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David R. Tschaggeny and Ellen Charlene Price Tschaggeny v. Union Pacific Land Resources Corporation and Fred F. Sanders : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

14487A

OF THE STATE OF UTAH

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

- vs. -

UNION PACIFIC LAND RESOURCES CORPORATION and
FRED F. SANDERS,
Defendants and Respondents.

BRIEF OF PLAINTIFFS-APPELLANTS

Appeal from a judgment of the Second Judicial District
in and for Weber County
HONORABLE CALVIN GOULD, Judge

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Plantiffs and Appellants,
- vs. -
UNION PACIFIC LAND RESOURCES CORPORATION and FRED F. SANDERS,
Defendants and Respondents.

No. 14487

BRIEF OF PLAINTIFFS-APPELLANTS

THE NATURE OF THE CASE

This is an action to establish an easement or way of necessity over certain properties in Weber County, State of Utah in which there was a unity of title at one time, the property having been the road bed of the Utah Idaho Central Railroad. The plaintiffs are the successors in interest of a certain tract of land, the subject of this action, which was bounded to the South and to a public way over property owned by the defendant Union Pacific Land Resources Corporation.

STATEMENT OF FACTS

In 1948, S. J. Quinney, as trustee, conveyed the property to William M. Howell, and William M. Howell

in turn conveyed the property to Charles W. Price (Tr. 196 line 24). Price occupied and used the land until 1967 when he sold part of the property back to the Union Pacific Land Resources Corporation and retained the balance, the subject of this action, until April of 1975 when it was conveyed to the plaintiffs.

The plaintiffs used the property and in order to reach the same, crossed over the property of the defendant until sometime in 1975, when the defendant Union Pacific Land Resources Corporation, acting through its lessee the defendant Fred F. Saunders, placed a gate across the roadway and placed a lock on said gate, locking them out. Although the period of time in which the plaintiffs and their predecessors crossed over the defendants' land in order to reach his property was a little less than the 20 year period to establish a prescriptive right, it is the plaintiffs' contention that a way of necessity had been established and that the roadway should be Ordered open and plaintiffs granted the use to cross defendants' property in order to go in and out of their own property.

DISPOSITION IN THE LOWER COURT

After a hearing the Court took the matter under advisement, and on the 24th day of December 1975, rendered a memorandum decision in substance as follows:

> "The Court finds that the plaintiffs and their predecessors in title have not used the southermost strip of land over which the right-of-way is claimed for the requisite 20 years under Utah law in order to establish a prescriptive right.

"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.

"The plaintiffs' Complaint is, therefore, dismissed, no cause of action.

"Dated and signed this 24 day of December, 1975.

"BY THE COURT

Calvin Gould, *Judge*"

Later, after arguing a motion for new trial, the Court reaffirmed its original decision and from this ruling dismissing plaintiffs' Complaint the plaintiffs appeal.

ARGUMENT

POINT I.

A WAY OF NECESSITY HAD BEEN ESTABLISHED AND THE ROADWAY SHOULD BE OPENED AND PLAINTIFFS GRANTED THE USE OF THE RIGHT OF WAY OVER DEFENDANTS' PROPERTY IN ORDER TO REACH THEIR GROUND.

All of the testimony would indicate that there was no other access to the road which had been in continuous use ever since the Utah Idaho Central Railroad sold the property and removed the tracks therefrom. See Tr.

182 Lines 12-26; 182 Lines 12-26; 183 Lines 1 to 17 and 184 Lines 7-19.

There was an attempt on part of defendants' counsel to show a road and access to the plaintiffs' property from the East. However there was no such road from the piece known as Stone's and the testimony was that both Stone's roadway was never used, except as to access to Stone's field and to the property of the plaintiffs there existed a swamp and other indications that no road had ever been established along that line. See Tr. 190 L. 27-30; 191 L. y-16; See also Tr. 181 L. 25-30; 182 L. 1-30 and 183 L. 1-30.

It therefore is apparent from the record that counsel's attempt to show that there was no other means of egress and ingress to the East of plaintiffs' property rather than the one, the subject of this action, is entirely without merit.

In the case of Savage v. Nielsen, 114 Utah 22, 197 P.2d 117, Justice Pratt stated:

> "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 mention 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 apparently obvious and visible; See (Exhs. P, A, B, C, D, E, and F.)
>
> " '(3) That the easement must be 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 Exs. A-E) (Tr. 191 L. 2-29)
>
> " 'See 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, 18 P. 742, 6 L.R.A., N.S. 410.

