2000

David R. Tschaggeny and Ellen Charlene Price Tschaggeny, his wife v. Union Pacific Land Resources Corporation and Fred F. Saunders : Brief of Respondent

Utah Supreme Court

Steven A. Goodsell; Attorney for Defendants-Respondents.
LaMar Duncan; Attorney for Plaintiffs-Appellants.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT

OF THE STATE OF UTAH

DAVID R. TSCHAGGENY and ELLEN CHARLENE PRICE TSCHAGGENY, his wife,

Plaintiffs and Appellants,

vs.

UNION PACIFIC LAND RESOURCES CORPORATION and FRED F. SAUNDERS,

Defendants and Respondents.

No. 14487

BRIEF OF DEFENDANTS-RESPONDENTS

Appeal from a Judgment of the
Second Judicial District Court
in and for Weber County
HONORABLE CALVIN GOULD, JUDGE

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Defendants and Respondents.	:	

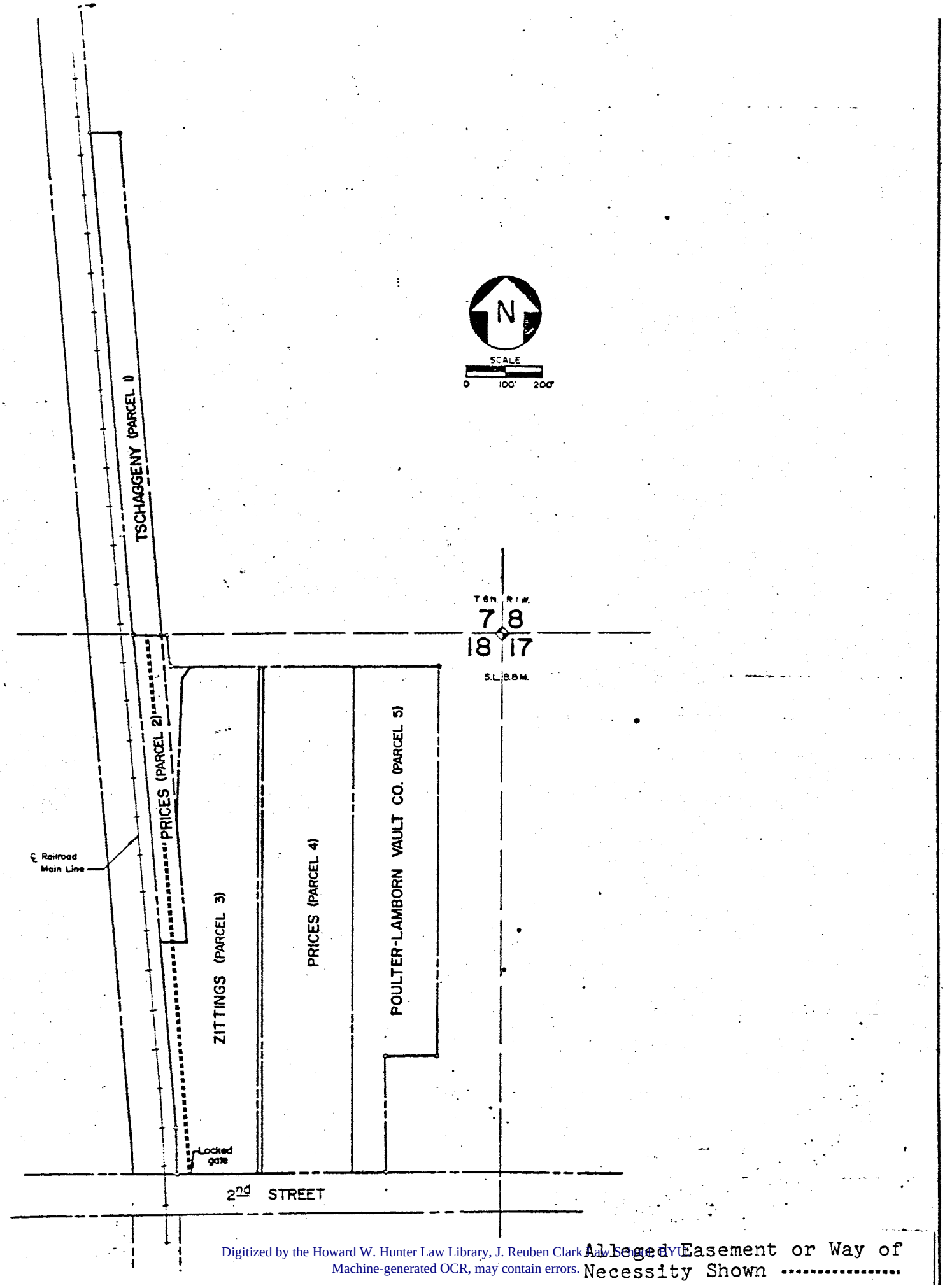
THE NATURE OF THE CASE

Respondents accept generally as sufficient THE NATURE OF THE CASE as set forth in appellants' brief with the exceptions, however, (1) that respondents claim the "unity of title" mentioned therein is not the type of unity of title required as a condition precedent to a finding of easement or way of necessity and (2) that the facts do not support appellants' contention that a "public way" existed over respondent Union Pacific Land Resources Corporation's property.

