entering upon and settling the Property, and entering his Declaratory Statement in the Land Office with the appropriate fee as required under the statute which resulted in a subsequent land patent being conveyed to Tomlinson, were sufficient to establish his claim to the Property under the Preemption Act of 1841 (the "Preemption Act"), which precluded the Property from being part of the **public lands**. The Railroad contends that until the full purchase price was paid for the Property, title did not "vest" in Weiser's predecessor-in-interest (Tomlinson) and the Property therefore remained part of **public lands**. Weiser disagrees and contends that the Property was removed from the **public lands** through Tomlinson's compliance with

¹ The 1870 Act of Congress (the "Grant," or "Conditional Grant") is attached to Appellant's opening Brief as Addendum, Tab "C."

the Preemption Act. Tomlinson fully complied with the Act by entering upon and improving the Property, by timely entering a Declaratory Statement with the local Land Office for the Territory of Utah together with other documents, by paying the necessary fee he had vested statutory rights to the ownership of the Property. Indeed, once a settler occupies and improves the land, enters his Declaratory Statement with the appropriate land office, and pays the application fee as required by the Preemption Act, he acquires a right of preemption in the subject property. As such, by complying with the Act, a settler acquires an equitable ownership interest in land “of which he cannot be dispossessed of his priority at the instance of any individual.” *Union Pacific R.R. Co. v. Harris*, 215 U.S. 386, 388 (1910).

In this case, the facts are undisputed that Tomlinson (who was Weiser’s predecessor in interest) appropriately settled the Property and timely entered his Declaratory Statement in the Land Office of the Utah Territory together with payment of the appropriate application fee. These events occurred from 1865 through 1869 and were *prior to* the Conditional Grant. (See Appellant’s Statement of Facts, at ¶16.)² Because Tomlinson had complied with the Preemption Act in making his statutory claim, he had obtained an equitable ownership interest in the Property. The Railroad does not dispute this fact but contends that the purported “attachment” of a preemption right was insufficient to remove the Property from the **public lands**. The Railroad argues that unless Tomlinson had paid the full purchase price for the Property, he acquired no vested

² Weiser refers to and incorporates his Statement of Facts contained in his Amended Brief, of record herein.

interest in the Property and therefore the Property remained **public lands**. Weiser disagrees. Weiser contends that Tomlinson's compliance with the Preemption Act of 1841 constituted a valid and lawful statutory claim to the Property which was duly recorded with the Land Office in the Utah Territory and which remove the Property from the public lands. A similar analysis occurs when a buyer enters into a land sale contract. The seller holds legal title of the property until full performance of the contract is completed. The buyer records a notice of interest with the recorder so that all persons dealing with the property are aware of the buyer's claim under the contract. Indeed, under the doctrine of equitable conversion, the buyer becomes the equitable owner of the property (which is an interest in land) and the seller holds legal title only to secure final performance. However, upon final performance of the contract, the buyer is the owner of the land. Moreover, his interest is superior to anyone who purports to take an interest in such property after the notice of interest or declaration is recorded. The same occurred here. Tomlinson's claims and interest in the Property was duly recorded with the Land Office in the Utah Territory well before the Conditional Grant was made in 1870. As such, the Property was subject to Tomlinson's statutory claims. Tomlinson fully performed under the Preemption Act and the United States properly conveyed the Property to Tomlinson. The conveyance of the Patent related to the prior Declaration recorded with the Land Office in the Utah Territory which was recorded before the Conditional Grant to the Utah Central Railroad was made.

The Railroad strives to distinguish the case authority cited by Weiser in his Opening Brief in support of his preemption argument by asserting that there is a

difference in the way the law treats an unconditional grant of right-of-way *in praesenti* (such as the Conditional Grant here) and a “checkerboard” grant, which carries exceptions or limitations in regards to its application to lands to which preemption claims have “attached” (such as the grants at issue in the some of cases cited in Weiser’s Opening Brief). The Railroad attempts to distinguish between an “attachment” of a preemption claim and the actual “vesting” of title in the Property (i.e, when the ultimate Patent was conveyed to Tomlinson). In other words, the Railroad asserts that despite Tomlinson’s full compliance with the Preemption Act, he lost his entire interest and investment in the Property because the final deed (i.e. the land Patent), which was conveyed to Tomlinson was conveyed after the Conditional Grant purported to convey a right-of-way through the **public lands**. The Railroad makes this argument despite the fact that the Declaration, fee and other documents filed with the Land Office of the Utah Territory were duly recorded before the Conditional Grant was made.

