

1954

# Oregon Short Line Railroad Company and Union Pacific Railroad Company v. Murray City and Statewide Plumbing and Heating Company, Inc. : Brief for Respondent

Utah Supreme Court

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Bryan P. Leverich; M. J. Bronson; A. U. Miner; Howard F. Coray; Marvin J. Bertoch; Attorneys for Respondent;

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In the  
**Supreme Court of the State of Utah**

OREGON SHORT LINE RAILROAD  
COMPANY, a corporation, and UN-  
ION PACIFIC RAILROAD COM-  
PANY, a corporation,  
*Plaintiffs,*

vs.

Case No.  
8122

MURRAY CITY, a municipal corpora-  
tion, and STATEWIDE PLUMBING  
AND HEATING COMPANY, INC.,  
a corporation,  
*Defendants.*

**BRIEF FOR RESPONDENT**

**FILED**

JUN 1 - 1954

Clerk, Supreme Court, Utah

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tion, and STATEWIDE PLUMBING  
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a corporation,

*Defendants.*

Case No.  
8122

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**BRIEF FOR RESPONDENT**

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**STATEMENT OF FACTS**

The plaintiff Railroad Companies filed herein a State-  
ment of Points by way of cross appeal wherein it was urged  
that the trial court erred in certain particulars. Those  
Points will be urged and argued herein. However Plaintiffs  
will be referred to herein as respondent and defendant Mur-  
ray City as Appellant.

The statement of facts as set forth in appellant's brief is, with one or two minor exceptions, substantially correct, as far as it goes, but there are numerous facts which are very material and important in presenting the matter fully to this court which appellant did not set forth. Respondent will add some of such facts here, as well as additional facts in connection with points of argument.

Emphasis throughout is ours unless otherwise indicated.

On page 4 of its brief appellant states: "A power line of Murray City runs down the east side of the tracks near the east boundary line of the street and has been there since 1914-15." It is true there are some poles carrying a power line on the east side of so-called 2nd West but they do not run from 5300 to 6400 South. There was nowhere any testimony that the power lines ran such full distance, Mayor Hansen merely testifying: "We have our power line on both sides of the street" (R. 126). The map, Exhibit P-11, made from actual survey and measurement of existing physical features (R. 56), shows a Western Union pole line on the east side running full distance about midway between the track and east fence line. The only Murray pole or power line on the east side extends a short distance north and south from 61st South Street to serve the half-dozen homes in that area. (See Exhibits D-10, P-11, P-37 and P-22 to P-26, inclusive.)

## USE OF RAILROAD RIGHT OF WAY

The fact is undisputed and indisputable that the railroad track was constructed during the summer of 1871 (R.



34, 60). The land was then all public domain, the first patent in the area being dated July 10, 1872, covering property at the north end, and the next earliest being dated December 1, 1874 (R. 37-39). There has been no change in the location of this railroad track since its original construction (R. 59). The property claimed by the railroad is now fenced on both sides (R. 109-110) and has been fenced at least since 1920 (Exhibits D-10, P-37) and has been returned to the state tax commission for tax assessment purposes and taxes paid thereon to the state and Murray City at least since 1917 (Exhibits P-7, 8 & 9; R. 47, 50).

In addition to building its track over the public domain, the railroad company secured full warranty deeds of title to the area claimed, except for a small strip in the north end of Section 24. The latter area has been claimed by the railroad, has been fenced and has been included in the tax returns to the state tax commission and taxes paid on it (Exhibits D-10, P-37, P-7, 8 & 9; R. 47, 50; see also County Plat Ex. P-6; see also Trust Deeds and Mortgages in Exhibit D-32, Entries 5, 6, 7, 8 and 10).

### USE OF AREA BY PUBLIC AS ROADWAY

There isn't a scintilla of evidence of any USE of *any of the area* as a *roadway* or highway prior to the issuance of patents from the United States Government, nor in fact prior to 1899 or 1900. Mayor Hansen's earliest recollection was about 1899, which would be when he was not over five years old (R. 120, 121). The witness Wahlquist's recollection did not go prior to 1903 (R. 111, 118, 163). Both of them said the roadway on the west side had been used as

long as they could remember (R. 111). This use was by pedestrians, horses and vehicular traffic, including carts, wagons and automobiles (R. 102, 109). Wahlquist used some roadway on the east side for two years while he was going to school, 1903 to 1905, but could remember nothing of it aside from those two years (R. 110-111). Mayor Hansen insisted the roadway on the east side was used longer but was not definite as to the nature of such use after 61st South was opened. 61st South was opened in 1905 (R. 106). This supposed roadway on the east side was in front of the school now located on 61st South Street and did not go all the way to 6400 South. "There was a road, however, almost up to the Cahoon and Maxfield's used by the Pioneer Nurseries" (R. 133). When asked as to who used it, the Mayor answered, "The Nursery Company did and anyone who come to purchase trees from the nursery" (R. 133). The Nursery Company owned the property to the east of the track and was the party who gave to Murray City the deed to 61st South Street (Ex. D-33; R. 139).

There is no evidence as to when the school on 61st South Street was first constructed. Respondent's counsel, having no knowledge, refused to stipulate as to when the school was constructed other than to stipulate that it was constructed on the property deeded from James Randall to named school trustees (R. 103). This deed was dated April 7, 1875 (Ex. D-12), and Randall's patent December 1, 1874 (R. 38, 84). It was stipulated that a Mrs. McMillan attended this school in 1881. Thus all that can be gained from the evidence is that it was constructed sometime between April 7, 1875, the date of the deed and 1881.

In the extreme upper left-hand corner of Exhibit P-20 is shown the school in front of which the roadway east of the track was supposed to pass. This is the present school but built on the same location as the old one. It was reconstructed in its present form in 1905 (R. 104). The first construction of the old school was a long rectangular building with the main or only door opening on the south side (R. 112, 113).

The only evidence of use of so-called 2nd West upon which a definite conclusion could be reached or judgment based shows a prescriptive use of an area starting 11 feet, and more at various points, west of the center of the railroad track (see stipulation of counsel dated April 12, 1954; see also Ex. P-11) and even this use as a roadway has not extended to the west fence as claimed by Mayor Hansen because of the presence of the Murray City pole line (See Exs. P-17, 18, and other pictures). This use has included not only surface traveling and oil surfacing, but the construction of the power pole line and laying of culinary water pipes under the surface of such roadway (R. 134-136).

## STATEMENT OF POINTS UPON WHICH RESPONDENTS REQUEST REVERSAL

1. The court erred in finding that Murray City held a fee title in trust for the public to the property described in paragraph 17 of the findings of fact (R. 215), and in failing to find that the railroad company held the fee title to said property subject to such prescriptive rights as have been acquired by the public therein.

(A) The court erred in finding, as set forth in Finding of Fact No. 9 (R. 210), that the public used and acquired a right of way by use of said property while the same was still public domain.

2. The court erred in concluding as it did in paragraph 3 of its Conclusions of Law (R. 217), that Murray City had the right to lay sewer mains under the property described in paragraph 17 of the Findings of Fact without authority or permission from the plaintiffs.

3. The court erred in its Conclusions of Law, in paragraph 2 of its Decree (R. 222), in holding that plaintiffs had no right to enjoin or restrain defendants from constructing sewer lines under said property without permission and in denying the injunction asked by plaintiffs.

## RESTATEMENT OF POINTS SET FORTH AND ARGUED BY APPELLANT

1. The court did not err in finding that the railroad company had the fee simple title to property described in paragraph 16 of the Findings of Fact.

(a) The rights of the public or of the railroad company secured by virtue of 43 U. S. C. A. 932, depend upon acceptance by use prior to issuance of patent.

(b) Railroads may acquire a right of way under the act of Congress, 43 U. S. C. A. 932, and the taking of a strip of land and constructing its railroad thereon while still public domain was suf-

ficient to effect such grant to the railroad company.

- (c) A public thoroughfare or highway under either 43 U. S. C. A. 932, or one acquired by prescription, is governed by actual use and reasonable necessity of such use as actually made.
- (d) There must be a highway shown to exist in the first place before there can be any necessity of argument re abandonment of such highway.

### ARGUMENT

In arguing the points involved on this appeal, respondent will first refer to the points set forth by appellant and the argument of appellant with respect thereto.

#### SUBPARAGRAPHS (a) AND (c) OF APPELLANT'S POINT 1.

Appellant's main point is that the court erred in not finding that the full 4-rod width was a city street. Appellant would have to base such argument upon some appropriation and use sufficient to create such roadway of such width while the property was still public domain. We will combine for purpose of argument appellant's paragraphs (a) and (c) because, if a right to a public way has been acquired either under the federal act or by prescription, that right must be shown by the actual use and will be limited by the use, or the reasonable necessity of the use, which created it.

At the outset, we must express surprise, if not amazement, at the amount of conjecture and the number of *ifs* and *assumptions* contained in appellant's brief. The argument starts with the assumption that "it seems fair" to say plaintiffs *intended* to rely on deeds to show title. Why then should plaintiffs go to the bother of securing an admission from defendants that the railroad was entirely constructed *prior to the date of any patent* and while the land was still public domain (R. 34). Appellant on page 10 of its brief refers to homestead laws providing for 5-year occupancy and says *if* such was the basis of the patent to the property in question, the street in question was *occupied* (not used) by the patentees prior to the building of the railroad. There is no evidence to which appellant can point to answer that "if", and *if* such was the case, must it be further *assumed* that such occupants *used* this so-called 2nd West *as a street*, or should we assume that they used 59th South or 64th South to come to State Street, the main state and county highway.

