

1979

# Jess W. Pickett v. California Pacific Utilities et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JESS W. PICKETT,

Plaintiff and Appellant,

vs.

CALIFORNIA PACIFIC UTILITIES, a  
California corporation, and THE  
COUNTY OF IRON, a political subdivision  
of the State of Utah,

Defendants and Respondents.

Case No. 16627

BRIEF OF RESPONDENT

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## AUTHORITIES CITED

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U.C.A. 27-12-89 (1953, as amended) . . . . .	8
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## CASES CITED

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BRIEF OF RESPONDENT

CALIFORNIA PACIFIC UTILITIES

STATEMENT OF THE KIND OF CASE

This Respondent specifically disagrees with the statement of the kind of case set forth in the brief of the Appellant. The unmodified and unamended complaint of the plaintiff asked for four (4) items. They are as follows:

1. The sum of \$1,320.00 for a permanent utility easement right of way over said plaintiff's property, and
2. That the County of Iron be stopped from all future authorization of the use of prescriptive right of way now owned by said County, by individuals, or private companies, for their personal use and profit in which the adjacent owner to said roadways is the owner in fee of said property, and

3. Plaintiff's costs incurred herein, and

4. For further relief as to the Court may seem just and equitable.

While the first paragraph of the brief of Appellant in general terms attempts to deal with one of these items in its statement of facts, the second paragraph goes into dangerous hazards of electrocution which was not touched in plaintiff's complaint, and was almost totally ignored by the plaintiff in its proof. The third paragraph goes into expansion of the use of a easement by prescription by the defendant Iron County, bearing in mind that plaintiff's complaint does not ask for the removal of the use or the additional use put on by the County in allowing the defendant California Pacific Utilities Company to build and the questions raised in the last three paragraphs of Appellant's statement of the nature of the case do not properly set the questions before the Court that tried this matter. To summarize the question of whether or not the County can increase the use of the easement by prescription, the plaintiff in its complaint did not ask for the removal of the power line and the Court very properly ruled that the plaintiff had no authority to raise any questions other than on the land as set forth in the complaint. Pertaining to the next to last paragraph in Appellant's statement of the kind of case, the question is raised whether or not an abutting land owner has any course of relief for damage as a result of a power company erecting power poles and transmission lines. Certainly this question was raised by plaintiff's

complaint; however, a complete examination in a very detailed manner of the transcript of the proceedings shows not one word of proof in connection with damage. Pertaining to the last paragraph in Appellant's statement of the kind of case, this question was not raised by the Appellant's complaint.

#### DISPOSITION IN LOWER COURT

The complaint of the plaintiff was dismissed with prejudice and on the merits with a judgment of no cause of action entered.

#### RELIEF SOUGHT ON APPEAL

This defendant and respondent, California Pacific Utilities, seeks to have the judgment of the trial court affirmed.

#### STATEMENT OF FACTS

Pertaining to the statement of facts furnished by the Appellant, the first four paragraphs are believed by the undersigned to be substantially correct. The last paragraph is not raised by the complaint. While there is some testimony in the transcript at the point where the plaintiff was testifying personally as indicated in Appellant's brief to the effect that he has some dangers with irrigation pipes, this question was not raised by the complaint, nor was there any prayer for removal, and certainly there is no question but that almost any line could physically be constructed in some other area. The last portion of this paragraph pertaining to the questions about the service



pole, in the transcript on page 41 from line 6 to line 16, the plaintiff testified that the cross-arms of the two poles that actually do encroach were for his specific benefit and were there in relation to the particular operation of his and that he did not want them removed. Again the complaint of the plaintiff at no point asked for removal of any item, and in line 5 of page 41 he specifically says he does not want these moved.

#### POINT I

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN RULING THAT THE COUNTY COURT AUTHORIZE PERMANENT INSTALLATION OF POLES AND POWER LINES OVER A PRESCRIPTIVE EASEMENT FOR PUBLIC TRAVEL

In connection with this particular point one must look at the history of prescriptive easements in the state of Utah, and one of the amazing things in Appellant's brief is the reference to other jurisdictions which do not have the same statutes or the same history in this particular area as the state of Utah. This particular point has actually been ruled by the Utah Supreme Court contrary to Appellant's brief in the case of White v. Salt Lake City, 121 U. 134, 239 P.2d 210, which this Respondent believes to be controlling in this particular item in the state of Utah and the best source of authority in the above entitled matter. The similarities of these two cases, to-wit, the White case and the case at bar, are noteworthy. Some of the statutory citation in the White case have to be adjusted to the present statutes, but when this is done the wording is in most instances

identical. In the White case, the differences are as follows:

1. The property owner, White, owned the property on both sides of the road.

2. It was a dedication by virtue of a subdivision-type recording. Under the old Code, Title 78-5-4, as in effect at that time, said, "that same shall vest the fee of such parcels of land as then expressed, named or intended for public uses in such county, city, or town for the public for the uses therein named or intended." The defendant Salt Lake City had placed in the right of way a forty-eight (48) inch water main for the purpose of taking water on past this property for the use and benefit of the residents of Salt Lake City, Utah proper. The section of the statute which at that time allowed the County Commissioners to grant the franchise along the public way was 19-5-39 Utah Code Annotated 1943, or prior thereto, and is almost identical with the present Title 17-5-39, Utah Code Annotated 1953, as amended. In the White case there was no finding of any item in the subdivision plat by which the dedication was achieved for the land to be used for anything but a highway out in the County.