Respondents accept as sufficient the DISPOSITION IN THE LOWER COURT as set forth in appellants' brief.

STATEMENT OF FACTS

A print depicting the property in question is set forth below for clarity and convenience in understanding the pertinent facts involved.



Defendant Union Pacific Land Resources Corporation acquired title to the 21.167 acres of property described in paragraph 2 of plaintiffs' complaint (Parcels 2, 3, 4, and 5) by a quitclaim deed dated as of April 1, 1971, from Union Pacific Railroad Company [Defendants' Exhibit 8].

Union Pacific Land Resources Corporation's predecessor in interest, Union Pacific Railroad Company, acquired title to said 21.167 acres pursuant to a warranty deed (covering Parcels 2 and 4) and a quitclaim deed (covering Parcels 2, 3, 4, and 5) from Charles W. and Ellen B. Price dated May 13, 1967 [Defendants' Exhibits 4 and 5, respectively]; a warranty deed (covering Parcel 3) and a quitclaim deed (covering Parcels 2, 3, 4, and 5) from Marvin C. and Rhea S. Zitting and Lorin C. and Sylvia N. Zitting dated May 19, 1967; a warranty deed (covering Parcel 5) and a quitclaim deed (covering Parcels 2, 3, 4, and 5) from Poulter Lamborn Vault Co.

On May 13, 1967, when Charles W. and Ellen B. Price executed the warranty deed covering Parcels 2 and 4 and the quitclaim deed covering Parcels 2, 3, 4, and 5 to Union Pacific Railroad Company, Prices also owned Parcel 1. At the time of those conveyances, Prices believed that they were conveying to the Railroad Company and that they were being compensated for said Parcel 1 (Tr. page 207, lines 18-30; page 208, lines 1-10).

Union Pacific Railroad Company further perfected its title to said 21.167 acres of property by instituting a quiet title proceeding covering said property and by securing a Decree Quieting Title thereto dated February 5, 1968 [Defendants' Exhibit 7]. Prices, appellants' predecessors in interest, were aware that Union Pacific Railroad Company was instituting this quiet title action (Tr. page 202, lines 18-26 because they executed an agreement dated April 17, 1967 [Defendants' Exhibit 6] wherein they agreed to pay Union Pacific Railroad Company for all costs incurred in pursuing said action.

By a lease dated June 1, 1967, Union Pacific Railroad Company leased Parcels 2 and 3 to respondent Fred F. Saunders (Tr. page 222, lines 18-19). Approximately one month after said lease was executed, respondent Saunders placed a lock on the gate at Second Street (Tr. page 223, lines 6-30; page 224, line 1). To respondent Saunders knowledge, no one has ever traversed the alleged right of way without his permission since the lock was installed in July of 1967 (Tr. page 224, lines 13-16). Said lease was subsequently assigned from Union Pacific Railroad Company to Union Pacific Land Resources Corporation and amended effective February 15, 1974, to cover Parcels 2, 3, and 4.

The easement or way of necessity claimed by appellants traverses the track bed of the old Utah-Idaho Railroad Company right of way (Tr. page 236, lines 23-25). The trackage on this old right of way was removed about 1948 (Tr. page 236, lines

26-28). Consequently, as pointed out on page 2 of appellants' brief:

> . . . [T]he period of time in which the plaintiffs and their predecessors crossed over the defendants' land in order to reach his [sic] property was a little less than the 20-year period to establish a prescriptive right. . . .

As evidenced by a warranty deed dated April 1975 (Tr. page 17), Charles W. Price and Ellen B. Price gave Parcel 1 to the appellants in this action (Tr. page 177, lines 11-12). Appellants now seek to establish an easement or way of necessity between Second Street and Parcel 1 by traversing a path across Parcels 2 and 3 as depicted by a dashed line on the print.