In support of its argument, the Railroad asserts that unlike the case where a grant provides for a “checkerboard” allotment of land to the Railroad limited by any “attachment” of a preemption claim, the Conditional Grant was unconditional and not subject to exception or limitation. The Railroad leaps to the assumption that in the case of an *in praesenti* grant of right-of-way, a perfection and full vesting of Tomlinson’s title was required prior to the effective date of the Grant in order to carve the Property from

the public lands subject to the Grant.³ Weiser disagrees and contends that legal case authority holds otherwise.

The United States Supreme Court has defined the word “attached” in the context of preemption and homesteading. *Whitney*, 132 U.S. at 362 (internal quotations omitted). It does not mean “mere settlement, residence, or cultivation of the land, **but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated.**” *Id.*, 132 U.S. at 362-63 (boldness added). Further, and contrary to the Railroad’s analysis, the Supreme Court established the importance of the distinction between a conditional grant (such as the “checkerboard” grants) and an unconditional *in praesenti* grant of right-of-way (such as the Grant at issue here). In *Stuart v. Union Pacific R. Co.*, 227 U.S. 342, 353-54 (1913), the Supreme Court considered the difference between an unconditional grant of right-of-way and a checkerboard style grant:

³ By analogy the Railroad would argue that the buyer of land would not be entitled to legal title to purchased property over a subsequent purchaser despite the fact that notice of interest of the land sale contract was duly recorded with the county recorder and the buyer fully performed the terms of the contract. Obviously, such is not the law. Rather, the buyer is entitled to the equitable and legal ownership of the property pursuant to the contract. Anyone else dealing with the seller has notice of the buyer’s claim or interest in the property because it was duly recorded with the county recorder. Similarly, here, Tomlinson, through the filing of his Declaratory statement of Preemption with the Land Office in the Utah Territory in 1869, gave notice to the world that Tomlinson was asserting his statutory preemption claim to the Property in compliance with the Act. The United States obviously recognized this when it conveyed the Property to Tomlinson through a land Patent. Surely, a Patent would not have been conveyed to Tomlinson had he not been entitled to legal title to the Property. However, he was entitled legal title and the United States properly conveyed the Property to him through the land Patent.

the former was without limitation or exception, while the latter was expressly subject to the limitation or exception that it should not include any lands which, ***although public at the date of the grant, were sold . . . or to which a preemption . . . claim attached***, at the date of definite location.

Stuart, 227 U.S. at 353 (emphasis added). Here, of course, the distinction is irrelevant because the Property was not “public at the date of” the Grant because Tomlinson had duly made his Preemption Claim which was recorded with the Land Office of the Utah Territory before the Conditional Grant was made. Nonetheless, the import of the distinction was that an *in praesenti* grant of right-of-way took effect immediately as of the date of the grant rather than as of the date of its definite location – whatever fell within the public lands on that date was deemed subject to the grant. In comparison, the lands subject to a limited or conditional grant were established by what lands were deemed public as of the date of the road’s definite location – not by what lands were public as of the date of the grant. Accordingly, the import of a present grant of right-of-way (such as the Conditional Grant at issue here) is as follows:

We are of the opinion, therefore, that all persons acquiring any portion of the public lands *after* the passage of the act in question, took the same subject to the right-of-way conferred by it for the proposed road.

Stuart, 227 U.S. at 354 (emphasis added). Thus, contrary to the Railroad’s position, the import of the distinction between a conditional grant and an unconditional grant rests on the timing of the effective date of the grant at issue in relation to the public lands – not by whether a preemption right had attached or actually vested as of the effective date of the grant.

The United States Supreme Court has determined that, "**lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained.**" *Witherspoon v. Duncan*, 4 Wall. 210 (boldness added).

Thus, where a settler is legally entitled to enter the land, and receives a certificate of entry, and as to which he ultimately receives a patent, "the contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain." *Id.*, at 218. In that event, "the government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title." *Id.* This premise applies to preemption claims as well as to homestead and cash entries. *Hastings & D. R. Co. v. Whitney*, 132 U.S. 357, 361 (U.S. 1889).