Appellant says because the railroad offered no evidence to show there was a street, the railroad *must have been* constructed down a public highway. The mere statement of such shows its absurdity. The railroad company proved the construction of its railroad over public domain, plus the securing of full warranty fee title deeds, which were secured practically as soon as patent issued. It was appellants burden to show there was a street *used* before patent. The appellant admitted the railroad was constructed there in 1871 and there was no evidence of *any* USE of a road prior to about 1900. On page 11, appellant says the trustees of the

school “certainly believed” they were acquiring a tract of land abutting on a highway. How do we know they so believed? They “must have believed” 61st South Street was going to be opened because the front door to the school faced the south (R. 112-113). On page 11 appellant states “certainly Randall thought” there was a public road and “Peter Hansen would likewise have to believe” there was a county road there when he deeded to Myers, yet the evidence is conclusive as far as the Myers deed was concerned, that there never was and never has been any sort of a roadway south of 6400 South adjoining the property covered by the Myers deed (R. 113, 134, 162). On page 12 of its brief appellant states that home owners “undoubtedly believed” they were on a highway and “it would seem reasonable” that if 2nd West existed only on the west side there would have been trouble with the railroad company before now.

IN SPITE OF ALL THESE ASSUMPTIONS AND CONJECTURES THERE IS NO EVIDENCE WHATSOEVER TO SUPPORT ANY OF THEM. Home owners now have the only ingress and egress they have ever had, which is that each one has a private crossing over the tracks to the west side of the tracks (Ex. P-11). There *was* “trouble with the railroad company” at least as far back as 1920 (R. 136) and it has been practically continuous, to Mayor Hansen’s own knowledge, for approximately twenty-five years past.

If appellant wants to conjecture: It would “seem reasonable” that if there were a county road in use, such road-

way would have been mentioned in at least *one* of the deeds by at least *one* of the five patentees when they gave their deeds to the railroad company. If we must *assume* that both the railroad and the roadway were established across property which was still public domain, couldn't we assume that there would have been ample room for both without, as appellant now wishes, superimposing one on the other? If we are to indulge further in conjecture, shouldn't we assume that Peter Hansen, the Mayor's ancestor and predecessor in interest, in giving trust deeds and mortgages as he did in Entries 5, 6, 7, 8, and 10 of Exhibit D-32, would have referred to a highway or roadway rather than outlining specifically the railroad right of way, as he did, extending 33 feet on either side of the center of the track? These mortgages in which he so outlined the railroad right of way, without any reference to a roadway are dated respectively 1876, 1878, 1880, 1884, and 1885. Surely, Peter Hansen with his Scandinavian astuteness would no more want to mortgage a county road extending across his property than he would a right of way which he considered the railroad had acquired across his property.

If we want to further indulge in assumptions, we could assume that the deeds upon which appellant seems to place so much reliance showing courses running to a "county road" are merely an indication that the people in the area *intended* to open up a county road in some manner and expected it to extend south of 6400 South as referred to in the Myers deeds, as well as north.

There is no escape from the admitted fact that the railroad was actually constructed in 1871. The only logical



conclusion, therefore, is that the people in the area as it grew began to travel along the railroad track, as was done in many instances in the early west, and if we want to indulge in assumption, the most logical assumption would be that this travel along the track was not objected to by the railroad company and was not of great extent, at least until after the smelters were located in the area and the use of the so-called 2nd West Street no doubt received its greatest impetus with its use by the ore wagons which came west along 64th South Street and then north along the west side of the track to the smelters (R. 137-138). That is when 2nd West Street really began to be traveled as a roadway and that was sometime around approximately 1900, or later. Even then it must not have been used to any great extent until after the extension of Murray City limits to include the whole area, because there appears to have been a very definite change even in the official maps of Murray City from the time that Murray was first incorporated, about 1903, as shown by Exhibit D-30, to a time when the Murray City limits were extended in 1905, as shown in Exhibit D-29.

## EVIDENCE BEFORE THE COURT

In spite of the foregoing, we most respectfully urge that neither this court nor the trial court can base its decisions upon *ifs*, assumptions, conjectures, “must have been”, or “certainly believes.” We must therefore see what the EVIDENCE was upon which the trial court based, or should have based, its findings and decision.

Appellant states at page 9 of its brief: "It is the position of the City that the 4-rod street was being used by the public prior to the construction of the railroad and that the public right to the highway was acquired pursuant to Section 932." There is no EVIDENCE whatsoever of any *use of any roadway* prior to construction of the railroad or prior to issuance of patents. Liberty School was located in the 6100 South area to the east of the tracks sometime after patent. It was stipulated that a Mrs. McMillan went to that Liberty School in 1881, but the stipulation did not extend so far as to say what, if any, roadway she used to get to the school (R. 103), nor that she even lived in the Second West area; she may have lived somewhere east of the school.

With respect to use of any area on the west side of the tracks, there is nothing but conjecture to show any use prior to approximately 1899 (R. 120), which was the point of earliest recollection as far as Mayor Hansen was concerned, and with respect to his recollection one of the earliest things that he could specifically remember was when an engine turned over at the smelters, which were constructed around 1903 (R. 122).

Apparently the same rules apply with respect to acquisition of a highway under 43 U. S. C. A. 932, as where one is acquired by prescription. Therefore, in discussing this matter further, we will state that we will apply the same law to our argument on this point as we will later apply to plaintiff's contention that Murray City holds only a prescriptive right along the west side of the track (respondent's points 1 and 1(A)).

It will be interesting to refer to the two cases from this court cited by the appellant which have involved 43 U. S. C. A. 932. In *Lindsay Land & Livestock Co. v. Churnos*, 75 Utah 384, 285 P. 646, the land in question did not pass from the United States to private owners by patent until sometime after 1894. The evidence was "substantially uncontradicted" and showed that land over which the roadway was located was "unenclosed and uninhabited mountain lands suitable only for grazing purposes." The area had been "extensively used for summer grazing for many years by owners of sheep who trailed them over the route in question \* \* \*." "In 1876 a sawmill was constructed in Davenport Canyon and the road in question was first definitely located and *commenced to be used*." "In about the year 1885" a mining camp was established in the locality and *the road used* for it.

"During all of the time from 1876 until shortly before the commencement of this action the road was used by numerous owners of sheep \* \* \* trailing their herds to and from the summer range and \* \* \* moving their camps and supplies to their herds." "*The use of the road for this purpose was general and extensive.*" There "must have been a hundred herds." One witness "*had 'seen as high as seven herds a day' going over the road.*" There was no assumption, conjecture, or "ifs" in connection with this. This witness *had seen* the road actually thus used. One witness for the plaintiff testified that herds of sheep while trailing through occupied a space of 200 yards on each side of the road (a wagon roadway was admitted by both parties). Others said 100 feet or more, and the trial court held

the road to be 100 feet in width. "There was *evidence* that more than this width *had actually been used*," although the court inferred that had only sawmills or mining been involved the result might have been different.

This court referred to cases holding that even where there is no formal acceptance of such a grant (under the federal act), acceptance is shown by evidence of "*continued use of the road* by the public for such length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant." This court further referred to early statutes providing that "roads laid out and recorded as highways and \* \* \* used \* \* \* for five years, are highways." And where not laid out by public authority, become highways where "continually and uninterruptedly used as a public thoroughfare for a period of ten years." This court concluded that the evidence showed that the road *had been used* by the public "from 1876 to 1894," which was prior to patent and while still public domain, and that this was "a time in excess of that required by the territorial statutes in force for creating a public highway by use."

We accept that case as good law, but there is absolutely no parallel between it and the case at bar and no evidence here whatsoever of public use of any roadway along so-called 2nd West while the land was public domain, nor at any time prior to approximately 1900.

Counsel for appellant places some reliance upon the case of *Jeremy v. Bertagnole*, 101 Utah 1, 116 P. 2d 420, in his attempt to show the "reasonable necessity" that gov-

erns the width of a road acquired by such use. In the *Bertagnole* case one witness, a William Archibald, testified to his personal knowledge, from his own observation, that the roadway in question was used "as early as 1869."

"In addition to the evidence adduced as to the *existence of a roadway* in 1869, some thirteen witnesses testified to the *use* of the road for vehicular and other traffic between 1877 and 1900 and an equal number as to its use since the latter date. Under the laws of 1880 and 1886, quoted *supra*, there is unquestionably abundant evidence to support the trial court's finding or conclusion that the roadway was dedicated and abandoned to the use of the public as a public highway."

The laws of 1880 and 1886 referred to were the same as involved in and were set out in a quote from the *Lindsay Livestock* case, *supra*, with respect to roads used for five years after being laid out and recorded by the county recorder and roads otherwise deemed abandoned to the public by uninterrupted use for a period of ten years. In the *Bertagnole* case this court said:

"\* \* \* While it is true, as contended by appellant, that where dedication is *established by user*, the use to which the way has been put measures the extent of the right to use, this limitation goes to the kind of use. The particular use having been established, such width should be decreed by the court as will make such use convenient and safe. A *bridle path abandoned to the public may not be expanded, by court decree, into a boulevard*. On the other hand, the implied dedication of a roadway to automobile traffic is the dedication of a roadway of sufficient

width for safe and convenient use thereof by such traffic.

