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

Utah Supreme Court

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Case No. 8122

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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
AND HEATING COMPANY, INC., a
Corporation,

Defendants.

BRIEF FOR APPELLANT

FILED

APR 19 1954

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Clerk, Supreme Court,

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Points the City intends to rely on for reversal of judgment Case No. 8122

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1. The court erred in finding that the Plaintiff and Respondent railroad owned the Easterly part of second West extending from 53rd to 64th South Streets, that is the property in question i.e. that East of a point 11 feet West of the center of said tracks.

(a) The public acquired the right to use Second West Street as a public highway by grant under 43 U.S.C.A. 932 prior to the issuance of patent.

(b) The railroad's right to maintain its line over the land in question must depend on Deeds from patentees and the patents and deeds were subject to existing rights in the public to maintain a highway.

(c) The width of Second South when established was such width as was reasonably necessary for public easement.

(d) The public thoroughfare once established has never been abandoned.

Argument

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IN THE SUPREME COURT

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MURRAY CITY, a municipal corpora-
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AND HEATING COMPANY, INC., a
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Defendants.

Case No.
8122

BRIEF FOR APPELLANT

STATEMENT OF FACTS

Both the Oregon Short Line Railroad Company and Defendant Murray City claim to be the owner of a strip of land approximately four (4) rods wide running in a northerly and southerly direction from what is now known as 5300 South in Murray City to 6400 South at a point known of as 200 West (R. 3).

Murray City was, in the spring of 1953, engaged in laying a sewer, one main of which ran the full length of the above piece of ground which was known of as Second

West Street in Murray. The railroad company claimed that the City merely had a prescriptive right to the travelled portion of the land and that this prescriptive right did not include the right to install a sewer underground. The railroad brought this action to enjoin the City from installing its sewer upon Second West Street (R. 1-7).

The City claimed that the land in question was a public highway and had been such prior to 1871 and that the railroad merely had an easement down the middle of the street and the City, by constructing a sewer was not interfering in any way with the railroad's easement (R. 8-12).

The City was also engaged in running sewer lines along 53rd South Street and 59th South, 61st South and 64th South Streets, and where these streets were crossed by the railroad track, the railroad maintained that the City could not install the sewer under its tracks without its permission. The City maintained that it had jurisdiction to install such sewers under its public highways provided it did not in any way interfere with or damage the railroad property.

The undisputed evidence is as follows: The railroad track in question was constructed in the summer of 1871 (R. 19). At the time it was constructed there were no deeds or rights of way procured by the railroad over the area involved in this law suit.

The railroad prepared a map of the area in question in 1920 which was admitted in evidence as Exhibit D-10. This map shows there then existed a travelled roadway

along the west side of the railroad tracks. The railroad offered no evidence as to when travel on Second West Street commenced, nor any evidence as to the extent of the use of Second West Street.

Plaintiff produced two witnesses, J. E. Walhquist and J. Clifford Hanson, now mayor of Murray. Walhquist lived at 6276 South Second West and now lives at 121 West 5900 South, which is adjacent to Second West Street (R. 102). Mr. Hanson has lived on Second West Street his entire life, part of the time at 6239 and the balance at 6191 (R. 120). Both men attended the 24th District School which was located on the east side of Second West Street at approximately 6100 South (R. 104, 121). The 24th District School was built in 1874 (R. 102-3), and the only means of ingress and egress to said school was from Second West Street (R. 103-123). Both Walhquist and Hanson testified that according to their earliest recollections, approximately 1899, that in front of the 24th District School there was travel on both the east and west sides of the railroad tracks (R. 105-121). The travel on the east side was from a point approximately two hundred yards South of the school to a point three to four hundred yards North of the school; travel on the east side was abandoned about 1930 (R. 124), when the railroad tracks were raised and the crossings removed (R. 125).

Mr. Hanson testified that according to his earliest recollection there were about as many homes on Second West Street as there are at the present time (R. 122).

Exhibit A prepared by the Plaintiff for this action shows the homes abutting upon Second West Street, and it is to be noted that there are nine (9) homes on the east side of Second West Street, whose only means of ingress and egress is by means of Second West Street. Mr. Hansen remembers ore haulers using Second West Street as early as 1900 in hauling ores to the old Germania Smelter, the haulers coming from Big and Little Cottonwood Canyons down 64th South to Second West and then north to the smelter. 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 (R. 126, 178). The travelled portion west of the tracks has been oil surfaced, Mr. Hansen says, since 1930 (R. 126), and the railroad's Exhibit P-37 shows that in 1920 this was an oil mulch road. This map also shows water line down the west side supplying the houses on both the east and west sides of the highway, shows Murray City's pole line running down the east side, and also shows houses on both the east and west sides.