There is no question that Tomlinson acquired an equitable interest and statutory claim to the Property when he appropriately settled the Property and entered his Declaratory Statement of preemption in the Land Office for the Utah Territory in 1869. Indeed, the Land Office's "acceptance of such declaratory statement . . . **is the official recognition of the preemption claim.**" *Tarpey v. Madsen*, 178 U.S. 215, 226 (1900)(boldness added). As such, Tomlinson's Declaratory Statement entered in the land office, coupled with his legal entry upon the Property, were sufficient to remove the Property from the "**public lands.**"

A fundamental principle of the land system in this country is that "a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate

upon it, although no exception be made of it.” *Hastings & D. R. Co. v. Whitney*, 132 U.S. 357, 360 (1889). Moreover, where (as here) there is a “subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants.” *Whitney*, 132 U.S. at 364.

Accordingly, based upon the acts undertaken by Tomlinson under the Preemption Act,

[i]t would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers.

Harris, 215 U.S. at 391 (citations omitted). Further, and in regards to the principles upon which the “munificent railroad grants” were based, the Supreme Court has stated that,

It is not conceivable that Congress intended to place these parties [homestead and preemption claimants on the one hand and the railway company on the other] as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations.

Whitney, 132 U.S. at 364-65, quoting *Kansas Pacific R. v. Dunmeyer*, 113 U.S. 629, 641 (1885). Thus, in consideration of the intentions of Congress in passing grants to the Railroad, and in light of the fact that the Property was lawfully settled and appropriated by Tomlinson under the Preemption Act and because the Land Office passed on Tomlinson’s legal entry upon the Property, the Property was severed from the public

lands as of the date of Tomlinson's entry of his Declaratory Statement on the official records upon the Land Office for the Territory of Utah in 1869. Consequently, the Property was not part of the **public lands** at the time the Conditional Grant was made. As such, Weiser's predecessor was indeed properly conveyed title to the Property by the United State's Land Patent and Weiser's interest in the Property is superior to any claim by the Railroad.

The Utah Supreme Court has also indicated that only lands to which settlers' rights attached *after the effective date of the Grant* were subject to it. In *Moon v. Salt Lake County*, this Court assessed the Conditional Grant at issue here and determined that "to the extent of the land included therein, [the Grant] operated as a reservation to any patent, ***based upon subsequently acquired rights***, issued for any portion of the public lands across which the right-of-way extends." 76 P. 222, 225 (Utah 1904) (emphasis added). The reasonable interpretation of the Court's statement is that the Conditional Grant did ***not*** operate as a reservation to any patent based on rights ***acquired before*** the effective date of the Conditional Grant.

In support of this interpretation, the United States District Court for the District of Nevada determined that where a right-of-way grant to a railroad antedates a settler's patent, it must prevail "unless it can be shown that the patent, in so far as it purports to convey title to [the settler], **is based on a prior equity**." *Southern Pac. Co.*, 257 F. 450, 462 (D. Nev. 1919). In that event, the burden of establishing the existence of a prior equity is on the settler. *Id.*

Again, there is no dispute that Tomlinson did in fact obtain a prior equity in the Property by recording his Declaratory Statement with the Land Office for the Utah Territory and by entering upon the land. This prior equity is also established by the undisputed fact that the United States acted to convey the Property to Tomlinson through its land patent in harmony with the Preemption Act.

The Railroad does not dispute that Tomlinson acquired his preemption rights *before* the effective date of the Conditional Grant; but merely argues that the attachment of Tomlinson's preemption claim or equity merely began the process of perfecting his title. (Appellee Brief, at 15.) The argument is unpersuasive and illogical. A settler would never want to undertake to settle upon land, spend years living upon the land and making expensive improvements to the land while running the risk that all would be lost if the land were conveyed away to another before the final patent was signed by the United States despite the settler's full compliance with the Act. Such an event would have resulted in a huge forfeiture for settlers and would have undermined the general objective of the United States in having settlers homestead land.

c. Tomlinson's Land Patent Determines Title to the Property.