"Twenty-eight witnesses were called by defendants, who testified to the nature of the road and the *use thereof which they had observed*, as well as the *use which they had themselves made of the road*. With respect to the use thereof for herding sheep and cattle, William Archibald testified that he *observed* sheep and cattle using it in the early seventies. He worked out poll tax on the road forty years ago. *Use of the road by sheep made work on the road necessary.*

"Testimony of other witnesses was to the effect that at various times *they drove sheep and cattle along the trail*. Such testimony covers a period from the 1870's to the time of trial. \* \* \* From the evidence adduced the inference is clearly a reasonable one that the road was used for the driving of cattle and sheep for a number of years in excess of that required, whenever it was necessary or convenient for the members of the public who were engaged in raising or herding stock to so use it."

In the case at bar not only is there an absolute lack of evidence with respect to use or showing of any necessity for use of the 4-rod width, but the only actual use shown that is of sufficiently definite a nature to enable a court to base any conclusions thereon is the use of that portion west of the tracks since 1900 and as the same has since been oil-surfaced by Murray City (See Exs. P-11 and 16 to 26, inclusive). Such use as shown is sufficient to prove a prescriptive right along the west side, but nothing more.

## PRESCRIPTIVE USE

What is the extent of this prescriptive right? On page 17 of its brief appellant seems to assume that because the Peter Hansen deed to Carl F. Myer referred to a 4-rod street that that would be a reasonable street. Would appellant insist that by virtue of that deed to Myer, and nothing else, the railroad company could be compelled to open a 4-rod street over and along its tracks extending along the property included in the Myer deed south of 64th South? On page 17 counsel states, referring to the entire area involved:

“There is no evidence that there was ever a 4-rod street on either the east or west side of the railroad tracks.”

With such statement we wholeheartedly agree. But counsel goes on to state:

“But there is now, and has for many years been, a 4-rod street with the railroad tracks running down the center of it.”

Does the fact that counsel calls this a street make it one, or would the fact that counsel for respondent would say that that was a 4-rod railroad right of way preclude the appellant? The *evidence* conclusively shows that there is not now and never has been a 4-rod street with railroad tracks running down the center of it. There is not even a 4-rod area enclosed between the right-of-way fences as they exist north of the dividing line between Sections 13 and 24. The only thing which shows a 4-rod street or a 4-rod right of way north of Section 24 is the fee title deeds to the railroad company. Even the fences as they are now in place, particularly along the west side as they extend north from

the north line of Section 24, do not follow along the claimed right-of-way line nor within the 4-rod area claimed by the railroad company (see Ex. P-11). South of the dividing line between Section 13 and Section 24 the fences have in the past and do now approximately encompass a 4-rod width.

Counsel refers to the power lines. Does the existence of a power line give a right of surface travel or, indeed show any prior surface travel? Counsel again conjectures by saying: "It seems reasonable to say that a 4-rod street would be a reasonable width," for public use. And at the top of page 18 counsel goes on with further "ifs" and "assumptions." We must again state that before any width can be *assumed* there must be shown a use and the nature of the use to show what width would be reasonable. The best evidence of what would be reasonable for the use actually made is to look at what has actually existed for the last fifty years and what was at first covered with an oil mat, and later with a hard-surfaced oil, as now used by Murray City (R. 126). The use of one side of the track, with no use being made or having been possible of the area where the track is laid, would not under any law that counsel has cited, nor in our opinion that he could find, be sufficient to give a right to use the other side of the track or to compel the moving of the railroad tracks because Murray City now thought it was necessary to widen the strip west of the tracks. If more property is necessary, Murray City will have to resort to proper statutory eminent domain.

In addition to lack of use being shown, it affirmatively appears that portions of the area east of the track could not have been used. There are swamp areas which had to be



filled on the west side but which still exist on the east side (R. 132-133; Exhibit P-19), including some areas wet enough to produce cattails (R. 131-132; Exhibit P-22).

## EFFECT OF RECITALS IN ANCIENT DEEDS

Appellant put in evidence, over the objection of plaintiffs, by the testimony of the abstracter Alton Lund, certain recitals in early deeds from Peter Hansen and James Randall, patentees, to certain parties named in such deeds. There was likewise introduced in evidence, over plaintiffs' objection, Exhibit D-12 upon which Murray City engineer platted the descriptions of such deeds from Hansen and Randall. Ordinarily, ancient deeds or recitals therein are inadmissible in evidence and are considered purely as hearsay except between the parties thereto. There is, however, some exception under which recitals in ancient deeds are admissible in evidence—*"When accompanied by possession under the deed or other corroborating circumstances."* (See Am. Jur., Vol. 20, Sec. 941, p. 794.)

The rule under which such recitals are admitted in evidence constitutes an exception to the hearsay rule and the cases which have been decided upon the subject are practically unanimous in holding that such recitals will be admitted, not to prove the *existence* of a certain fact not otherwise shown, NOR the possession or occupancy of certain property NOR the location of a certain roadway, river or creek, BUT if the *existence* of such roadway, waterway or other point in issue at the time involved is first proved, or if actual and long-continued possession of the property involved is shown, then recitals in such ancient documents will

be admissible to help define the limits or otherwise bolster the proof of *location* of such roadway, creek, or boundary line. It was for this reason that respondent's counsel objected to evidence of recitals in these deeds on the grounds, not only that they were hearsay and incompetent, but that no proper foundation had been laid to make them admissible (R. 77-81, 99-100).

In the annotation following the case of *Gabarino v. Noce* (Cal.), 183 P. 532, in 6 A. L. R. 1437, reference is made to the admissible types of recitals in ancient deeds, and included are the following:

"Recitals" as to "source of title." These recitals relating to the person or persons from whom the title claimed by parties in the action was derived are admissible "but only in connection with *other proof of a long continued and undisputed possession in accordance with the right or title claimed.*"

"Recitals as to extent of title," "where the *EXTENT of the property conveyed*, or the location of boundary lines" with respect to property so conveyed, are in dispute "ancient deeds are properly admitted in evidence to prove these matters." But *conveyance of the property* must be first shown, and such ancient deeds are not admitted to prove the conveyance or title itself, except as they may be necessary as a part of the chain of title concerned in the lawsuit.

"The cases are in accord in holding that recitals in ancient deeds are evidence of facts recited therein as against strangers to the title *when accompanied*

*by possession under the deed or other corroborating circumstances."*

*Wigmore*, in his work on *Evidence*, Third Edition, Vol. V, Sec. 1573, page 430, in discussing the question of such recitals, refers to the early United States case of *Carver v. Jackson*, 4 Peter 1, 83, 7 L. Ed. 761. In that case an attempt was made to prove a lease. In a marriage settlement contract, which was designated as a deed of release, certain property had been set apart to third parties, and in this marriage settlement contract there were certain recitals concerning the lease, and the question was whether the recitals were sufficient and competent evidence of the proof of the lease. The United States Supreme Court held that the recital was not per se evidence of the lease, "but if the *existence* and *loss* of the lease be established by *other evidence*, then the recital is admissible as secondary proof in the absence of more perfect evidence, to establish the contents of the lease."

Thus, the existence of such lease must be first established, or the fact of conveyance of certain property, title to which is claimed, must be first established and then recitals may assist in showing the limits or extent of the property conveyed. With respect to the situation on 2nd West in Murray there must first be proof of the *establishment* and *existence* of a roadway at the time of the deed. Then if the existence and use of the roadway is otherwise proved, ancient deeds may be admissible as some evidence tending to show its boundary or location *at that time*.

The usual case where such deeds are admissible involves deeds showing boundary lines between present oc-

cupants of property where there is a dispute between them, and one party will be held to be bound by recitals made in deeds by his predecessor in title. And even then, recitals showing such boundary are not admissible unless it is shown that the original deed *by which the property in question was conveyed*, in which the boundary was set forth, is lost. As stated by *Wigmore*, Third Ed., Vol. V, p. 431: "That such a recital is not admissible where the original deed recited is not accounted for as lost or the like seems unquestioned." Therefore, in the case at bar there would have to be proof of a deed or other conveyance granting the 4-rod strip to the county as a county road or some other formal action showing the actual establishment of such 4-rod strip as a county road, plus a showing that the original deed or dedication is lost;—but there must be no question but that there was an actual conveyance or establishment of such county road, and then perhaps such deeds would be admissible to help define the boundaries of the road.

Another case referred to by *Wigmore* is *Drury v. Midland R. Co.*, 127 Mass. 571. The question in that case concerned the location of the channel of a creek. There was no question about the fact that the creek had actually existed and had been filled in. The only question was as to its exact location. Plans in ancient documents were held admissible to show the former or original location of the creek. (See Section 1575, *Wigmore*, cited *supra*.)

The usual case supporting the text statements above referred to is like that of *Village of Oxford v. Willoughby*, (N. Y.), 73 N. E. 677. The city sued to enjoin the defendants from encroaching upon a public street by the construc-

tion of a building. An ancient deed from one Stevens *conveying* Property to a turnpike company was introduced in evidence to show the boundary line of the defendants' property and the street line, the extent of defendants' property which they still held possession of being the question in issue. In order to prove their title the defendants had to rely on some other deeds from the same Stevens, who was a predecessor in interest. There was offered in evidence the turnpike deed from Stevens and also a city map which had been prepared by Stevens in dedicating some of the streets. The court held that the Stevens turnpike deed and the map were properly admitted.

It will be noted here that the question was as to the boundary of the street and the boundary of the defendants' property, *possession of which they held*. The present possession of defendants' property under deeds from predecessors was admitted, and the prior *existence of the street* was proved without question. THE ACTUAL DEED CONVEYING THE TURNPIKE WAS PUT IN EVIDENCE. The deeds were admitted merely to locate the boundary line, and the deeds under which the defendants themselves claimed referred to the Stevens map, which showed the boundary line.

See *Twinning v. Goodwin* (Conn.), 77 A. 953, where the court held that what was generally "understood" and "talked about" as to location or existence of a right of way was inadmissible.