Alton Lund, an attorney at law and registered abstractor, was employed by the City for the purpose of making a search of the records of Salt Lake County. He testified that there are very few deeds in the County Recorder's office prior to 1872 and that the lands over which the street in question and railroad ran were taken to patent between 1872 and 1875 (R. 84). He said that the streets in Salt Lake County, except for those in subdivisions or other City plats are not dedicated (R. 86). He said, for example, there is no dedication of State

Street (R. 85-88), and that titles to property abutting upon the public highways generally runs to the center of the street (R. 86). He stated that he searched for deeds conveying property abutting upon Second West between 53rd and 64th South Streets and found the following deeds making reference to a street (R. 77) :

Deed from James Randle to Sven M. Lovendahl, dated June 11, 1875, recorded June 15, 1875 (R. 77) ; in the body of the deed the following reference is made to a road: "thence South on the West line of a county road," (R. 79).

Another deed found by Lund ran from James Randle to James Winchester and other trustees of the 24th School District dated April 7, 1875, which description contained the following reference to a country road: "Thence North on the East line of county road and parallel and 50 links east of the center of the U. S. Railroad track," (R. 80).

Another deed was found from Peter Hanson to Thomas Steffensen dated April 1, 1876, which made the following reference to a county road: "Thence South 88° 45' East 9 chains and 30 links (to the West line of county road) thence South along the West line of county road 5 chains and 78 links."

Another deed was found which ran from Peter Hanson to Carl F. C. Meyer, dated December 16, 1874, which made the following reference to the road: "Thence North 322 rods more or less to the center of the county road (this would refer to 64th South Street) thence on the

center of said road South $84\frac{1}{2}^{\circ}$ 2302 rods to the East line of a four rod street thence on the East line of said street," (R. 81). The four rod street referred to is Second West Street.

The City prepared a Plat of Second West Street between 5300 South and 6400 South and the same was introduced in evidence as Exhibit B-12, and on this Plat the four deeds above referred to are platted showing that the county road referred to was located at the same place as Second West Street is at the present time.

In this connection it is to be noted that the deeds from Peter Hanson to Carl F. C. Meyer are South of 64th South Street and Second West Street does not at this time extend South of 64th South Street, however, Plaintiff caused to be introduced in evidence a copy of the official highway plat of Salt Lake County as Exhibit P-34; this map having been adopted in 1898 by Salt Lake County as the official road map (see Exhibit P-34). This map shows Second West Street, or Route 10 as it was then known, as extending South of 64th South Street. Two exhibits which are unmarked are important in this connection, one being a photostat of the index of highways of Salt Lake County and which shows Highway 10 to be Second West Street, and a photostat of the field notes of Highway 10, which also shows Highway 10 to be the same as Second West Street.

The railroad claims ownership under five deeds introduced in evidence as Exhibits P-1, P-2, P-3, P-4, and

P-5; the pertinent information is shown as follows:

<i>Patent To</i>	<i>When</i>	<i>Deeded to Railroad</i>
Andrew Cahoon	March 3, 1875	December 14, 1874
Benjamin Wright	December 1, 1874	August 12, 1876
James Randle	December 1, 1874	February 14, 1876
Peter Hanson	March 5, 1875	April 4, 1876
Christian Berger	July 10, 1872	July 5, 1873

These deeds grant to the railroad the property traversed by the highway and railroad with the exception of an area of about 758 feet southerly from the North line of Section 24 (R. 41). As to this particular strip of land, the railroad was unable to show any title or interest other than continued user of their tracks.

Based upon the foregoing, the Court found that the railroad owned all of the land in controversy from the East fence line to a point 11 feet West of the center line of the main track of the railroad and found that the City was the owner of the land West of this line to the fence lines on the West and found that the City was the owner of a 64 foot street at 64th South Street and a 24 foot street at 61st South Street, a 50 foot street at 59th South Street and a 26 foot street at 53rd South Street.

The trial judge visited Second West Street and found 64th South to be 66 feet wide with a traveled portion over the railroad tracks 64 feet wide. 61st South was found to be 50 feet wide with a traveled portion over the tracks 24 feet wide; 59th South is 66 feet wide with a 50 foot traveled area over the railroad tracks; and 53rd South is 33 feet wide with a 26 foot traveled portion over the tracks (see Stipulation of Counsel).