As stated above, the Land Office for the Territory of Utah accepted Tomlinson's entry upon the Property and his Declaratory Statement. Moreover, based on those prerequisites and based upon Tomlinson's compliance with his occupation of the land and other requirements of the Act, President Ulysses S. Grant issued Tomlinson a land patent to the Property in 1873. While "it is true that the decisions of the Land

Department on matters of law are not binding” upon the Court, they are yet “entitled to great respect at the hands of any court.” *Whitney*, 132 U.S. at 366.

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. . . . The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

United States v. Moore, 95 U.S. 760, 763 (1878). “The action of the land office in issuing a patent for any of the public land, subject to sale by preemption or otherwise, is conclusive of the legal title.” *French v. Fyan, et al.*, 93 U.S. 169, 172 (1876). Again, the facts are undisputed that the Land Office for the Utah Territory accepted Tomlinson’s money as the final step in fulfilling all prerequisites under the Preemption Act and that it conveyed legal title to the Property to Tomlinson in compliance with the Act. The acts of the United States in conveying the Property to Tomlinson pursuant to his preemption rights, which were established before the Conditional Grant was made, vested full ownership in the Property in Tomlinson and thus the Conditional Grant had no effect upon Tomlinson ownership of the Property. Therefore, Weiser is the owner of the Property as a matter of law and the District Court erred when it refused to consider at trial the acts of preemption undertaken by Tomlinson.

II. THE RAILROAD FAILED TO COMPLY WITH THE CONDITIONS OF THE GRANT AND AS SUCH IS NOT ENTITLED TO THE RIGHT-OF-WAY OVER WEISER’S PROPERTY

The Conditional Grant contained express conditions precedent which had to be performed by the Railroad for the conveyance of right-of-way to be effective.

Specifically, the right-of-way was granted through the public lands “[P]rovided, That within three months from the passage of this act, the [Railroad] shall file with the Secretary of the Interior a map to be approved by him.” (*See Grant*)(emphasis in original). The Secretary rejected the map because it was not certified; consequently, the Railroad did not file a map capable of the Secretary’s approval until after the passage of three months. For the same reasons as promulgated by the Railroad in subsequent argument, that the Secretary’s actions are “quasi-judicial” and should be protected from collateral attack, the Secretary’s action in rejecting the map should similarly be deemed conclusive of the Railroad’s non-compliance with that condition of the Grant. (*See e.g., Appellee’s Brief, at 22.*)

The Secretary did not approve the second and untimely map but merely permitted the map to be filed. However, the filing was not made within the time required by Congress. Thus, the conveyance failed as a matter of law pursuant to the express terms of the Grant. When Congress expressly provided that the Act would only become enforceable upon certain specific events and those events were not timely performed, the conveyance failed because the ability to alter or amend the conditions precedent in the Conditional Grant rested solely with Congress. (1870 Act, at §5.) Indeed, the ancient records obtained and presented to the District Court reflect that the Utah Central Railroad hired counsel in New York in an effort to obtain some indication from the United States that the conveyance was in fact effective despite the failure of condition. However, no such approval or acknowledgement was ever obtained. The District Court determined that the Utah Central Railroad had failed to comply with the Act and initially ruled in

Weiser's favor. Later, however, the Court reserved its prior order of partial summary judgment and ruled that the Court was bound by the doctrine of stare decisis based on rulings made by other courts despite the fact that Weiser was not a party to any of those proceedings.

III. THE *SALT LAKE INVESTMENT CO.* AND *MOON* CASES ARE DISTINGUISHABLE, AND THEY SHOULD NOT BE DEEMED *STARE DECISIS* OF THE ISSUES HERE

The facts of both Utah cases relied upon by the Railroad, *Salt Lake Investment Co.* and *Moon*, as grounds for determining the validity of the Conditional Grant and its priority over Weiser's claim to the Property are distinguishable from the facts and issues of this case. Moreover, neither case should be deemed *stare decisis* of the issues presented by Weiser in regards to his Property insofar as *stare decisis* relates to legal doctrines only and not factual determinations. See, *Salt Lake Investment Co. v. Oregon Short Line R.R. Co.*, 148 P. 439 (Utah 1914), 246 U.S. 466 (1918); and *Moon v. Salt Lake Cty.*, 76 P. 224 (Utah 1904).