See also :

*New York, N. H. & H. R. Co. v. Sella*, (Conn.)  
91 A. 972;

*Horgan v. Town Council of Jamestown*, (R. I.)  
80 A. 271;

*Ray v. Farrow*, (Ala.), 100 S. 868.

See also *Wilson v. Snow*, 228 U. S. 217, 57 L. Ed. 807, 33 S. Ct. 487, wherein the United States Supreme Court referred to the fact that "the deed was more than thirty years old. *The possession of the land had for forty years been consistent with its terms* and it was therefore admissible as an ancient deed \* \* \*."

#### OLD DEEDS DO NOT PROVE LOCATION OF ROAD- WAY AS CONTENDED BY APPELLANT.

There is one other thing to which we must call the court's attention in connection with the ancient deeds and recitals therefrom as introduced by appellant over plaintiff's objection. The witness Wood, as engineer of Murray City, made an actual survey of the area (R. 66) and prepared Exhibit D-12 from such actual survey. After making the actual survey, he took the deeds according to the descriptions as furnished by Abstracter Lund and platted them on the map as produced from his actual survey (R. 68). With respect to the Exhibit D-12, the line of the railroad itself, 2nd West, and the entire area involved were put on the map from actual field survey (R. 71-72). Then the descriptions in the deeds produced by Lund were platted on the map,— "if you measured in the field you would get the same thing you would get on the map" (R. 71). From those descriptions as given, it will be seen on Exhibit D-12 that the 4-rod street as so referred to in the deeds lies entirely to the west of the railroad track. Therefore, even if the descriptions in the

deeds were taken at face value, they would not prove what appellant and its counsel seem to contend but could not help but indicate that such 4-rod street as referred to in the deeds lay entirely to the west of the railroad tracks as constructed. We merely refer to this aside from any question of admissibility of such deeds or of any proof of actual possession of or existence or use of any such roadway prior to 1900.

OFFICIAL HIGHWAY MAP AND OFFICIAL MURRAY CITY PLAT DISPROVE EXISTENCE AND USE OF 2ND WEST AS A PUBLIC ROADWAY OR STREET PRIOR TO 1900.

When Utah was admitted to the Union as a state one of the first acts of the State Legislature was to authorize the compilation and issuance of revised statutes. As a result of this legislative action, the Revised Statutes of Utah of 1898 were put into force and became effective as of January 1, 1898. Section 1122 of those Revised Statutes provided:

“It shall be the duty of the Board of County Commissioners in each county immediately to determine *all* public highways existing in its county, and to prepare in duplicate, plats and specific descriptions of the same and of such other highways as such Board may from time to time locate upon public lands, one copy of which shall be kept on file in the office of the County Clerk, and the other, said Board shall cause to be filed in the office of the State Board of Land Commissioners.”

As a result of and pursuant to this statutory mandate the county surveyor of Salt Lake County did prepare a map

of all of the public highways in Salt Lake County and under date of March 7, 1898 this official map was presented to and approved by the County Commissioners (R. 148). Minutes from the County Commissioners' records as of that date show: "Map of Salt Lake County showing particularly the highways was presented to the board by County Surveyor Wilcox. On motion said map is hereby accepted as the official map of the State of Utah highways and the county surveyor is directed to file one with the county clerk and one with the State Board of Land Commissioners in accordance with the statute of 1898." The map as introduced (Ex. P-34), was one of three maps together designated as "G-16 A, B, C." The three maps were three sections making a complete county map and together constitute the same as one map covering the whole of Salt Lake county (R. 150). The maps are dated, drawn to a scale which is indicated on each map, and certified to as the official maps presented to and accepted by the County Commission pursuant to the statute above quoted. The certification as so contained on such maps is shown by Exhibit P-35. These maps were and are a part of the official records of the Salt Lake County Surveyor's office (R. 154).

On Exhibit P-34 there is shown a "highway" designated as "highway No. 10." It is shown as being a direct continuation of 2nd West Street in Salt Lake City, Utah, and extends directly south from 2nd West Street in Salt Lake City in approximately a direct southerly line until after it crosses Little Cottonwood Creek in the NE  $\frac{1}{4}$  of Section 12, T. 2 S., Range 1 West. From that point the highway bears slightly to the east and near the southern line of Section 12 crosses



both the Rio Grande and Oregon Short Line railroad tracks and continues to extend in a southeasterly direction through the NE  $\frac{1}{4}$  of Section 13, and also in a southeast direction through the N  $\frac{1}{2}$  of the SE  $\frac{1}{4}$  of Section 13, until it meets and crosses what is designated as highway No. 76 coming west from State Street. Said street designated as highway No. 10 continues on thence southerly through the E  $\frac{1}{2}$  of Section 24, and into the NE  $\frac{1}{4}$  of Section 25, crossing a highway designated as highway No. 79 in the Northeast quarter of Section 24. The map shows that said highway No. 10, after crossing the Rio Grande and Oregon Short Line tracks near the south line of Section 12 continues to bear to the east and, rather than following the Oregon Short Line railroad tracks, extends and goes on southeasterly and then south some distance to the east of the Oregon Short Line tracks. The map being drawn on a scale of 2000 feet to the inch shows that this highway No. 10 is  $\frac{1}{8}$ th of an inch, or 250 feet, east of the Oregon Short Line tracks at the center line of Section 13; is  $\frac{3}{16}$ th of an inch, or 375 feet, east of the Oregon Short Line tracks where it crosses highway No. 76 in the North half of the Southeast quarter of Section 13; and then it continues at approximately the same distance (which would be approximately 375 feet) east of the Oregon Short Line railroad tracks as it crosses the dividing line between Sections 13 and 24 and as it continues on southerly beyond highway No. 79 and on into Section 25.

It is inconceivable that if there had been a traveled area on either side of the Oregon Short Line tracks which had been used and traveled sufficiently in any respect to

be considered as a public highway it would not have been shown on this official map in some way or another. This map was made pursuant to statutory mandate directing that the county make and file a map showing *all* public highways and was submitted by the county surveyor as such, accepted by the county commissioners as such OFFICIAL MAP, and one copy was filed with the county clerk and one with the State Board of Land Commissioners pursuant to the statutory mandate.

When Murray was first incorporated as a city, official maps and plats were filed by and on behalf of Murray City (R. 81-83) showing the line of the city limits and showing, or purporting to show, at least some of the roads and highways within the limits of Murray City. Exhibit D-30 is a photostat of such official map or "official plat" as filed by Murray City with the county recorder at the time Murray was incorporated (R. 90). This Murray "official plat" was filed and recorded in the office of the county recorder under date of December 1, 1902 (R. 90). An examination of such exhibit shows a highway, designated thereon as highway No. 10, as coming in approximately a southerly direction into the Northeast quarter of Section 12, Township 2 South, Range 1 West. At approximately what would be the east-west center line, if the Northeast quarter of Section 12 were so divided (which would be approximately the point where such roadway would cross Little Cottonwood Creek), said highway No. 10 turns and bears to the southeast in exactly the same manner and follows the same line of direction as such highway No. 10 is shown to follow on Exhibit P-34. Although the Oregon Short Line railroad track is not shown

with reference to this highway, it will be noted that as said highway No. 10 crosses the south line of Section 12 and into what would be the Northeast quarter of Section 13 it is still extending in the same southeast direction, and instead of going on approximately a north-south line, as the railroad track does, it continues to diverge to the east, farther and farther away from what would be the center line of both Sections 12 and 13.

In about 1905, Murray City extended its city limits and a further "official plat Murray" was filed and recorded in the office of the county recorder under date of June 26, 1905,—Exhibit D-29 (R. 90). On this plat for the first time there is shown extending through the S  $\frac{1}{2}$  of the NE  $\frac{1}{4}$  of Section 13, and through the SE  $\frac{1}{4}$  of Section 13, and into the NE  $\frac{1}{4}$  of Section 24, a segment of "highway No. 10," which coincides with and is superimposed upon the Oregon Short Line railroad, and as will be readily seen by ordinary observation and more clearly by placing a ruler on such map, said "highway No. 10" rather than extending in a southeasterly direction as it extends southerly, bears slightly to the west of south, being some distance closer to the north-south center line of Section 24 than to the north-south center line of Sections 12 and 13 where those two sections meet.

The official plat Exhibit D-30 was filed as an official act by Murray City on incorporation and would constitute an admission by Murray City as of that time that highway No. 10, whether it be in actual existence or only in contemplation, extended in a southeasterly direction through

the area involved. It would be an admission on the part of Murray City and an acknowledgment by Murray City that such highway No. 10 as shown on Exhibit P-34 was correct, and a further acknowledgment that as of that time there was no official roadway or highway extending north and south along the Oregon Short Line railroad tracks, and the only time and the first time that such highway No. 10 is shown or claimed to coincide with the Oregon Short Line railroad tracks is by the Exhibit D-29 as filed and recorded on June 26, 1905 (R. 90).

These official maps should be conclusive evidence, Exhibit P-34 having been made and filed pursuant to statutory mandate, to effectively conclude the matter here and furnish sufficient basis upon which the trial court, as the trier of fact, should have concluded as he did, that there was no roadway established immediately adjacent to and within the 2-rod area east of the railroad tracks, but which, together with entire lack of evidence of use of any roadway while the property was still public domain, likewise should have been sufficient to compel a conclusion on the part of the court that there was no public roadway or highway of any kind immediately adjacent to or following closely either side of the railroad track at any time prior to the period between 1900 and 1905, and that therefore the only right that is shown or could be shown by the evidence to any roadway along such track is a prescriptive right acquired along the west side of the track by use since such use was started sometime between 1900 and 1905, and very apparently started with the construction and placing in operation of the

American Smelting & Refining Company's plant in about 1903.