THE POINTS THE CITY INTENDS TO RELY
UPON FOR A REVERSAL OF THE JUDGMENT

1. The Court erred in finding that the strip of land approximately four rods in width extending from 53rd South Street to 64th South Street at a point commonly known of as 200 West was not a public thoroughfare, it being contrary to the evidence and erred in finding the Easterly portion of said four rod strip, to-wit: the portion described in Paragraph 16 of the Findings of Fact belonged to the Railroad.

(a) The rights of the public to any part of the four rod strip of land depends upon acceptance pursuant to 43 U.S.C.A. 932 prior to the issuance of patent.

(b) 43 U.S.C.A. 932 does not grant to a railroad the right to acquire a right of way across the public domain and there is no evidence of any right in the railroad to construct its line over the four rod strip in question in 1871, its right depending upon deeds acquired from the patentees between July 5, 1873 and August 12, 1876 and the patentees of the land in question and the railroad as grantee took said property subject to the rights of way acquired by the public prior to the issuance of patent.

(c) The public thoroughfare established by the public along Second West Street was of such width as was reasonably necessary for the public easement.

(d) The public thoroughfare once established has never been abandoned or vacated.

ARGUMENT

1. (a) When the railroad commenced this action it seems fair to say that the drafter of the Complaint intended to rely upon the rights that the railroad obtained pursuant to the five (5) deeds introduced in evidence as Exhibits P-1 through P-5 inclusive. These deeds bear dates between July 5th, 1873 and August 12, 1876.

These deeds covered all of the land in question except a strip of about 758 feet North and South running South-erly from the North line of Section 24 and Plaintiff's only claim to this 758 feet would have to depend upon some kind of prescriptive right. The court, in its Findings of Fact and particularly in Paragraph 16, apparently found that

43 U.S.C.A. 932

applied to railroads and gave to the railroad a piece of land approximately thirty-three (33) feet East of the center of its tracks while only running eleven (11) feet West. There is not anything to indicate just how the court arrived at this lop-sided right of way over the 758 feet in question.

It is the position of the City that the four-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, *supra*.

This court has construed the above section in the case of

Lindsay Land v. Churnos, 75 Utah 384, 258
Pac. 646, Utah 1929

where the section was construed to be a standing offer by the Federal Government which could be accepted in any manner by the public using the land for a highway or by a public body formally accepting a piece of land for a highway itself.

Much of the land in Utah was settled upon and reduced to possession many years before any patents were issued. The first land office to be established in Utah was in 1869 and no patents were issued prior to that date. The evidence does not disclose the basis for the issuance of the patents to the land in question whether by preemption or homestead. Homestead laws required five (5) years of occupancy before issuance of patent and if such is the basis of the patents to the land in question the street in question was occupied by the patentees prior to the construction of the railroad in 1871. This being true it can well be asked, upon what right did the railroad rely when constructing its tracks? Having offered no evidence of such right we submit it must have been constructed down an established public highway, unless we wish to assume an illegal act of trespass.

Neither party was able to produce any direct evidence at the trial on which was first the road or the railroad. The following evidence was introduced by the City which throws some light on the subject. The 24th District School was built in 1874 (R. 102-3). The railroad had been constructed at that time and if there was no public road on the East of the railroad track as found by the

trial court in this matter, then the trustees of the 24th District School acquired a piece of property and built a public school which had no means of ingress and egress. The evidence is undisputed that from the time the school was built until it was demolished in 1907, that the only means of ingress and egress was by way of 2nd West Street and we think the least that can be said for this evidence is that the trustees of the 24th District School, when they bought the tract of land in question, certainly believed that they were acquiring a tract of land which abutted upon a public highway. In 1875 when James Randle gave to Sven Lovendahl a deed (R. 77) which in the body thereof, had a clause which read: "Thence South on the West line of a County Road." Certainly James Randle thought that at Second West Street along which this course of the deed ran, was at that time a county road or a public thoroughfare. Peter Hanson would likewise have to believe that Second West Street was a county road when he gave the deed to Thomas Stephenson, and also when he gave the deed to Carl F. C. Meyer (R. 81). James Randle also gave a deed to James Winchester with a similar reference to a county road, the East line of which was East of the center of the U. S. Railroad tracks (R. 81). Now these uncontradicted acts of Randle and Hanson, and the trustees of the 24th District School certainly evidenced a state of mind of people much closer to the facts than anyone now living and, it is respectfully submitted, constitutes the most reliable evidence available that Second West Street had an East side and a West side and that the railroad track

ran down the center thereof.