STATEMENT OF POINTS

POINT I

RESPONDENT UNION PACIFIC LAND RESOURCES CORPORATION'S PREDECESSOR IN INTEREST, UNION PACIFIC RAILROAD COMPANY, DID EVERYTHING POSSIBLE TO PERFECT ITS TITLE TO THE ENTIRE 21.167-ACRE PARCEL AND TO EXTINGUISH ANY EASEMENTS AND/OR RIGHTS OF WAY AFFECTING THE SAME.

POINT II

THE REQUISITE "UNITY OF TITLE" DID NOT EXIST IN CHARLES W. AND ELLEN B. PRICE ON MAY 13, 1967, THE DATE OF THE CONVEYANCES BY WARRANTY DEED AND BY QUITCLAIM DEED OF THE PROPERTY UNDERLYING MERELY A PORTION OF THE ALLEGED EASEMENT OR WAY OF NECESSITY.

POINT III

THE ALLEGED EASEMENT OR WAY OF NECESSITY IS CONTRARY TO THE INTENT OF THE RESPECTIVE PARTIES AT THE TIME OF THE MAY 13, 1967, CONVEYANCES BY WARRANTY DEED AND BY QUITCLAIM DEED FROM CHARLES W. AND ELLEN B. PRICE TO UNION PACIFIC RAILROAD COMPANY.

POINT IV

SINCE ALTERNATIVE MEANS OF ACCESS WAS AND IS AVAILABLE TO APPELLANTS' PROPERTY, NO NECESSITY EXISTS FOR AN EASEMENT OR WAY OF NECESSITY.

ARGUMENT

POINT I

RESPONDENT UNION PACIFIC LAND RESOURCES CORPORATION'S PREDECESSOR IN INTEREST, UNION PACIFIC RAILROAD COMPANY, DID EVERYTHING POSSIBLE TO PERFECT ITS TITLE TO THE ENTIRE 21.167-ACRE PARCEL AND TO EXTINGUISH ANY EASEMENTS AND/OR RIGHTS OF WAY AFFECTING THE SAME.

Respondent Union Pacific Land Resources Corporation's predecessor in interest, Union Pacific Railroad Company, secured from Prices, appellants' predecessors in interest, a warranty deed dated May 13, 1967, conveying title to Parcels 2 and 4 "subject to existing easements and rights of way of record" [Plaintiffs' Exhibit 1]. In this regard, no evidence was adduced at trial of any easement or right of way of record (Tr. page 203, lines 6-21). On May 13, 1967, Union Pacific Railroad Com-

pany also secured from Prices a quitclaim deed conveying title, without any reservations whatsoever, to Parcels 2, 3, 4, and 5 [Defendants' Exhibit 5]. Consequently, if Prices had owned any easement and/or right of way traversing any portion of Parcels 2 or 3, the same was extinguished by said title instruments. Wallace v. Build, Inc., 16 Utah 2d 401, 402 P.2d 699 (1965); Nix v. Tooele County, 101 Utah 84, 118 P.2d 376 (1941).

By an Agreement dated April 17, 1967 [Defendants' Exhibit 6], Prices, appellants' predecessors in interest, and others agreed to pay the costs of a quiet title lawsuit to be instituted by Union Pacific Railroad Company covering the entire 21.167-acre parcel. Said quiet title action was reduced to a Decree Quieting Title dated February 5, 1968 [Defendants' Exhibit 7]. Although Mr. Price admitted that he knew the Railroad Company was instituting this quiet title action (Tr. page 202, lines 18-26), Prices made no attempt to preserve or except from said Decree any interest they may have owned or claimed to have owned in the alleged easement or right of way.

Union Pacific Railroad Company by securing (1) the warranty deed, (2) the quitclaim deed, and (3) the Decree Quieting Title exhausted every available expedient either to obtain any right, title and/or interest which Prices may have owned in any such easement or right of way or to extinguish the same. Based upon the foregoing title documentation secured by the Railroad Company, it is inconceivable that the appellants

presently have any legal or practical basis whatsoever to assert any title or interest to such an easement or right of way.

POINT II

THE REQUISITE "UNITY OF TITLE" DID NOT EXIST IN CHARLES W. AND ELLEN B. PRICE ON MAY 13, 1967, THE DATE OF THE CONVEYANCES BY WARRANTY DEED AND BY QUITCLAIM DEED OF THE PROPERTY UNDERLYING MERELY A PORTION OF THE ALLEGED EASEMENT OR WAY OF NECESSITY.

Appellants, throughout their brief, point out that one of the legal requirements which must be satisfied in order to establish a way of necessity is "unity of title followed by severance". Morris v. Blunt, 49 Utah 243 at 254, 161 Pac. 1127 (1916); Savage v. Nielsen, 114 Utah 22 at 31, 197 P.2d 117 (1948); Chournos v. Alkema, 27 Utah 2d 244 at 247, 494 P.2d 950 (1972).