That there has been some change in this so-called highway No. 10 is very apparent from the photostats of the so-called "Bible" introduced in evidence by defendant (R. 167-170), but which photostats were supplied after conclusion of the trial and therefore appear as unnumbered exhibits. Pages 94 and 95 of such photostats, being designated "Field notes of the survey of Highway No. 10 (Second W. St.)," show such 2nd West Street or "highway No. 10" starting from 13th South as it was then designated, or what is as we know it today—2700 South, as shown by the pencil notations (R. 170-171), and shows a continuation of this 2nd West Street in an almost direct southerly course, bearing in one column a direction of "S.  $0^{\circ}1'$  W.," and in a second column "S.  $0^{\circ}9'$  W.," and in a third column "S.  $0^{\circ}10'$  E." The pencil notations show that this street at such time extended thus from 2700 South to a point after it crossed 4500 South as we know such streets today. However, the witness Wahlquist testified (R. 113), that the north end of this 2nd West Street today is at about 43rd South and it is not straight from there on south. The roadway comes straight from 4300 South to 4800 South, then jogs to the east, then goes south almost to 5300 South, and turns off a little bit to the west as it comes into 5300 South, then in order to go on south on 2nd West you have to come a ways east on 5300 South and turn down between the Oregon Short Line and Denver & Rio Grande tracks (R. 114). There have undoubtedly been a number of changes throughout the whole area and if we want to conjecture or assume, as ap-

pellant has done in so many instances, we should perhaps assume some change in the roadway near the south line of Section 12 at the time the American Smelting & Refining plant was built. But whether we conjecture or not, the evidence by these field notes of actual survey of Highway No. 10 shows that such highway No. 10 is not the same today north of 4500 South as it was when this actual survey was made, and whether such highway No. 10 was in actual existence or only contemplated as it extended farther south through Sections 12, 13 and 24, it is apparent that there have been some changes made. However, one IF that I think we are justified in urging here, is that *if* there had been any public roadway or highway adjacent to and paralleling the Oregon Short Line railroad tracks through this area in 1898 when Exhibit P-34 was made, or in 1902 when Exhibit D-30 was officially filed, such roadway would have been shown at least on the official mandated map, Exhibit P-34, if not also on Exhibit D-30, and particularly would any public roadway along the tracks have been shown if such highway No. 10 as it so extended into the area was not actually in existence as claimed by defendant, and if the roadway along the tracks was in existence as claimed by defendants.

Again we state, these official maps and official plats are conclusive to show that there was no public road or highway adjacent to or paralleling the railroad tracks in question prior to sometime between 1898 and 1905. Therefore, all that the defendants can claim under the evidence in this case is a prescriptive right acquired by actual use and

travel over the roadway to the west of the track during the past approximately 50 years.

(b) SECTION 43 U. S. C. A. 932, GRANTING RIGHTS OF WAY "FOR THE CONSTRUCTION OF *HIGHWAYS* OVER PUBLIC LANDS" DOES APPLY TO RAILROADS, AND THE PREDECESSORS IN INTEREST OF THE PLAINTIFFS HEREIN ACQUIRED A VALID RIGHT OF WAY THEREUNDER.

Counsel for appellant admits that "this section has been construed in a number of cases" and admits that with respect to the position he takes there is some conflict of authority, but counsel urges in his brief that "in spite of the conflict of authority" the case of *Burlington, K. & S. W. R. Co. v. Johnson* (Kan., 1887), 16 P. 125, is "the best reasoned one" of such cases. It is true that in said case the Kansas Supreme Court held that the term "highways" did not include railroads. A study of that case, however, will convince anyone that such a decision was not necessary to the determination of that case, a number of other valid and much more compelling reasons being set forth in the opinion to support the judgment in the case, which involved as "the principal point in controversy" the measure of damages to which Johnson was entitled. Reference was made in the opinion to the fact that rulings of the federal land department prior to the date of that case held that "a valid homestead entry operates as an appropriation and reservation of the land embraced in the same \* \* \* " and "\* \* \* segregates the tract from the mass of the public domain."

Therefore, whether the statutory use of the word "highways" referred to railroads or not, the particular land had by the homestead entry been segregated from the public domain so that no sort of a highway could have been acquired over it. Under early law it was held that lands subject to homestead entry were still property of the United States as Public Domain and the government held full title to the same until patent was issued. That theory, however, was changed, first, by the land department's rulings, and later by the courts themselves, the Supreme Court case of *Hastings & Dakota R. Co. v. Whitney*, 132 U. S. 357, 10 S. Ct. 112, 33 L. Ed. 363, which was decided shortly after the *Johnson* case, holding that a valid homestead entry is a sufficient appropriation of land to segregate the homestead tract from the public domain and that such homestead entry precluded the possibility of any subsequent grant of such tract by Congress in any manner.

The real basis and purport of the decision in the *Johnson* case was that "the land when homesteaded ceased to be a part of the public domain," that "the homestead entry gives the homesteader the exclusive right of possession, not only against individuals, but against the government." See *United States v. Turner*, 54 Fed. 228 (1892), which cited and followed the *Johnson* case and referred to it as holding that "the homestead entry operated as an appropriation and reservation of the lands embraced in the same, and segregated the tract from the public domain." This view of the *Johnson* case has been confirmed by the Supreme Court of Kansas itself. See *Union Pacific R. Co. v. Harris*, (Kansas), 91 P. 68.



Appellant's counsel, although admitting some conflict in the authority, refers to the *Johnson* case as "the best reasoned one." We firmly disagree and insist that the best reasoned case is the case of *Flint & P. M. Ry. Co. v. Gordon*, (Mich. 1879), 2 N. W. 648. The writer of the opinion in the Michigan case was Judge Cooley, who was early recognized as an authority and has long been recognized as an eminent authority on constitutional and statutory subjects. In a rather exhaustive opinion Judge Cooley held that *railways*, though not strictly highways like plank and macadamized roads, were "highways" within the section of the federal act referred to and were entitled to the benefit of the provisions of that act. Judge Cooley referred to the fact that an earlier act of Congress, passed in 1852, had been allowed to expire, and that the act of Congress of July, 1866, in which the statute referred to was contained, was the only authoritative law on the subject at the time.

In the Michigan case, a homestead entryman had settled upon the land but had not yet acquired his patent. The railroad company had located its line across his land and the question was as to whether or not the railroad company was authorized to acquire the right of way under the section above quoted. We quote from Judge Cooley's opinion:

"The section of the act of 1866, on which reliance is placed, declares 'that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.' This is not limited in time, and seems to be amply sufficient in scope, if railways are highways within its meaning. This is disputed.

“There is no doubt that when the term ‘highways’ is used in legislation, the common highways for the country are generally to be understood. But this is not universally true. There are other highways than these, and the sense in which the word is employed must be determined by the end which the legislation has in view, and by the context. Here a right of way is given for highways, and the question is whether the purpose was to give the right for other roads than the common wagon roads of the country, or other roads open to the public for use in the same way.

“The subject is not free from doubt, but we are inclined to think, and shall so hold, that all highways were intended. A forcible reason for this conclusion is that we can conceive of no considerations operating to induce congress to grant the right of way for wagon roads, and not grant it for other public highways. \* \* \* It is a matter of notoriety that, in the absence of legislation, roads have been freely laid out across the public lands, without objection or controversy, wherever the lands were not appropriated or desired for other public uses. Such roads facilitate the settlement of the country, and benefit the neighborhood, and in both particulars they further a general policy of the federal government. But they also tend to increase the value of the public lands, and for this reason are favored. And what the common highways of the country accomplish in this direction the railroads of the country accomplish to a much greater extent.

“As bearing upon the construction of the act of 1866 we may well take notice of the fact that, at the time the United States were seeking to stimulate and encourage the construction of railroads in the newer sections of the country by making large grants of land to the projectors, two motives may be said to

have influenced this action: First, the general benefit to the country by encouraging new settlements; second, the general benefit to the interest of the United States, as proprietor of other lands, by giving to such other lands additional market value, and creating increased demand for them. It would certainly be very remarkable if, while thus pursuing a policy of liberal encouragement to railroads, the United States should purposely withhold a favor so unimportant to the government as permission to cross the public domain; a permission, too, almost certain, so far as it had influence, to be beneficial. It would be specially remarkable if, in so withholding this privilege, the United States were, in fact, discriminating against this form of thoroughfare.

"It is true railroads are not, in the proper sense of that terms, highways, but they have been frequently called highways in the decisions of the federal supreme court. *Rogers v. Burlington*, 3 Wall. 654, 663; *Railroad Company v. County of Ottoe*, 16 Wall. 667, 673. It is not an unreasonable inference that the legislative department of the government may sometimes have employed the word in the same sense. Plank-roads and macadamized roads, which are open to use by the whole public with their own teams and vehicles, are highways in the strictest sense, and yet these, which with railroads were provided for specially by the act of 1852, are only provided for now by the act of 1866. We may well suppose that the act of 1852 was limited in terms to the roads constructed by private companies, because the tacit acquiescence by the United States in the construction of highways by the states and territories over its lands made further provisions unnecessary; but that act was suffered to expire because subsequently it was deemed best, by a general provision in the act of 1866, to embrace all public ways, this at once giving the sanction of law to the custom of

taking public lands for common wagon roads, and providing for other roads also. This would account for the fact, which otherwise would at least seem very strange, that congress suffered the limitation in time, imposed by the act of 1852, to run out without making any new or further provision for the special benefit of the companies which by that act were favored. All the considerations which should lead to the assistance of such companies, so far as the giving of a right of way would assist them, are as forcible today as they ever were. They were not peculiar to the twenty-five years following the enactment of the law of 1852.