The evidence is also undisputed that there are now nine (9) homes on the East side of Second West Street (Exhibit A) and their only means of ingress and egress is by means of Second West Street. About the turn of the century, there were nine (9) homes on the East side of Second West Street (R. 12). The owners of these homes undoubtedly believed at the time they were constructed that they were building them upon a public highway. The evidence is silent as to whether these householders ever had any trouble with the railroad because of their being on the East side of the road and having, according to the railroad's contention, to cross its right of way and tracks to get to the travelled portion of the highway. It would seem reasonable that if Second West Street only existed along the West side of the railroad tracks that long before this the railroad and the householders on the East side would have come to grips over the use made by the householders of the railroad's right of way. If the railroad had considered the land East of the tracks as its own private property, it undoubtedly would have objected to the City's putting its power line down the East side of the right of way (R. 126, 178).

(b) Congress enacted:

43 U.S.C.A. 932

in 1866. This Section reads as follows:

"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

This section has been construed in a number of cases, the best reasoned one being

Burlington , K. & S.W.R. Co. v. Johnson, 16
Pac. Rep. 125, Kansas 1887

In this case Johnson had made a homestead entry and was in possession of land when the railroad constructed a grade and track across a portion of the land occupied by Johnson as a homesteader. From an award to Johnson for damages the railroad appealed, claiming that the word "highways" in Section 932, *supra*, embraced railroads. The court held that the language did not lend itself to such construction arguing that Congress in 1875 enacted a special Section 43 U.S.C.A. 934 which granted rights of way upon public lands to railroads and by such enactment must necessarily have believed that Section 932 did not grant such right. The court disposed of the matter in the following language:

"The railroad company contends that, because he holds under a homestead entry, and has not yet acquired the full legal title, he is entitled to recover nothing beyond the mere injury done to the improvements which he had placed on the land. We cannot agree with this contention. The claim is based mainly on an act of Congress of July 26, 1866, which declares that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted." Rev. St. U.S. paragraph 2477. It is argued that railroads are highways within the meaning of this provision, and that the plaintiff took his homestead subject to the right of the railroad to appropriate a right of way over the same without any compensation for any value of the

soil or damages otherwise than to his improvements. The term "highways" used in the section quoted does not, in either its ordinary or strict sense, include railroads. It is true that in a certain sense a railroad is a public highway to be constructed and operated according to law and subject to public control. It can only be used, however, in a particular manner, and is not open to common use for foot passengers, horse passengers, animals and carriages, as an ordinary highway may be used. In the usual understanding, a highway is one which is common to all people without distinction, and which they may travel over on foot or horseback or in carriages. Thomp. Highw. 1; Ang. Highw. 3. A railroad and a common highway are essentially different in regard to construction control, and use, as well as ownership, and the distinctions are so well understood that a mention of them is unnecessary.

"It is a familiar rule of law that in interpreting statutes, words and phrases are to be taken in the ordinary sense and common acceptance, unless it appears from the context of the act that a different meaning was intended. We discover nothing in the provision in question, or in the subsequent legislation of congress, which indicates that an unusual meaning was attached to the word, or that it included railroads. Instead of that, we find that, since the law in question was enacted, congress has deemed it necessary, by both general and special acts, to grant right of way to railroads over the public domain. Aside from several special acts, a general one was passed on March 3, 1875, granting to any railroad the right of way through any public lands of the United States. It provided at length the conditions to be observed, and the steps that were to be taken in order to

secure the benefit of the act. No reference is there made to the act of 1866; but congress, as well as those who were instrumental in obtaining the legislation, seem to have proceeded upon the theory that the act of 1866 did not grant a right of way for railroads. 18 St. at Large, 482. On March 3, 1873, another act was passed by congress, which indicates to some extent the legislative understanding of the act of 1866. It was then provided that a settler on the public lands, either by virtue of the pre-emption or homestead law, shall have the right to transfer, by warranty against his own acts, any portion of his pre-emption or homestead for the right of way of railroads across such pre-emption or homestead. Rev. St. U. S. Section 2288. Neither of these enactments purports to modify or repeal the act of 1866. It was wholly unnecessary for congress to grant a right of way to railroads, or to provide that a settler may convey his interest in a pre-emption or homestead for such purpose, if the act of 1866, already in force, embraced railroads within its intent. It is true that the case to which we are referred, (*Railway v. Gordon*, 41 Mich. 420, 2 N.W. Rep 648) holds that railroads are highways within the meaning of the act of 1866. The court in that opinion concedes that when the term "highways" is used in legislation, the common highways of the country are generally to be understood. The construction that railroads were intended was based on the apparent liberal policy pursued by congress in encouraging railroads to build through the new and unsettled portions of the country. The court, however, expressed doubt in regard to the conclusion which it reached, and it does appear that its attention was called to the subsequent general legislation of congress expressly granting a right of way to railroads. An examination of the

congressional legislature on the subject, and having in mind the rule of interpretation that the usual meaning is to be given to words in the statute, unless another is obviously intended, we have come to the conclusion that only the common highways of the country were intended to be included in the term used in the act of 1866."