Up until 1967 the burdens upon a public highway by prescription and a public highway by dedication were identical. In either instance the county or the authority concerned achieved a right of use and upon abandonment the property went to the property owners on each side to the middle. Title 27-12-101 still makes this provision and this has been upheld continually by the Utah Supreme Court. Some of the recent

cases upholding this are Oregon Shortline Railroad Company v. Murray City, 2 U. 2d, 427, 277 P.2d 798, and Fenton v. Cedar Lumber and Hardwood Company, 17 U.2d 99, 404 P.2d 966, of which the undersigned has some personal knowledge. Until 1967, regardless of whether a street or highway was acquired by deed, easement, prescriptive use, or what purpose, at the time of abandonment same reverted to the property owners on each side regardless of the interest that the city or county or state might have had. In 1967 the statutes were passed to the effect that in certain instances where the title was taken in fee, abandonment under some conditions may not return the property to the property owners. This phase of the matter is not applicable in this particular instance inasmuch as Mr. Pickett's testimony showed that the road was there when he first went onto the property twenty years before the trial and was in its present condition with fences on both sides and there is no question of the use of the area as a public highway for both vehicular and livestock travel. From a practical standpoint the rights obtained by the County in the White case and the rights obtained by Iron County in the instant case were identical and were the right to use the property for travel and purposes incidental thereto as defined by our statute in case law, and upon abandonment, the properties were to be returned to the property owners on each side to the middle of the road by operation of the law. In each instance a county had acquired the right of use of the area for highway purposes. In the instant case, the right of the county to allow franchises to someone else and in the instant case, the power company, for all lawful purposes upon

such terms and conditions and restrictions as the county may deem proper, was based upon a statutory enactment 17-5-39 Utah Code Annotated 1953, as amended, which is the successor statute to the old Title 19-5-39, and is almost identical. In addition, in the White case, the then Title 78-5-4 and the then Title 36-3-3 there was specific authority for water mains and sewer pipes, it does not state whether these are water mains and sewer pipes of the county or of a third party such as Salt Lake City. In the White case, the rights of the county are set forth in detail on page 139 of Volume 121, Utah Reports. "As long as the dedicated street remains plated as a public thoroughfare the statutory provision that the fee is vested in the County Commissioners can only be interpreted to mean that the rights of the county, acting through its commissioners, are superior to those of the abutting property owner insofar as the normal use of the street is concerned." Certainly the Supreme Court of Utah, at the time of the White case interpreted the rights of the county in exactly the same fashion as the prescriptive right for a highway is concerned. Certainly the rights of the county where they have acquired prescriptive rights for a highway are superior to those of the abutting property owner insofar as the normal use of the street is concerned. Under these conditions there can be no question in the White case and the instant case that the rights acquired by the county were right and ethical. Under these conditions there should be no question that the county acted properly in allowing the power company to build and

there should be no question that the trial court did not commit error when it approved the installation on the prescriptive easement.

## POINT II

### THE TRIAL COURT DID NOT ERROR IN PROMULGATING PARAGRAPH 4 OF CONCLUSIONS OF LAW

In the first place, the statement of Point II in Appellant's brief is not correct. Paragraph 4 of the conclusions of law does not in any way use the words, "entire fee." It states specifically, "that the County of Iron has used and held the area between the fences, including that described in the plaintiff's complaint sufficient time and has established a right of way by prescriptive use of the area between the fences on each side of the road, including that portion of the area described in the plaintiff's complaint that is between the fences. That this prescriptive right has been developed over many years by travel of all kinds on said public right of way, and the property is available by the statutory methods for all kinds of public use, including but not limited to the power line of the defendant California Pacific Utilities."

Under these conditions paragraph 4 is a conclusions of law to the effect that Iron County has complied with Title 27-12-89, Utah Code Annotated 1953 as amended, and in addition has complied with many identical statutes prior to the 1953 revision to the effect,

"a highway shall be deemed to have been dedicated and abandoned in the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." This paragraph 4 amounts to a finding that the area between the fences has been used as a highway for a period in excess of ten years, and long enough to comply with the statute. Mr. Pickett, in his testimony, admitted he had been in the property for twenty years and it had been used from the time he has been present to the present time in this specific manner that it is now being used and was being used at the time of the filing of the complaint and at the time of the trial, and that in addition he bought same with knowledge of the existence of the public right of way. (See transcript page 37, line 9 to line 26, and transcript page 45, line 24.) This became a general right of passage and a highway by use, and the use extends to the fences on both sides according to the testimony. There is no question from Mr. Pickett's own testimony that this has been used by the public for a period in excess of twenty years as indicated above in the transcript citation.