“We shall hold, therefore, that the act of 1866, which gives a right of way for all highways, embraces within its intent railways, and that by force of it the complainant was entitled to a right of way across the lands in dispute unless the homestead entry of defendant constituted an impediment.

\* \* \* \*

“To acquire the benefit tendered by the act of 1866 nothing more was necessary than for the road to be constructed. No patent is required in such cases; but the offer and acceptance taken together are equivalent to a grant. The complainant, therefore, by accepting the offer of the government, obtained a grant of the right of way which was at least perfectly good as against the government, and must be held to be perfectly good as against this defendant unless his patent ante-dates it by relation, or unless the equities springing from his possession and improvement would preclude any right being acquired adversely.

\* \* \* \*

“It is not very clear that under the general railroad law so peculiar an interest as that of the defendant could have been appropriated by adversary

proceedings, and it is certain that complainant could have been under no obligation to proceed to an appropriation of the interest of the United States, if that interest was freely granted by that act of 1866, as we think it was. Complainant accepted the offer of that act, and the construction of its road under the offer would be not only a sufficient but also an equitable consideration. And when the right was thus perfected we do not think it could have been defeated by any act or relation springing from the accomplishment of something subsequently."

It will be noted that some question was raised as to the right of the homesteader to require payment for his interest in the land and although it seemed that the court decided against the entryman on that point, still the question was not seriously in dispute because of the fact that the railroad company had offered to make such payment, and concerning these improvements the court said:

"We should infer from the statement of facts that those actually made within the limits of the right of way were inconsiderable, and for those the complainant offered to make payment. \* \* \* the decree should have allowed the defendant to take a reference to compute the value of the improvements made within the limits appropriated by complainants, and it will be modified by this court so as to permit that to be done."

About the only case which has directly questioned the decision of Judge Cooley in the Michigan case on his interpretation of the word "highways" is the Johnson case from Kansas, and as above stated, such a holding was unnecessary in that case and the case has been cited as holding that the

homestead entry segregated the land from the public domain.

In *Atchison, T. & S. F. Ry. Co. v. Richter*, 148 P. 478, the Supreme Court of New Mexico quoted and followed Judge Cooley's holding in the Michigan case that a railroad company could acquire a right of way under the 1866 act. In referring to the Michigan case, the New Mexico court said:

“The opinion is by Judge Cooley and for that reason if for no other deserves the most careful consideration.”

In that case the New Mexico court held very directly that a homestead entryman was entitled to compensation, but affirmed the right of the railroad company to acquire a right of way under the act of 1866. The New Mexico court in that case concluded:

“We conclude that under Section 2477, R. S. U. S., no right can be secured which is superior to the right of an intervening coal entryman who has filed his declaratory statement *prior to the acceptance of the grant by a railroad company.*”

Under date of March 3, 1875, in order to give further impetus to railroad building for development of new areas and to expand our national frontiers, Congress passed an act specifically giving railroads a 100-foot right of way over public domain and imposed certain conditions which had to be met. Judge Cooley referred to this act in the Michigan case, as did some of the other courts who discussed the act of 1866.

In the case of *Tennessee & C. R. Co. v. Taylor*, (Ala. 1894), 14 So. 379, the Supreme Court of Alabama had the question of the 1866 act and its application to a railroad company before it. A railroad company had taken possession of a strip of land through the public domain sometime prior to the 1875 act ("more than twenty years before suit brought"), and had graded a roadbed over the area but had not constructed its ties and rails thereon at a time when an entryman purchased and secured patent to the property from the U. S. Government. As a matter of fact, the railroad company had allowed the strip to lie for some time uncompleted after it had cleared and graded its roadbed thereon, but after the purchase of the title by the individual from the U. S. Government the railroad completed this construction and laid its rails and ties over the previously constructed roadbed. The Supreme Court of Alabama held that the railroad had a "highway" under the section of federal statute heretofore referred to. We quote from the opinion of the Alabama Supreme Court:

"The theory of defendant is that it acquired title to the 100-foot strip as right of way by the location of its line and construction of its roadbed thereon prior to the sale to plaintiff, by force of section 2477 of the Revised Statutes of the United States, which declares that 'the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.' That a railroad is a 'highway' within this section, would seem to have been the understanding of congress in the passage of the act of 1866 in aid of the construction of this and other railroads in Alabama, for while careful provision is made by that act for the acquisition of a right of way over reserved land em-

braced in the general terms of the grant, but specially excepted therefrom, no provision is therein made for rights of way over other public land; an omission which, in view of the fact that at that time there was no law, state or federal, other than this section, for the acquisition of rights of way over public lands, is most reasonably accounted for on the theory that congress supposed that section 2477 applied to railroad rights of way over all public lands 'not reserved to public uses.' *And this is the construction put on the section in every instance of direct adjudication. Railway Co. v. Gordon*, 41 Mich. 420, 2 N. W. 648; *Verdier v. Railroad Co.*, 15 S. C. 476; *Sams v. Railway Co., Id.*, 484. Indeed, there is nothing in the adjudged cases against this view, except the merest dictum in *Railroad Co. v. Sture*, 32 Minn. 95, 20 N. W. 229, a case arising under the act of March 3, 1875, (18 Stat. 482), which superseded the application of section 2477 to railroads, and was in the nature of an amendment by implication to that effect, not, however, affecting rights acquired under the section in question prior to the amendatory enactment. We concur in the construction put on the statute by the Michigan and South Carolina courts, and hold that it operated to grant rights of way for the construction of railway highways over public lands at the time the defendant located its line and constructed its roadbed on the strip sued for."

The Supreme Court of Oregon in *Wallowa County v. Wade*, 72 P. 793, uses the following language in referring to the 1866 act:

"While the language of this act is somewhat indefinite and uncertain it has usually been construed as a present grant of an easement over public lands for highways, and that *it is not confined to*



*technical public highways, but is applicable to rail-ways and toll roads."*

The fact that railroads were considered as highways is further confirmed by early text writers. *Elliot on Roads and Streets*, Third Edition, Vol. 1:

"\* \* \* the term highway is the generic name for all kinds of public ways, including county and township roads, streets, alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers."

*So. K. Ry. Co. v. Oklahoma* (Okla.), 69 P. 1050;  
*Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26  
S. Ct. 91, 50 L. Ed. 192;

*Strange v. Board of Commissioners* (Ind.), 91  
N. E. 242;

*Detroit International Bridge Co. v. American  
Seed Co.*, (Mich.), 228 N. W. 791.

The early constitutions of many of the states provided that railroads were public highways. The Utah Constitution merely states that railroads are common carriers subject to legislative control (Art. XII, Sec. 12), but in the Constitution of the State of Idaho, adopted approximately ten years before the Utah Constitution, Art. XI, Sec. 5, it was provided:

"All railroads shall be public highways, and all railroad transportation and express companies shall be common carriers and subject to legislative control."

This Idaho provision was similar to a provision of the New York Constitution, as well as that of many other states joining the Union prior to Idaho.

In determining whether the *Johnson* case from Kansas contains "the best reasoning" or whether Judge Cooley's opinion does, we must consider the background against which each of the judges at the time may have interpreted the statutory provision. Interpretation of such a provision based upon conditions as we know them today would clearly give us a different outlook than might have been the case in 1866. The opinion of Judge Cooley, issued in 1879, was preceded only three years by a decision of the Supreme Court of the United States which gives somewhat of a history of the development of railroads and the understanding that was had of them, not alone by members of the public but by members of congress and legislators generally. We refer to the case of *Lake Superior & Miss. R. R. Co. v. United States* (1876), 93 U. S. 442, 23 L. Ed. 965. The opening paragraph of the opinion reads:

"Congress, in most of the legislative acts by which it has made donations of the public lands to the States in which they lie for the purpose of aiding in the construction of railroads, has stipulated that the *railroads* so aided *shall be public highways* for the use of the government, free from all tolls or other charge for transportation of its property or troops."

The Supreme Court, in the opinion, refers to an early statute and says:

"It will be observed that the last-cited act was passed in 1833, when railroads were about being introduced as means of public communication in this country. It is undoubtedly familiar to most of those whose recollection goes back to that period, that

railroads were generally expected to be public highways, on which every man who could procure the proper carriages and apparatus would have the right to travel. This was the understanding in England, where they originated. The Railway Clauses Consolidation Act, passed in 1842, provided in detail for the use of railways by all persons who might choose to put carriages thereon, upon payment of the tolls demandable, subject to the provisions of the statute and the regulations of the company."

The court then goes on to refer to various statutes, including those setting up the charters of early railroads, and likewise refers to the trend of development of railroads to the point where the railroad companies not only provided the "highway", but also furnished the vehicles and performed the complete course of transportation. The Supreme Court then states:

"Be this, however, as it may, the general course of legislation referred to sufficiently demonstrates the fact, that in the early history of railroads it was quite generally supposed that they could be public highways in fact as well as in name."

