

1954

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

OREGON SHORT LINE RAILROAD
COMPANY, a corporation and UNION
PACIFIC RAILROAD COMPANY, a
corporation,

Plaintiffs,

— vs. —

MURRAY CITY, a municipal corpora-
tion, and STATEWIDE PLUMBING
& HEATING COMPANY, INC., a cor-
poration,

Defendants.

Case No. 8122

REPLY BRIEF FOR APPELLANT

FILED

SEP 14 1954

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REPLY BRIEF FOR APPELLANT

In this Reply Brief Appellant will use the subtitles
of Respondent's Brief as appropriate.

STATEMENT OF FACTS

Respondent on page three makes the statement that
at the time the railroad was constructed "the land was
then all public domain, * * *".

The fact is that the land was not then public do-

main. The portion patented to Andrew Cahoon was sold to him May 31, 1869. The land patented to Christian Berger was sold to him May 7, 1869. The land patented to James Randle was sold to him on May 1, 1869. The land patented to Peter Hanson was sold to him on August 10, 1869.

Respondent also on page three states that the property claimed by the railroad is fenced on both sides and has been since 1920. There is nothing in the evidence as to who fenced the property in question and the same statement, of course, would be applicable to 2nd West Street, i.e., 2nd West is now fenced on both sides. On page four counsel states: "There is no evidence as to when the school on 61st South Street was first constructed." The only school on 61st South is the Liberty School which is located East of the site occupied by the 24th District School which was also known of as the Winchester School. The Stipulation of Counsel (R. 102) is that 61st South was not cut through when the Winchester School was constructed and that the records of the Church of Jesus Christ of Latter Day Saints show that the Winchester School was constructed in 1874 (R. 103).

ARGUMENT

PRESCRIPTIVE USE

Such rights as the Appellant has in 2nd West Street between 53rd and 64th South Streets, it holds for the benefit of all members of the public. These rights as well as the rights of the public to the street were acquired long before Murray City was incorporated.

There is no question between the parties hereto that there is now a street extending from 53rd South to 64th South known of as 2nd West Street and there is no question between the parties hereto but what the rights of the public in and to the use of that street ante-date the year 1900. *The only question involved in this litigation is the nature and extent of the public's right in 2nd West Street.*

As stated in Appellant's brief, Appellant claims the public acquired its rights in and to what is now known of as 2nd West Street while the same was still public domain and that those rights gave to the public full and complete ownership of the roadway which was then four rods wide.

Appellant claims that the Deeds obtained by the railroad from the abutting property owners were acquired after the road had been established and hence were taken subject to the public's existing right to the use of the four rods for a road.

Appellant does not claim the public acquired its right by prescription.

EFFECT OF RECITALS IN ANCIENT DEEDS

There being no question between the parties hereto but what the public does have a road, now known of as 2nd West Street between 53rd South and 64th Streets, the only question before the court being the extent of the right of the public in and to said road, the Deeds from Randle to Lovendahl and Randle to Winchester, Hansen to Steffenson and Hansen to Meyer, as described on page

five of Appellant's Brief, were admissible even under Respondent's own citation, that such ancient Deeds are admissible " * * * when accompanied by possession * * * ". The last clause of the cited section 941 of 20 Am. Jur. reads:

" * * * recitals in ancient deeds are admissible to establish the extent of the property conveyed or the location of disputed boundary lines."

Clearly, the public has been in possession of the street and its rights are derived, not from Deed, not by prescription, not by condemnation, but under and pursuant to the Act of Congress of 1866 (43 U.S.C.A. 932).

Respondent makes some point of the fact that the Plat Exhibit D-12 which platted these original Deeds does not line up the boundary lines of 2nd West Street exactly as they are today. This court has had sufficient experience with the discrepancies which occurred in original surveys that this argument should carry no weight.

Roach v. Dahl

84 Utah 377, 35 P 2d 993

Reese v. Murdock

(Utah 1952) 243 P 2d 948

OFFICIAL HIGHWAY MAP AND OFFICIAL MURRAY CITY PLAT DO NOT DISPROVE EXISTENCE AND USE OF 2nd WEST AS A PUBLIC ROADWAY OR STREET PRIOR TO 1900.

Exhibit P-34 being the official highway map of Salt Lake County adopted under Section 1122, Revised Statutes of 1898, shows the existence of the road in question. It is highway No. 10. Counsel makes some point of the fact the map does not show the Oregon Short Line Rail-

road tracks running down the center of the road. This map was *not adopted as a railroad map* and does not purport to have been prepared for the purpose of showing the location of railroads. There is no evidence that the railroads were ever surveyed by the map maker or that the map was ever intended to accurately show the course of the railroad. The evidence is that there never has been a North - South road West of State Street except 2nd West Street running between 53rd and 64th South Street. The evidence would indicate that at the time the map was made, and prior thereto, that Route 10 did extend South of 64th South Street. The Deed from Hansen to Meyer dated December 16, 1874, conveys a tract of land South of 64th South and one of its courses runs to the East line of a four rod street which must have been the same extension of 2nd West as shown on the map of 1898. The fact that 2nd West South of 64th South has apparently been abandoned, offers no succor to Respondent.

SECTION 43 U.S.C.A. 932, GRANTING RIGHTS OF WAY "FOR THE CONSTRUCTION OF HIGHWAYS OVER PUBLIC LANDS" DOES NOT APPLY TO RAILROADS, AND THE PREDECESSORS IN INTEREST OF THE PLAINTIFFS HEREIN DID NOT ACQUIRE A VALID RIGHT OF WAY THEREUNDER.

Counsel wishes to point out as set forth in the fore part of this Reply Brief that the lands in question were not public domain at the time the railroad was built, the records of the Bureau of Land Management show the lands had been sold to the settlers prior to the construction of the railroad.

