

1951

# M. Kenneth White v. Salt Lake City : Appellant's Reply Brief

Utah Supreme Court

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## Recommended Citation

Reply Brief, *White v. Salt Lake City*, No. 7652 (Utah Supreme Court, 1951).  
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# In the Supreme Court of the State of Utah

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M. KENNETH WHITE,

*Plaintiff and Appellant,*

vs.

SALT LAKE CITY, a Municipal Corporation,

*Defendant and Respondent.*

Case No. 7652

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## APPELLANT'S REPLY BRIEF

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**FILED**

SEP 10 1951

Clerk, Supreme Court, Utah

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## APPELLANT'S REPLY BRIEF

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Comes now Appellant and herewith submits his Reply Brief.

### STATEMENT OF POINTS

#### POINT I

Ownership of property abutting both sides of a street includes ownership of the street itself, subject only to the use of the same by the public for highway purposes.

## POINT II

The unauthorized laying of a water pipe line by a municipality in a street outside of its corporate limits, which line in no way benefits or serves the abutting property, is an additional burden upon the property, constituting an invasion of the abutting owner's rights, and is actionable.

## ARGUMENT

### POINT I

OWNERSHIP OF PROPERTY ABUTTING BOTH SIDES OF A STREET INCLUDES OWNERSHIP OF THE STREET ITSELF, SUBJECT ONLY TO THE USE OF THE SAME FOR HIGHWAY PURPOSES.

Respondent in its answer brief, cites several cases from other jurisdictions holding that municipalities own the fee interest in streets and highways. These cases have no bearing upon the point under discussion. Here, we are only concerned with the Utah Statutes bearing upon the subject and our own Supreme Court decisions construing them.

From Sections 36-1-1 and 36-1-7, U. C. A. 1943, it is very clear that the public has an easement in streets and highways, and that the abutting owner has the fee title. However, on the surface, there is an apparent inconsistency with Section 78-5-4, U. C. A. 1943, relied upon heavily by Respondent, which provides that the fee to the street passes when a plat of a subdivision is recorded. But the case of Sowadzki vs. Salt Lake

County, 104 Pac. 111, cited in Appellant's original Brief, resolves this apparent inconsistency. This case was dealing with the abandonment of a street, and the argument of the County was that inasmuch as the "fee" passed by virtue of Laws of 1890, P. 76, C. 50, the forerunner of Section 78-5-4, U. C. A. 1943, abandonment of the interest in the public could not result by non-use of the street. It was in answer to this argument that our Supreme Court held that the fee to the corpus or the land did not pass, but only the fee to the surface for public use as a street or highway. Please also see Hall v. North Ogden City, 175 P.(2) 703, at Page 713.

The case of Tuttle v. Sowadzki, 126 Pac. 959, cited in Respondent's brief, was an action brought as an outgrowth of the other Sowadzki case. But this case confirms the doctrine of the other Sowadzki case, by holding that only an easement in the street is created in the public by the recording of a platted subdivision.

To rebut Appellant's contention, Respondent cites Section 36-3-3, U. C. A. 1943 which provides for the "Regulation of Water and Water Mains, etc.", which is part of Chapter 3, "Division and Use of Highway Space." Respondent contends this enlarges the right of the public in the highway. This section is not designed to describe or enlarge upon the rights of the public in highway space as set forth in Section 36-1-7, U. C. A. 1943, but is solely for the purpose of giving control of the highway, such as it is, to the county commission.

Please see Dailey vs. State (Ohio), 37 N. E. 710, wherein the court said:

“The legislature may authorize the construction of a telegraph line by a telegraph company upon a public highway, in such a manner as not to incommode the public in the use of such highway; but authority so given does not empower such company to injure the property of an adjoining landowner, nor to appropriate any of his property rights in the highway, except upon condition that compensation be first made; . . . ”

So, in the case at bar, the necessity of securing permission of the county commission to lay water mains, etc., does not carry with it the right to appropriate the property right of the abutting owner in the highway itself.

Thus, to summarize: The cases from other jurisdictions do not determine the extent of the public's right in a street or highway in our state. Such rights must be determined by our own statutes and Supreme Court decisions construing them. Our statutes and decisions definitely establish that the fee is in the abutting owner, with an easement in the public for highway purposes. To hold otherwise would be to ignore our own statutes and to overturn the decision of the Sowadzki case, *supra*.

## POINT II

THE UNAUTHORIZED LAYING OF A WATER PIPE LINE BY A MUNICIPALITY IN A STREET OUTSIDE OF ITS CORPORATE LIMITS, WHICH LINE IN NO WAY BENEFITS OR SERVES THE ABUTTING PROPERTY, IS AN ADDITIONAL BURDEN UPON THE PROPERTY, CONSTITUTING AN INVASION OF THE ABUTTING OWNER'S RIGHTS, AND IS ACTIONABLE.