The foregoing Supreme Court case while only three years ahead of Judge Cooley's decision in the Michigan case was still ten years after the date of the 1866 statute. The Johnson case in Kansas was nearly ten years after the Michigan case, during which time following the general railroad right of way act of March 3, 1875, there was great railroad expansion throughout the country and a general development of railroads into large general transportation companies rather than companies which merely provided

a "highway" for the vehicles of others. It was apparent that the Judge in the Johnson case was influenced by the later development and saw what was immediately before him and did not, as Judge Cooley did, go back the nearly twenty years to see what the actual background was at the time and prior to the time of the passing of the act of 1866. Indeed the development of railroads into general transportation companies rather than companies which merely constructed and operated a "highway" like a plank road or toll road furnished the basis for a separate act with respect to them as was embodied in the act of March 3, 1875. This does not afford a basis for reasoning that the 1866 act did not apply to railroads, but indicates very strongly that it did, and the act of 1875 became necessary because of the difference in the trend of the development of railroads generally.

A still earlier case from the Supreme Court of the United States, decided one year after the construction of the railroad involved in the case at bar and before the act of Congress of 1875, providing specifically for railroad rights of way over the public domain, is the case of *Olcott v. The Supervisors*, (1872), 16 Wall. 678. In that case, at page 694, the Supreme Court stated:

"That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence."

The court goes on to say that the building of a railroad is considered as an act done for a public use and then adds:

"And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legislative grant."

\* \* \* \*

"That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway."

\* \* \* \*

"It is said that railroads are not public highways per se; that they are only declared such by the decisions of the courts, and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such."

If anything more authoritative or showing a "better reasoning" could be had we think that it could not possibly change the conclusion that when the act of 1866 was passed it was considered by congress, the courts, and the public in general that railroads were "highways" and therefore included with the act of 1866.

In *Cherokee Nation v. Kansas City Ry. Co.*, 135 U. S. 641, at 657, 10 S. Ct. 965, 34 L. Ed. 295, the United States Supreme Court, in 1890, again reaffirms these prior cases as follows:

"\* \* \* the question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the

people, and to subserve public ends, and, therefore, subject to governmental control and regulation. *It is because it is a public highway \* \* \*.*"

In view of the foregoing, there is no escape from the conclusion that the predecessors in interest of the plaintiff in the case at bar were included within the provisions of the 1866 federal act and entitled to a right of way over the public domain for construction of the railroad. As was stated by Judge Cooley: "To acquire the benefit tendered by the act of 1866 *nothing more was necessary than for the road to be constructed.* No patent is required in such cases." This actual construction is held by all the cases to amount to an acceptance of the grant. There is and can be no dispute of the fact that the predecessor of plaintiff actually constructed its railroad here at a time when the property was still public domain. It thereby acquired a right of way under the federal act referred to. But it even went further and afterwards secured full warranty deeds from adjoining owners whose subsequently issued patents included the property on which the railroad had been constructed.

#### APPELLANT'S POINT 1(d)

Under its point (d) Murray City refers to *abandonment*. We do not know just what appellant has in mind with respect to this point. There has been no intimation or suggestion that there has been any abandonment of any of the traveled portion of the roadway as it has existed west of the tracks. If the appellant intends to refer to a supposed roadway referred to in the ancient deeds, our only answer is that there is no sufficient competent evidence of

the establishment of a roadway at any place other than that as now used west of the tracks. The recitals in the deeds no more prove the existence of a roadway north of 6400 South than they do south of 6400 South, where all of plaintiff's witnesses admit there never was a roadway. The supposed roadway referred to in the ancient deeds, as shown by Murray engineer's own platting (Exhibit D-12), would have been to the west of the tracks, anyway, where a prescriptive right of travel has been acquired.

The only competent and proper evidence of any nature shows a roadway having been acquired by use west of the tracks, with such use beginning around 1900 or shortly thereafter, at the time Murray City was incorporated as a city and at the time the American Smelting & Refining smelter was located there. The roadway, even as it exists west of the tracks, could not have become established under the evidence in this case prior to the incorporation of Murray City in 1903.

The statute, U. C. A., 1953, section 27-1-3, concerning abandonment, as cited by appellant, refers to counties and not to cities. *Tucker v. Conrad* (Ind.), 2 N. E. 803; *Sowadski v. Salt Lake County*, 36 Utah 127, 104 P. 111.

If appellant by mentioning "abandonment" intended to refer to any roadway east of the tracks, we must answer that there is no definite, competent evidence from which any court could definitely locate and define such a claimed roadway. Where did it start, and how far did it extend? "It didn't go all the way to 6400 South" (R. 133). The mayor testified that such a way was traveled for 300 or

400 yards north and south "*in front of the school*" (R. 121). Wahlquist said "400 yards, *more or less*" (R. 110). Where did it cross the tracks? There was no crossing in front of the school (R. 121). All of the homes east of the tracks have private crossings over the tracks (Exhibit P-11). Would one of these be the terminus, and if so which one? All of these private crossings have apparently been in existence "since the memory of man runneth not to the contrary." Did any of these owners use a roadway east of the tracks instead of crossing over to the west? If so, why the private crossing over the tracks immediately in front of each private home? And who used this supposed roadway? The mayor and Mr. Wahlquist used it about two years each to go to the Liberty School around 1903 to 1905. Aside from that, the mayor said people going to do business with the Pioneer Nurseries used it (R. 133). This would indicate a private rather than a public roadway. And where was it located with reference to the track? It was supposed to pass in front of the Liberty School. The school as it exists today was constructed in 1905 (R. 104). As shown by Exhibit P-20, with such roadway passing in front of the school it would have to have been some distance to the east of the tracks and railroad right of way. When 6100 South Street was opened in 1905, about the time the new school was constructed (R. 106), it was extended right across to the west side of the tracks. If there was a definite roadway east of the tracks in that vicinity, the people to the north and south would have used it more than ever before and would have gone east to State Street over 6100 South Street. They would not have crossed the tracks to the west



in front of their homes and then gone north or south to 6100 South Street and recrossed the tracks to east; they would have continued to travel east of the track to 6100 South Street and then east to State Street, and the roadway east of the tracks would thus have been continued in use to date, as well as that west of the tracks. Not only that, but there would have been some evidence of the location of the roadway, rather than hills and hollows, irrigation ditches and depressed cattail swamps as exist today in the area east of the tracks (Exhibits P-20 to P-24).

It is impossible to conclude from the evidence that there was any definitely established public roadway to the east of the tracks, and the trial court, as the trier of fact, who not only saw and heard the witnesses but made a personal inspection of the area, must be affirmed in so far as his conclusions with respect to lack of any roadway east of the tracks is concerned.

Again, we repeat and confidently urge that there must be a highway shown to exist in the first instance before there can be any necessity of argument with respect to abandonment of such a highway.

RESPONDENT'S POINTS 1 AND 1(A)  
THE COURT ERRED IN FINDING THAT MURRAY CITY HELD IN TRUST FOR THE PUBLIC A FEE TITLE TO THE PROPERTY DESCRIBED IN PARAGRAPH 17 OF THE FINDINGS OF FACT AND IN FAILING TO FIND THAT MURRAY CITY AND THE PUBLIC

HELD ONLY PRESCRIPTIVE RIGHTS IN SAID DESCRIBED PROPERTY.

THE COURT ERRED IN FINDING, AS SET FORTH IN FINDING NUMBER 9, THAT THE PUBLIC USED AND ACQUIRED A RIGHT OF WAY OVER SAID PROPERTY WHILE THE SAME WAS STILL PUBLIC DOMAIN.

Respondent will here combine reference to its points 1 and 1(A).

There is and can be no dispute concerning the fact that the Utah Southern Railroad Company, predecessor in interest of the plaintiff railroad companies, secured full warranty deeds from the patentees who secured proper title from the United States Government to all but a small strip of land involved herein. With respect to that small strip in the north portion of Section 24, the railroad company's records indicated a right by court order over that strip of property, but plaintiff was unable to secure or furnish proper evidence of that court order (R. 41). However, a copy of the ownership plat from the county recorder's office was introduced in evidence as Exhibit P-6. The county recorder is required by law to make and maintain ownership plats showing the ownership of each tract of land in the county. He must keep these plats up to date and furnish a copy each year to the county assessor for tax assessment purposes, and the tax assessor, after assessing taxes, must return the plats to the recorder for corrections, changes or additions for each ensuing year. (Utah Code Annotated, 1953, Title 17, Chapter 21, Sections 21 to 23.)

The assessor uses these in making up his tax assessment rolls, for tax purposes. The county recorder is not required to go back of 1899 to check these ownership plats. The reason the year 1899 is given is because such law was first enacted in 1899 and has been continued practically unchanged to date. (See Laws of Utah, 1899, Chapter 41, page 61, Section 1.) The fact that the law, even as it exists today, indicates the county recorder should go back to 1899 would indicate that what is shown on the plat, Exhibit P-6, is a record of long standing, although it has apparently been added to from time to time as is shown by the platted subdivisions adjoining the OSL right-of-way property.

As to such records, *Wigmore* in his work on Evidence, says, Vol. 5, Third Edition, section 1640, page 552:

“\* \* \* No one maintains that they are conclusive, but at least they afford some evidence to a rational mind seeking the truth.”

The evidence further shows as to this strip that the railroad was built thereon while the land was still public domain. This in itself gives a fee title to the railroad company under the federal act, 43 U. S. C. A. 932.

The evidence shows without contradiction that the 4-rod strip in the north portion of Section 24 has been enclosed within right-of-way fences since about 1917 (Exhibits D-10 and P-37), and is so fenced today (R. 109-110). Since 1917, this strip, together with the rest of the area, as shown on Exhibits P-7, 8, and 9, has, by exact platting and description, been assessed as railroad property and taxes paid thereon to the State of Utah and other taxing

units, including the City of Murray (R. 47, 50). This evidence should compel the conclusion that the plaintiff Oregon Short Line Railroad Company is the owner in fee simple of this strip of land in the north portion of Section 24. As to all the remainder of the property involved in this action there cannot be any dispute as to the title received by the railroad company by virtue of the warranty deeds from the patentees in addition to building said railroad track over the land while it was public domain, which in itself gives a fee title.