### POINT III

#### THE TRIAL COURT DID NOT ERROR IN PARAGRAPH 6 OF CONCLUSIONS OF LAW

Paragraph 6 of the conclusions of law, which reads, "That the public benefit has been served by adding to the public uses on said prescriptive easement of the power line of the defendant California Pacific Utilities," is a correct statement of a conclusion of law based upon the findings. Certainly the plaintiff and Appellant should be the last to argue that this was not for the public benefit.

He benefits from it and other people benefit from it. And really it is immaterial whether anyone benefits from it or not. Undoubtedly no power company is going to make an extension of plant poles without purpose, the purpose in the long run is to furnish power to someone. Plaintiff and Appellant has a well that is served by this power line as well as other wells. This particular power line, together with the lines on which it joins on each end, not only serves the property of the plaintiff, but serves other property. As indicated by the plaintiff, this is in a pump well area and water has to be pumped by the farmers that farm this area. Said water is used for irrigation purposes. There is no question raised that this is not a lawful purpose and under Title 17-5-39 for the county to grant a franchise it has to be for a lawful purpose, there is actually no requirement for it being for a public purpose or public use.

#### POINT IV

#### PLAINTIFF OFFERED NO PROOF OF DAMAGES

In going through the transcript in connection with this matter on a detailed basis, many times since same has been obtained, and specifically and with this point in mind, plaintiff at no time offered any proof of damages. The only thing that has been shown by the plaintiff, neither defendant had to make any defense whatsoever. All they had to do was to appear and stand on their answers. While plaintiff and Appellant is appealing on the basis that the trial court committed error, even had the trial court felt that the plaintiff's theory was correct, the trial court could not have granted a judgment



for the plaintiff. The only thing that was asked for in the prayer of the complaint of the plaintiff was \$1,320.00 for permanent utility easement. No proof was offered that this was a proper amount, and no proof has been offered that any damage has been done to the plaintiff. Even had the Court found that the pole line was improperly placed, there is no basis for any award of damages in the testimony. The plaintiff has not said he has been damaged one dollar. He has produced no evidence that he has been damaged ten dollars or any other specific amount. The only question of damages that has been heard in this entire lawsuit was not an evidence item and there was not an allegation of damage in the complaint, but was simply the statement in the prayer where he asked for judgment for \$1,320.00 for a permanent utility easement right of way over said plaintiff's property. As of this date there has been no proof.

#### POINT V

THERE IS NO PROOF OF ANY AUTHORITY TO BRING ANY ACTION FOR OTHER LANDOWNERS IN THE COUNTY AND COURT PROPERLY RESTRICTED THE QUESTION TO LAND DESCRIBED IN PLAINTIFF'S COMPLAINT

This, of course, is the other question in which no proof was offered, and while again without any allegation of damage in the complaint or without any allegation of authority by other landowners, and without any allegation that the county has in other instances allowed pole lines to be placed on rights of way, plaintiff asked that the county be stopped from allowing the statute allowing them to give



franchises in this fashion be denied availability in Iron County.

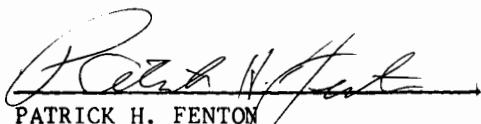
Again the Court very properly restricted the plaintiff from making proof or any statement in regard to pole lines in any property other than that described in the complaint.

#### CONCLUSION

That the trial court acted properly in every respect in hearing the above entitled matter, that the plaintiff failed to furnish proof to support any of its allegations, that there was no error in law or any other item in connection with the above entitled matter, and the judgment of the trial court should be affirmed.

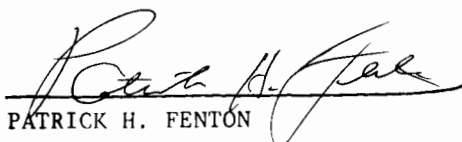
DATED this 11 day of DECEMBER, 1979.

Respectfully submitted.

  
PATRICK H. FENTON  
Attorney for Defendant and Respondent  
California Pacific Utilities

#### CERTIFICATE OF SERVICE

I do hereby certify that on the 11 day of DEC 1979, the plaintiff and appellant was served with the foregoing Brief by mailing two copies of same to him at P. O. Box 94, Parowan, Utah 84761; and the defendant County of Iron was served with same by mail two copies to its attorney James L. Shumate at 110 North Main, Suite Cedar City, Utah 84720.

  
PATRICK H. FENTON