In answering Point II of Appellant's brief, Respondent on page 27 of its brief, suggests that the Hofius v. Carnegie-Illinois Steel Co. case, 67 NE (2) 429, relied upon by Appellant, should be construed with two other Ohio cases, Smith v. Central Power Company, 103 Ohio 681, 137 NE 159, and State v. Board of Commissioners of Summit County, 175 NE 590. The latter case held that the county could lay water lines in a county road where it was for the benefit of the abutting as well as other owners. But the Hofius case, decided in 1946, which was much later, specifically overruled that particular part of the opinion in the Board of Commissioners of Summit County case. The Smith and Hofius cases establish that in Ohio, the fee interest in city streets is in the municipality, but that in county roads, the fee is in the abutting owner, with an easement in the public for highway purposes. However, the Hofius case goes further, as pointed out in Appellant's original brief, and holds that a water main over a county highway, solely for the benefit of a neighboring village, is an additional burden on the fee of the abutting owner.

Inasmuch as our own Court, in the Sowadzki vs. Salt Lake County case, supra, held the fee to be in the abutting owner, with the public having an easement in the highway for highway purposes, the Hofius case from Ohio is squarely in point, and supports Appellant's Point II.

Respondent cites three Kansas cases to the contrary. They hold that telephone, oil and gas lines constructed by public utilities in county highways are not additional burdens on the rights of the abutting owner. The earliest of these three, McCann v. Johnson County Telephone Company, 76 Pac. 870,

which was used as authority for the other two, was a three to two split decision.

The Oklahoma case cited by Respondent, concerns an oil line, built by a public utility in a county highway. The Minnesota case cited by Respondent, which used the McCann case, *supra*, as an authority dealt with a telephone line in a county road. It was also a three to two split decision.

Respondent cites an Oregon case, dealing with an unincorporated part of a county, which became incorporated into a town. This Oregon case contains a quotation from Elliott on Roads and Streets, which particular quotation is set out in Respondent's brief, dealing with a street under circumstances. But in another part of Elliott's text, Third Edition, paragraph 489, page 541, the particular point in the case at bar is discussed under the heading "Illustrative Cases—Pipes in a Country Road" as follows:

"In the Pennsylvania case (Sterling's Appeal, 2 Atl. 105, which also was cited in Appellant's original brief) the court stated with clearness and precision the rights of the owner of the fee in a country road and said: 'In other words, the only servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be open and free for public use as a highway.' If this premise be granted, and it cannot well be denied, there would seem to be no doubt as to the correctness of the conclusion that laying gas or water pipes in a country highway is not a purpose legitimately connected with the use of the land as a way for public travel . . . "

Two of the cases cited by Respondent under its Point III contain references to McQuillin on Municipal Corporations,

presumably in support of Respondent's position. However, in Volume 3 of McQuillin, paragraph 1344, page 2901, there is footnote No. 96, which refers to Baltimore County Water & Electric Co. v. Dubreuil, 105 Md. 424, 66 Atl. 439. At page 440, the court in this case said:

"But the great weight of authority is to the effect that there is a distinction between the use of streets in cities and towns for gas and water pipes and the use of country or rural highways. See 14 Am. & Eng. Ency. of Law, 921, 30 Ib. 438, 15 CYC. 671, Ib. 683, 2 Abbott on Mun. Cor. 1166, and Thorton on Oil and Gas, para. 505, where many cases will be found in the notes. In Mackenzie's case, 74 Md. 47, 21 Atl. 690, 28 Am. St. Rep. 219, the distinction is recognized and reasons given for it. In that case it was said of 'an ordinary road or highway in the country' that 'all the public acquires is the easement of passage and its incidents,' and that is in substance the doctrine announced by most courts."

Thus, Elliott and McQuillin, together with Tiffany and the cases cited in Appellant's original brief all support Appellant's position that the laying of the water main in the streets located in the County, as set forth in the Complaint filed in the instant case, is an additional burden on the abutting fee. This represents the majority view. The few cases cited by Respondent represent a minority view.

However, we must consider Respondent's cases further, for there is a distinction between them and the case at bar. The cases cited by Respondent dealing with the laying of gas, oil and telephone lines in country roads all concern public carriers and public utilities. Each case included in its discus-

sion the public nature of the use and the fact that a public utility was concerned.

But what about the instant case? Respondent is not a public utility. When it placed the water main in the streets described in the complaint, it was doing so solely for the use and benefit of the inhabitants of Salt Lake City. The abutting owner had no right to connect on to the line. Thus, Respondent actually appropriated a portion of the subsurface of the street solely for a certain group of people, which is not a public, but a private use.

Therefore, not even the minority view that country roads may be used by public utilities and carriers without further burdening the fee, applies.

Under Point III of Respondent's brief, numerous cases are cited to support the proposition that although an abutting owner owns to the center of the street, there is no right to damages for the laying of lines in the street. Each case refers to the laying of lines in city streets, which is not our problem. Thus, not one of them is in point.

## CONCLUSION

From the foregoing, only two conclusions can logically be reached.

First, the Appellant owns the fee to the streets in question, subject to the right of the public to use the same for highway purposes.

Second, in view of such authorities as Tiffany, Elliott, McQuillin, and the numerous cases cited, all of which deal squarely with the point involved in this case, Respondent had no right to lay the water main in the streets abutting Appellant's property, and in doing so is liable for the damage sustained.

Thus, Appellant respectfully urges that this Honorable Court reverse the judgment of the District Court.

Respectfully submitted,

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