In *Salt Lake Investment Co.*, the plaintiff in that action sought compensation from the railroad (the Railroad's predecessor in interest) for the use and taking of property as to which the plaintiff asserted title by virtue of a claim of preemption under the Preemption Act. Contrary to the Railroad's interpretation of the case, the only reason the right-of-way was determined to have priority over Salt Lake Investment Company's claim was because the court determined that the plaintiff did not actually have title to the land in the first place – not because of the validity and asserted priority of the Conditional Grant. (*Cf.*, Appellee's Brief, at 24.) Specifically, and similar to Weiser's claim, Salt

Lake Investment Company claimed an interest in the property under the Preemption Act of 1841 as a result of having filed a declaratory statement and settled the land prior to the time when the railroad acquired the right-of-way by virtue of the Grant. In *Salt Lake Investment Co.*, the settler had settled the land and recorded its Declaratory Statement before the date of the Conditional Grant, although the purchase price for the land was not paid until after the date of the Conditional Grant. However, the similarities between this case and *Salt Lake Investment Co.* end there. The property at issue in *Salt Lake Investment Co.* was situated within the incorporated limits of Salt Lake City and therefore it was not subject to preemptive rights under Section 10 of the Preemption Act. Because the land was within the city limits, the Act did not apply and the plaintiff could not acquire a preemption equity in the land, and the recording of the declaratory statement and plaintiff's settlement upon the land were of no effect. *Id.*, at 448-49. As such, the court determined that it was a legal impossibility for title to the property to have been acquired by Salt Lake Investment Company under the Preemption Act of 1841, despite the fact that the land office issued a patent to Salt Lake Investment Company for the property. It was on that basis alone that the court deemed the railroad's claim to the right-of-way superior to the settler's claim, and only in regard to that particular tract of land. Essentially, the Court found that the status of the land was unaffected by the plaintiff's claim. "His claim was not merely irregular or imperfect, but was an impossible one under the law, and so the status of the land was not affected thereby. The land continued to be subject to the disposal of Congress and came within the terms of the right-of-way act as much as if he were making no claim to it." *Id.*, at 449. Consequently,

the Court determined that no taking demanding of compensation had occurred. The facts in this case are very different because the subject Property was indeed subject to Tomlinson's claim of preemption under the Act.

In *Moon*, the rights claimed by the plaintiff were acquired *after* the date of the Conditional Grant, 76 P. 224, 225, therefore that case is also distinguishable from this action. Here, Tomlinson filed his Declaration with the Land Office of the Utah Territory and other documents *before* the Conditional Grant was made. Therefore, even if this Court were to determine that the Property at issue herein remained within the public lands until Tomlinson actually paid the purchase price for the land, the Grant still does not operate as a reservation to Tomlinson's patent. Based on this Court's prior analysis, Tomlinson's patent is based on rights of preemption acquired before the date of the Grant, and as such the Grant does not operate as a reservation to it. *Moon*, 76 P.2d at 225.

The two cases are important to this matter insofar as the District Court used them as the basis to revisit and overturn its own ruling of partial summary judgment which was originally rendered in favor of Weiser. By asserting the application of the doctrine of *stare decisis*, the District Court determined that it was compelled to reconsider its original ruling in favor of Weiser despite the fact that neither Weiser nor his predecessors were parties to either case. The District Court rejected Weiser's contention that the doctrines of *res judicata* and *collateral estoppels* were the applicable legal doctrines that the Court should apply in determining whether the findings and facts and conclusions of law in one case should be binding upon another. Weiser argued that *stare decisis* applied only to

legal doctrines and not to the issues of claim preclusion (*res judicata*) or issue preclusion (collateral estoppel). Furthermore, *stare decisis* does not compel the same application of law when different facts are established in a subsequent case. If this were not true, a plaintiff could establish binding precedent in an action in which proper defenses were not raised. Such is not the law in this State. Rather, a party is only bound by the doctrines of claim preclusion (*res judicata*) and issues preclusion (collateral estoppel).