As contrasted to this evidence, there is no competent evidence of any kind of *any* USE of any of the area as a roadway while it was public domain, nor at any time prior to about 1900.

The use by the public generally of this strip west of the tracks has been of a sufficient nature and of sufficient duration to require a holding that the public has acquired a right of way by prescription in such westerly strip.

It would be but useless repetition to refer here to the many authorities and to repeat the argument included in pages 12 to 19 and 25 to 33 of this brief. In connection with respondent's points 1 and 1(A), we wish merely to refer the court back to what has been said on page 12 of this brief—that we would apply the argument and law then being set forth to our later reference to respondent's points 1 and 1(A). The argument and the authorities therein referred to are as pertinent to respondent's points 1 and 1(A) as they are to respondent's view of appellant's points 1(a), (b) and (c), and we think they must compel a conclusion in favor

of the position taken by the respondent, that the railroad company has the fee title to the full 4-rod width and the defendant Murray City and the public generally merely a prescriptive right, over the defined area to the west of the tracks.

### RESPONDENT'S POINTS 2 AND 3.

THE COURT ERRED IN CONCLUDING AS IT DID IN ITS CONCLUSIONS OF LAW AND DECREE THAT MURRAY CITY HAD THE RIGHT TO LAY SEWER LINES WITHOUT PERMISSION FROM PLAINTIFFS AND ERRED IN DENYING THE INJUNCTION SOUGHT BY PLAINTIFFS.

We acknowledge here that if Murray City holds in trust for the public the *fee title* to the strip west of the tracks, and if this court should so conclude, then respondent's points 2 and 3 would not be well taken. Nevertheless, we respectfully urge that such holding is not in any manner warranted or justified by the evidence. Assuming, therefore, that the rights of the city and the public exist only by prescription, what is the extent of those rights?

We must admit that the right to travel over the surface as pedestrians and by horses, wagons, carts, automobiles and other motor vehicles does now and has existed for some time by virtue of long-continued use for upwards of fifty years. The oil surface has for over twenty years past confirmed that use and, in addition, *has served to define the extent of such use.*

We must admit that the city has by long-continued use acquired the right to erect and maintain its power pole line down the west side of the traveled portion west of the tracks, as well as the right to maintain some poles for power line on the east side as now existing for a short distance both north and south of 6100 South Street.

The city also installed a 4-inch culinary water line under the surface of the ground to the westerly side of the oil surfaced and traveled portion west of the tracks. That culinary water line has now existed and been maintained a sufficient length of time to establish a right by prescription (R. 134-136). Does that prescriptive right to maintain a 4-inch culinary water line under the westerly side of the traveled portion, give a right—by prescription or otherwise—to now lay a 12-inch sewer line under such traveled portion in close proximity to the railroad tracks? If the city does not hold the fee,—and we insist under the evidence it cannot,—by what right does it claim to add an additional burden by laying the sewer line?

If A acquires a right by prescription to run one irrigation ditch across the property of B, does that right give A the license, permission or authority to construct a larger and second irrigation ditch across B's land in a different location, even though it may parallel and be in close proximity to the first and smaller ditch? It would seem to need no authority to bring a vehement denial in answer to the latter question.

“An easement acquired by prescription is always limited to the use made during the prescriptive

period." *Robins v. Roberts*, 80 Utah 409, 15 P. 2d 340; *Stephens Ranch & Livestock Co. v. Union Pac. R. R. Co.*, 48 Utah 528, 161 P. 459.

"A right of way for one purpose gained by user cannot be turned into a right of way for another purpose if the latter adds materially to the burden of the servient estate. \* \* \* The servient estate can only be subjected to the easement to the extent to which the easement was acquired and the easement owner cannot change this use so as to put any greater burden upon the servient estate." *Nielsen v. Sandberg*, 105 Utah 93, 141 P. 2d 696.

"\* \* \* An increase in the burden on the servient tenement beyond that caused by the adverse use by which an easement was created is an undue increase if it is such an increase as it may reasonably be assumed would have provoked an interruption in the adverse use had the increase occurred during the prescriptive period. \* \* \*"  
*Big Cottonwood Tanner Ditch v. Moyle*, 109 Utah 197, 159 P. 2d 596.

The railroad company objected when the city put its culinary water line down along the west side of the traveled portion west of the track. It insisted on signed agreements where the water lines extended under the track (R. 136). The use of that area for a culinary water line, however, was not a serious threat to the railroad company's property or operations, and although the railroad company objected it filed no action. THE LAYING OF A 12-INCH SEWER MAIN, AT A DEPTH OF 8 FEET, MUCH NEARER THE TRACKS IS A DIFFERENT MATTER. The railroad company did not say it would not permit the laying of the sewer but merely asked the city to enter into an agreement to pro-

tect the railroad properties, and to define the location and manner of work to be done, and defining rights during the existence of the sewer in such location. The prayer of the complaint was for an injunction, *unless and until* the city entered into an agreement with the railroad company, or until the city otherwise acquired a right of way by eminent domain (R. 5-6). The city refused to do either.

Railroads all over the country have been installing modern electrical control systems for the movement of trains. The Union Pacific Railroad Company has such centralized train control over a good part of its system. It has planned to install an electric signal system through Murray, and it is even likely that the Interstate Commerce Commission might order installation of centralized train control through this area (R. 64). In order to install such electrical control, it would be necessary to put underground cables to the west of the existing tracks (R. 65) and also to locate control boxes west of the tracks. Thus, the use not only of the surface immediately west of the track but also of the subsurface may become of vital necessity to the railroad company, and the right to lay these subsurface cables is important even though part of the surface over them may be used for public travel. The culinary water line to the west would not affect such underground cables, but the proposed sewer would.

The proposition we think is elementary and is unanimously supported by all authorities, that the acquisition by the public of one easement in land gives no right to another or different easement and a prescriptive way ac-



quired by a particular user cannot justify a materially enlarged user which has not been enjoyed for the full prescriptive period.

If a street or roadway is a dedicated street, as was involved in *White v. Salt Lake City*, . . . Utah . . ., 239 P. 2d 210, the question presented is a different one because in such instance the city or county does hold the fee in trust for the public. But there have been no dedicated streets in the Murray area involved herein (R. 85-86), and where the right of use rests merely in prescription, as the one at bar must, then the past right acquired by the prescriptive use cannot be extended or enlarged without permission of the fee owner of the property—the plaintiff railroad company in this case. See *District of Columbia v. Robinson*, 180 U. S. 92, 21 S. Ct. 283, 45 L. Ed. 440; *Hofius v. Carnegie Steel Corp.* (Ohio), 67 N. E. 2d 429; *City of Park Ridge v. Wisner* (Ill.), 97 N. E. 841; *Ward v. Triple State Natural Gas & Oil Co.* (Ky.), 74 S. W. 709; *Board of Supervisors v. Manuel* (Va.), 88 S. E. 54; *Board of Supervisors v. Norfolk & W. Ry. Co.* (Va.), 91 S. E. 124.

## CONCLUSION

The evidence clearly and without dispute shows that the railroad in question was constructed in its present location while the property was all still public domain. Under 43 U. S. C. A. 932, this gave a right of way in fee to the railroad company to such a width as would reasonably be necessary for railroad purposes. Immediately upon patents being issued, the railroad company secured full warranty

deeds from the patentees, enlarging this right of way to a strip 4 rods wide over the southern portion of the area involved and 100 feet wide over the northern portion. A small area in the north portion of Section 24 was not included in these warranty deeds, but through that area the 4-rod right of way has been claimed by the railroad company, has been fenced, has been assessed to the railroad company for tax purposes, and taxes paid thereon to the proper taxing authorities, including both the state of Utah and Murray City since at least the year 1917.

The record is absolutely void of any evidence of USE by any party whatsoever of any of the area as a roadway prior to the time patents were issued, and while the property was still public domain. The recitals in ancient deeds are not competent or sufficient in and of themselves to prove the establishment or existence of the roadway and could not, by any stretch of the imagination, be considered as evidence of USE of any roadway while the property was still public domain.

The evidence is competent and sufficient to show that a roadway by prescription has been acquired over the westerly strip beginning 11 feet and more to the west of the track and extending on westerly and including, also, a prescriptive right over the cross streets. This prescriptive use includes the right to maintain power pole lines down the westerly side (plus a few as exist on the east side). It includes a right to maintain an underground 4-inch culinary water line down the west side and includes the right of surface travel over the described westerly strip by

pedestrians, wagons, carts, automobiles, and other modern surface traffic. The reasonable necessity and extent of this surface travel has been well defined by the oiled surface placed and maintained thereon by Murray City for well over twenty years past.

The trial court correctly concluded and adjudged that the railroad company had the fee title to property described in paragraph 16 of the findings of fact, and his judgment thereon should be sustained and affirmed.

The trial court erred in finding that the public used and acquired a right of way over the property described in finding of fact No. 9 while such property was still public domain.

The evidence does not warrant nor justify any finding or judgment other than that the public has acquired prescriptive rights in the property described in said paragraph 9 of the findings of fact, including cross streets, and the judgment should be modified to so show, and the injunction as prayed for by plaintiffs should be granted unless the defendant Murray City secures a proper right of way or otherwise enters into a contract with plaintiffs with respect to the laying and maintaining of said sewer line as proposed and as being undertaken by said city.

Respectfully submitted,

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