The court's finding in paragraph 16 of the Findings of Fact must necessarily depend upon construing Section 932, *supra*, as applying to railroads. It is respectfully submitted that in spite of the conflict in the authority that the reasoning in the Johnson case, *supra*, is persuasive and that Section 932 does not grant rights of way over the public domain to railroads. Hence, the right the railroad acquired to 2nd West Street must, per force, have been by possession. The City concedes that the railroad has, at this time, a right to maintain its railroad down the middle of 2nd West Street but that such right is subject to the prior right of the public to the use of a four rod street as a public thoroughfare. Between 1871 and 1874 such uses as the railroad was making of 2nd West Street had not developed into a prescriptive right and furthermore the right of the railroad would be to that part of the street actually used, to-wit eleven (11) feet West of the center line of the tracks and the eleven (11) feet East of the tracks, or a total distance of twenty one (21) feet.

1. (C) The public thoroughfare established by the public along Second West Street was of such width as was reasonably necessary for the public easement.

This court, in the case of

Jeremy v. Bertagnole, 100 Utah 116 Pac. 2nd
420, Utah 1941

affirmed the case of

Whitesides v. Green, 13 Utah 341, 44 P. 1032,
Utah 1896

which held that the right acquired by the public by prescriptive use is subject to different rules than a private prescriptive use. In the Whitesides case, the Court said:

“The right acquired by prescriptive use carried with it such width as is reasonably necessary for the public easement of travel.”

The original rights of the public acquired for Second West Street by its prescriptive use against the Federal Government with its consent under Section 932, *supra*, was for a street of reasonable width and Peter Hanson's deed to Carl F. C. Meyer (R. 81) referred to Second West Street as a four rod street. Most of the pioneer streets in Salt Lake County were four rod streets. There is no evidence that there was ever a four-rod street on either the East or West side of the railroad tracks; but there is now, and has for many years been, a four-rod street with the railroad tracks running down the center of it. There is evidence of use by the public of the East side of the tracks and the power lines of Murray City are east of the tracks, *supra*, and a travelled area some five to six hundred yards long on the East side in front of the 24th District School was used for many years and never abandoned (R. 124).

It seems reasonable to say that a four-rod street would be a reasonable width for a highway obtained by

public use under Section 932, supra, and if the use had established the highway before the railroad was constructed, it seems reasonable and logical that the travelled way would be forced to the East or West side of the tracks by the establishment of the railroad which is apparently what happened. The householders and abutting property owners on either the East or West side still abutted upon a public thoroughfare and did not, by the construction of the railroad, become land-locked citizens.

(d) The public right to use Second West Street is the same today as when it was originally acquired.

Section 27-1-3, Utah Code Annotated, 1953, which reads as follows:

“All highways once established must continue to be highways until abandoned by order of the County Commissioners of the County in which they are situated, or other competent authority.”

It is respectfully submitted that there is no evidence of any abandonment of Second West Street or any part of it by the County Commissioners of Salt Lake County, the City Commission of Murray City or any other competent authority.

CONCLUSION

It is respectfully submitted that the evidence in the foregoing case discloses that there was a public thoroughfare over Second West Street between 53rd and 64th South Streets, located prior to 1874 and the reasonable interpretation of the evidence would indicate it was established some five (5) years or more before that date,

and that the public acquired said right by user under and pursuant to 43 U.S.C.A. 932, which right has never been abandoned or lost to the public and that the evidence shows that the reasonable width of the county road thus established was four rods, and was so considered by the abutting property owners and that it remains and still is a four rod public road, subject now to the jurisdiction of Murray City in which it is presently located. There is no evidence of abandonment.

The Findings of Fact and Conclusions of Law and Judgment should provide that a four rod City street so exists, subject to a twenty two (22) foot easement through the middle of said street, belonging to the railroad, acquired by adverse use, which easement is now owned by Plaintiffs.

Respectfully submitted,

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