IV. THE RAILROAD ABANDONED ANY INTEREST THAT IT HAD IN THE PROPERTY WHEN IT QUITCLAIMED AWAY ITS INTEREST THEREIN

Even if the Court were to reject all of Weiser's arguments concerning Weiser's ownership rights in the Property, the Property is still currently owned by Weiser because the Railroad abandoned any interest in the Property when it quitclaimed away its interest in the Property. The Railroad does not challenge that the purported right-of-way conveyed by the Conditional Grant is subject to reverter. (Appellee's Brief, at 28.) Under the doctrine of reverter, the right-of-way reverted to the United States upon such abandonment and thereby vested with Weiser pursuant to the land Patent conveyed to him by the United States. The Railroad rejects this argument and contends that no reverter has occurred. Weiser disagrees because the facts are undisputed that the Railroad purported to quitclaim any interest in the Property to another. The quitclaim instrument executed by the Railroad establishes that the Railroad released and remised any interest in the Property. Under Utah law, the underlying purpose in construing or interpreting a contract or instrument is to ascertain the parties' intentions thereto. *See WebBank v. American General Annuity Serv., Corp.*, 54 P.3d 1139, 1144 (Utah 2002).

Because the terms of the Railroad's quitclaim deed of the Property are unambiguous, the Railroad's intentions to abandon the Property are clear from the plain meaning of the instrument as a matter of law. See *West Valley City v. Douglas W. Martin* 2004 WL 2152196, *2 (Utah App. 2004) (citing *ELM, Inc. v. M.T. Enters., Inc.*, 968 P.2d 861, 863 (Utah Ct.App.1998)). Thus, the Railroad's purported conveyance of its interest in the Property manifested an intent to abandon its purported right-of-way under the Conditional Grant. For example, in *Barton v. Jarvis*, 218 Ky. 239, 291 SW 38 (1927), the Kentucky court held that the act of the railroad company in attempting to convey a fee simply title in its right-of-way was conclusive evidence of its intention to abandon the ground for railroad purposes. See also *Cannco Contractors, Inc. v. Livingston*, 282 Ark. 438, 669 S.W. 457 (1984)(supplemented 282 Ark. 438, 670 S.W.2d 454 (1984)).

In sum, when the Railroad purported to transfer any interest in the Property, the right-of-way was abandoned and reverted to the United States. Because the United States had conveyed the Property to Weiser pursuant to its patent, the reverted Property vested in Weiser. Consequently, Weiser is indeed the current owner of the Property and the District court improperly dismissed Weiser's claims for relief concerning the Property.⁴

⁴ Concerning standing to challenge the transaction between the Railroad and the UTA during the course of the litigation, Weiser sought to join the UTA as a party in interest to the litigation to resolve its interest, if any, in the Property. However, in an effort to resolve the joinder request made by Weiser the UTA agreed with the District Court that it would be subject to the District Court's jurisdiction and that it will be bound by District Court's ruling regarding the Property that it had attempted to purchase from the Railroad. See District Court's Docket Minute Entry, dated August 31, 2004, page 22. Based in part upon the foregoing, the District Court refused to permit Weiser to obtain full discovery concerning the sale transaction between the Railroad and the UTA.

CONCLUSION

For the reasons set forth above and in Weiser's Opening Brief and based upon the prior proceedings and record in the case, the District Court committed reversible error when it dismissed all of Weiser's claims for relief with prejudice and determined that Weiser had no interest in the Property. For one or more of the independent grounds asserted by Weiser, Weiser is the owner of the Property and the Court should reverse and remand the action back to the District Court with instructions that Weiser may proceed with the enforcement of his claims against the Railroad and the Property as prayed for in his complaint.

DATED this 4th day of March, 2009.

RAY, QUINNEY & NEBEKER

By: _____

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UTAH APPELLATE COURTS

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IN THE UTAH SUPREME COURT

GLEN C. WEISER, an individual,

Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD
COMPANY, a Utah corporation,

Defendant-Appellee.

**CERTIFICATE OF SERVICE (RE:
REPLY BRIEF OF
APPELLANT'S)**

Case No. 20080124-CA

(District Court No. 910749302PR)

I hereby certify that on the 4th day of March, 2008, a true and correct copy of **REPLY**
BRIEF OF APPELLANT was served by first-class mail, postage prepaid, to:

Jeffery J. Devashrayee
280 South 400 West
Salt Lake City, Utah 84101

DATED this 5th day of March, 2009.

RAY QUINNEY & NEBEKER

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