In Savage v. Nielsen, supra, the Utah Supreme Court states at pp. 31-32:

> The theory upon which a way of necessity is based is that all the property is once owned by a single person. He divides it into two tracts and conveys away one tract. The physical location of the other tract is such that it is not reasonably accessible without crossing the tract conveyed away. If the grantor retains the tract which is thus surrounded, without any mention of a way, it is presumed that he intended to reserve a right of way to and from the tract retained. If he sells the tract which is thus surrounded without men-

tion of a means of ingress and egress it is presumed that he intended to create a servient estate in himself to the extent of a right of way in favor of the other tract of land. The requirements for a way of necessity are set out in the case of Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132, as follows:

"(1) Unity of title followed by severance;

"(2) That at the time of the severance the servitude was apparent, obvious, and visible;

"(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and

"(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises."

See also: Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264; citing Morris v. Blunt, and reaffirming requirement number three above, and discussing generally the doctrine of easements by implication, and reasonable necessity; Smith v. Sanders, 112 Utah 517, 189 P.2d 701, Fayter v. North, 30 Utah 156, 83 P. 742, 6 L.R.A., N.S., 410.

It is apparent then, from an analysis of the above requirements, that the doctrine had its basis in the theory of a grant by reason of the circumstances attendant at the time of the grant. It is inconsistent with the adversity contemplated in the theory of an easement based upon prescription.

A way of necessity arises from the existence of such necessity at the time of the dividing of the property. . . . [Emphasis added.]

At the time of the conveyances to Union Pacific Railroad Company in 1967, the property underlying the alleged easement or way of necessity was owned in part by Zittings and in part by Prices as depicted on the print. In short, there was no "unity of title" in the property underlying the alleged easement or way of necessity at the time appellants' predecessors in interest (Prices) conveyed Parcel 2 to Union Pacific Railroad Company.

The "unity of title", however, that appellants attempt to rely upon is that unity which may or may not have existed when the property in question was all purportedly owned by Utah-Idaho Central Railroad. The difficulty with this position is that appellants during trial never established that any such unity of title ever existed in the Utah-Idaho Central Railroad. Furthermore, even if unity of title did exist in the Utah-Idaho Central Railroad, appellants did not and cannot establish that at the time of severance, if any, the claimed servitude was apparent, obvious, and visible. This is particularly true since the alleged easement "is right on the bed of the old Utah-Idaho Central Railroad" (Tr. page 236, lines 23-25), which trackage wasn't removed until 1948 (Tr. page 236, lines 26-28) at or about the same time Prices' predecessors in interest acquired title to Parcel 2 (see the first sentence of appellants' STATEMENT OF FACTS). Consequently, if the trackage overlying the alleged easement wasn't removed until or near the date Prices

obtained title thereto, it is impossible for any servitude (other than as a railroad right of way) to have been established prior to Prices' acquisition of Parcel 2. In summary, the severance of the property, if any, occurred prior to the establishment of any servitude for any purpose other than as a railroad right of way.

The only point in time when any question of severance could be raised by appellants would be the 1967 conveyances from Prices to Union Pacific Railroad Company; however, at that time, there was no unity of title in the property underlying the alleged easement or right of way of necessity. Such property was owned in part by Prices and in part by Zittings. Nowhere in the record did appellants ever establish any unity of title to, or a severance of, that property underlying the entire length of the alleged easement or way of necessity.

In order to establish an easement or way of necessity, appellants must also establish that such easement was "continuous and self-acting, as distinguished from one used only from time to time when occasion arises". Savage v. Nielsen, supra at page 31. Since the gate at Second Street was locked in July of 1967 (Tr. page 223, lines 6-30; page 224, line 1) and since respondent Saunders doesn't have any knowledge of anyone gaining access through said gate without his permission (Tr. page 224, lines 13-16), the evidence reveals that appellants have not traversed the area in question since July of 1967. Consequently,

appellants clearly cannot establish the requisite "continuous and self-acting" use.

POINT III

THE ALLEGED EASEMENT OR WAY OF NECESSITY IS CONTRARY TO THE INTENT OF THE RESPECTIVE PARTIES AT THE TIME OF THE MAY 13, 1967, CONVEYANCES BY WARRANTY DEED AND BY QUITCLAIM DEED FROM CHARLES W. AND ELLEN B. PRICE TO UNION PACIFIC RAILROAD COMPANY.