Appellant agrees with Respondent that

Hastings & Dakota R. Co. v. Whitney
132 U.S. 357, 10 S. Ct. 112, 33 L. Ed. 363

correctly holds and states the law that a valid homestead entry is a sufficient appropriation of land to segregate the homestead tract from the public domain and such entry precluded any subsequent grant by Congress in any manner. The lands in question having been sold before the railroad was built, the railroad could not take advantage of the Act of 1866 as a basis of obtaining a right to construct a railroad along 2nd West Street. Appellants maintain that the fact that the homesteaders, by conveyances, executed within a period of four to seven years of their purchase of the land, in their Deeds to purchasers, made reference to the existence of this road, is, in view of the short time between purchase and sale, excellent proof that the public had acquired, before their purchase from the government, such a right.

We are talking about a time more than eighty years removed and no man now lives with a personal memory of what happened in 1869 or 1871 or even 1874 along 2nd West Street. But it seems clear, that when these homesteaders who acquired this property by patent, within a year or two, convey away a portion of their land, and in the conveyances refer to the existence of a "four rod county road" that not only did the road exist at that time, but that the right, which they so identified, was superior to their right under the patent.

Counsel puts great stress upon the opinion of Judge Cooley in the case of *Flint & P.M. Ry. Co. v. Gordon*, 2

N.W. 648 (Mich., 1879). In this case the railroad was built across the homesteader's land before the property was sold to the homesteader. The Hastings case herein-before cited and cited by Respondent, shows the inapplicability of the Flint case to the facts at bar. Counsel also cites the case of:

Atchison T. & S. F. Ry. Co. v. Richter

148 P 478, Sup. Ct. of N.M. (1915)

as following Judge Cooley's decision. The headnote in this case reads:

"An entryman of coal lands of the United States who has filed a declaratory statement in the United States Land Office, under the provisions of sections 2347-2349, R.S.U.S. (sections 4659-4661), has a possessory right to the land of such a character as to render unlawful an entry thereon by a railroad corporation for railroad purposes, previous to condemnation proceedings.

This case cites with approval the following cases:

Red River, etc. R. Co. v. Sture

32 Minn. 95, 20 N.W. 229.

Wallowa County v. Wade

43 Or. 253, 72 P. 793.

Tholl v. Koles

65 Kan. 802, 70 P 881.

McAllister v. Okanogan Co.

51 Wash. 647, 100 P 146.

all in support of the proposition that the grant under the Act of 1866 takes effect as of the date of acceptance and does not take precedence over the rights of the settler on unsurveyed public lands. See also:

City of Butte v. Mikosowitz

39 Mont. 350, 102 P 593

Should the court conclude that the public's right in and to the section of 2nd West in question was acquired only by prescription, nevertheless such interest gives to the City the right to the use of the sub-soils for the installation of a sewer. See 44 Am. Jur. 341, 127 A.L.R. 521, and

Penn Railroad Co. v. Breckenridge
60 N. J. Law 583, 38 Atl. 740 (1897)

where the court said:

“Thus an easement acquired by prescription in a railroad right of way has been held not to give a railroad company the right to prevent the laying of pipes below the surface.”

See *American Law of Property*, Vol. II, page 486:

“Where the creation of a public highway operates to vest in the public merely an easement of way rather than the fee, a problem arises as to the uses by the public that come within the exercise of this easement of passage. It has been said that the easement acquired by the public ‘includes every reasonable means for the transmission of intelligence, the conveyance of persons and the transportation of commodities.’

“Where the use of the highway under a franchise from the municipality or state involves the sub-surface of the way, there is a conflict between this use by the public and the rights of the owner of the fee to utilize the sub-soil under the way. Generally, the use of the sub-surface of a public highway for the construction of sewers, water pipes, gas or electric conduits has been held to be within the scope of the public easement of passage, where the utilities are for the benefit of the immediate surrounding community.”

This court held that the Public Service Commission has jurisdiction over a railroad crossing public streets but that the City still has jurisdiction over the sub-soils at railroad crossings. See

Provo City v. Dept. of Business Regulation
117 Utah 607, 218 P 2d 675

CONCLUSION

The problem of establishing a right in the public created more than eighty-five years ago creates evidentiary problems. Still Appellant maintains that the four deeds from the homesteaders, as described on page five of Appellant's Brief, are excellent evidence that the public right to a road had vested at the time those deeds were executed and that the homesteaders considered the rights of the public in the road to be superior to theirs. The fact that the Trustees of the 24th District School constructed a public school on the East side of this road in 1874 is rather excellent evidence *that at that time* the public road existed four rods wide with the railroad track down the middle. The fact that a portion of the road on the East side was still used in the 20th Century is important and once having been established could only be abandoned by order of the Board of County Commissioners or other competent authority (Section 27-1-3, U.C.A., 1953). There is no evidence of such action by the County Commissioners or anyone else.

The fact that the railroad ultimately obtained deeds to a portion of the road can have no bearing upon the right of the public to the full enjoyment of the road. Sec-

tion 27-1-7, Utah Code Annotated 1953, provides that:

“The public acquires only the right of way and incidents necessary to enjoying and maintaining it. A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the middle of the highway.”

but this certainly does not mean that the public, through its duly constituted representatives, cannot utilize that road for the installation of sewers, water mains, gas mains, electric power lines and telephone lines where they all constitute modern methods of transporting and conveying things necessary to the public welfare in the manner established and accepted in modern society.

It is respectfully submitted that Respondent is entitled to no relief by its cross appeal and the Findings and Decree should be corrected in the manner set forth in Appellant's Brief.

Respectfully submitted,

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