One of appellants' predecessors in interest, Charles W. Price, testified that in 1967, when the warranty deed and quitclaim deed were executed, he understood and believed that Union Pacific Railroad Company had purchased and compensated him for Parcel 1 in addition to Parcels 2 and 4 (Tr. page 207, lines 18-25; page 208, lines 5-10). Furthermore, Mr. Price testified that he knew Union Pacific Railroad Company was purchasing his property for the purpose of constructing a number of warehouses and tracks thereon (Tr. page 204, lines 3-28), which use would conflict substantially with any alleged easement or way of necessity. Consequently, it is clear that at the time of the 1967 conveyances, Prices never intended to reserve any easement and/or right of way. See Watkins v. Simonds, 11 Utah 2d 46, 354 P.2d 852 (1960), where the Supreme Court quotes with approval from the Restatement of Law on Real Property, § 476 at page 49:

> An easement created by implication arises as an inference of the intention of the parties to a conveyance of land. The inference is drawn from the circumstances under which the conveyance was made rather than the language of the conveyance. To draw the inference of intention from such circumstances, they (the circumstances) must be or must be assumed to be within the knowledge of the parties. The inference drawn represents an attempt to ascribe an intention to parties who had not thought or had not bothered to put the intention into words, or perhaps more often, to parties who actually had formed no intention conscious to themselves. [Emphasis added.]

POINT IV

SINCE ALTERNATIVE MEANS OF ACCESS WAS AND IS AVAILABLE TO APPELLANTS' PROPERTY, NO NECESSITY EXISTS FOR AN EASEMENT OR WAY OF NECESSITY.

Respondents introduced into evidence a photograph identified as Defendants' Exhibit 2 secured in October of 1966 (Tr. page 232, lines 26-30; page 233, lines 1-30) which verifies that approximately seven months prior to the conveyances from Prices to Union Pacific Railroad Company in May of 1967 an alternate means of access existed into appellants' property from Second Street in Ogden. That photograph depicts a well-defined roadway to the east of the 21.167 acres in question and an automobile situated in close proximity to appellants' south property line. Furthermore, respondent Sanders testified that he had traversed at least a portion of this alternate roadway several times (Tr. page 225, lines 4-30; page 226, lines 1-13).

If a landowner has other reasonable means of acquiring access to his land, he cannot acquire an implied easement of way by necessity, Frazier v. Bobbitt, 526 P.2d 1343 (Colo. 1974). Furthermore, the court in Ewan v. Stenberg, 541 P.2d 60 (Mont. 1975), stated at p. 63:

> The crux of this claim is the question of whether the requisite necessity does or does not exist. . . . The fact is that the plaintiffs do have other ways of access to and from Tract B. The fact that the other ways involved longer distances and more inconvenience is not an acceptable basis upon which to grant the relief requested. The criterion is not one of convenience, but of necessity.

CONCLUSION

Based upon the uncontroverted facts and the applicable law involved, it is evident that appellants have no legal title or interest whatsoever in or to Parcels 2, 3, 4, and 5. If any such title or interest was enjoyed by appellants' predecessors in interest prior to the 1967 warranty deed and quitclaim deed from Charles W. and Ellen B. Price to Union Pacific Railroad Company and the 1968 Decree Quieting Title, all such rights either merged into Union Pacific Railroad Company's fee simple title or were extinguished thereby.

Appellants never established the requisite "unity of title followed by severance" as a condition precedent to establishing an easement or way of necessity. As Judge Calvin Gould stated in his Memorandum Decision dated December 24, 1975, following trial of this case:

> The fact that no prescriptive right exists makes the question of an easement of necessity a moot question. This is because an easement of necessity is simply an easement implied in law to reserve access to a property retained by a grantor on the assumption that the grantor would not have conveyed without reserving a right-of-way. Here there was nothing in the nature of a right to be reserved. The essential ingredient to a way of necessity is that the grantor had access to either (1) a public way or (2) other property which he owned or had rights in. Neither exists in this case.

Appellants' allegation of easement or way of necessity is contrary to the intent of the respective parties to the warranty deed and quitclaim deed dated May 13, 1967, between Charles W. and Ellen B. Price and Union Pacific Railroad Company. Furthermore, since alternative means of access was available to appellants' property at the time of the 1967 conveyances, no necessity existed for an easement or way of necessity as contended by appellants.

Based upon the foregoing, respondents respectfully request that the decision of the lower court be affirmed.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that on the 25th day of May, 1976, I served by mailing, postage prepaid, a true and correct copy of the foregoing Brief of Defendants-Respondents to LaMar Duncan, attorney for plaintiffs-appellants, 706 Phillips Petroleum Building, Salt Lake City, Utah 84101.

Gail L. Young