"It is apparent then, from an analysis of the above requirements that the doctrine has its basis in the theory of a grant by reason of 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. A right of way by prescription can

only be obtained by satisfying certain other requirements. These requirements may, for all practical purposes, be included within the three set out below though the cases under particular fact situations have emphasized other subdivisions. The three uses are: (1) Continuous; (2) Open; and (3) Adverse under a claim of right. See Jensen v. Gerrard, 85 Utah 481, 39 P.2d 1070; Dahl v. Roach, 76 Utah 74, 287 P. 633; Bowers v. Gilbert, 63 Utah 245, 224 P. 881; Morris v. Blunt, supra; Colton v. Murphy, 41 Utah 591, 127 P. 335; Lund v. Wilcox, 34 Utah 205, 97 P. 33. For a recent discussion of the elements necessary to attain a prescriptive right, and the confusion that has existed on this matter in the past, see Zollinger v. Frank, 110 Utah 514, 175 P.2d 714, 170 A.L.R. 770."

In the case of Hancock v. Henderson, 236 Md. 98, 202 A.2d 499, 9 ALR 3rd, 592, the Court stated:

"We have said the doctrine of easements by necessity is based upon a public policy favoring full utilization of land and a presumption the parties do not intend the land conveyed be rendered unfit for occupancy. Condry v. Laurie, 184 Md 317, 321, 41 A.2d 66. In 3 Tiffany Real Propetry, (3d ed.). Section 793, pages 296, the writer states that decisions are not in harmony where the property borders on navigable water. The cases seem to be searching for the intent of the parties, but some hold that where none is expressed it will be presumed the parties intended any lawful use of the property.

"As in Condry v. Laurie, supra, we are dealing with the rights and obligations of subsequent title holders of both the alleged dominant and servient

properties. The Hendersons, as remote grantees, cannot create the way of necessity. If the way of necessity was not implied at the time of the grant in 1898 it cannot be established by a subsequent necessity. Feldstein v. Segall, 198 Md 285, 294, 81 A2d 610; 28 CJS Easements #35 b. In other words, the necessity must be determined from the conditions as they existed at the time of the conveyance. In the first Condry v. Laurie case we held that a personal license in the deed did not negate a way of necessity, but the occasion for using the way was deferred until expiration of the license, the necessity having been in existence at the time of the grant. The theory is that such an easement, being appurtenant, passes with each conveyance to subsequent grantees. Douglass v. Riggin, 123 Md 18, 23, 90 A. 1000. Hence a remote grantee of land not being used at the time of severance may nevertheless, when the use becomes necessary to the enjoyment of his property, claim the easement under his remote deed. See Finn v. William, 376, Ill 95, 33 NE2d 226, 133 ALR 1390, which is the subject of an annotation in 133 ALR 1393 on the effect of non-use of a way of necessity. This rule is consonant with the generally held view that non-use alone is not sufficient to extniguish a way by necessity. Knotts v. Summit Park Co., 146 Md 234, 126 A 280. * * *

"We now turn briefly to the question of location of the right of way. While the way by necessity did exist at the time Little Woods was conveyed away, there was no proof in the case that its location was established at that time. There was testimony of course that a road existed in 1911 for a brief span of time utilized for a limited purpose, and as noted previously soon thereafter

it fell into disuse until the appellees recently began to improve it. We do not think this slight activity so long ago was sufficient to establish with exactitude the location of an easement claimed now by a remote grantee of the dominant tract. It appears that the roadbed claimed is not inconveniently located on the servient land which is now being farmed. While there is some dispute, counsel for the appellants claimed it nearly bisects the farm. The uses now being made of both parcels of land have materially changed since 1911. While there is no question that the appellees have a way by necessity over the land of the appellants, we are of the opinion that the equitable disposition of the case calls for us to remand it to the lower court for a determination of a location of the road which will be fair to both sides. * * *"

POINT II.

UNITY OF TITLE FOLLOWED BY SEVERANCE.

In the present case, there was no doubt there had been a unity of title. The Court certainly can take judicial notice of the fact that the Utah Idaho Central Railroad had owned the entire tract where it laid its tracks and that the entire tract constituted the roadbed of this railroad. Subsequently the property was sold off in sections with the plaintiffs being the ultimate owners, and from the exhibits as herein set forth, the only access to the property was over the land of the defendant and while the use has not existed for the past 20 years, it certainly was the intention of the parties to reserve to the plaintiffs and their predecessors in interest the right-of-way over the property as a means of ingress and egress.

In the case of Savage v. Nielsen, 114 Utah 22, 197 P.2d 117, Justice Pratt stated:

> "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 mention 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:
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> " '(1) Unity of title followed by severence;
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> " '(2) That at the time of the severance the servitude was apparently obvious and visible; (See Exs. P, A, B, C, D, E and F)
>
> " '(3) That the easement must be 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 Exhs. A to E) (Tr. 181 L. 2 to 29)

In 19 C.J. ¶155-156, it was recited:

> "An owner of land cannot have an easement in his own estate in fee, for the plain and obvious

reason that he has an unlimited right to use the land in any manner he chooses, and all subordinate and inferior derivative rights are necessarily merged and lost in the higher right. * * * and the right of way is extinguished * * * *.

"However an exception to the general rule arises in the case of a way of necessity. Where there is a unity of ownership a previous right of way which came into existence by necessity is merely in suspension and not extinguished."

Again in 19 C.J. 947, Sec. 161, it recites:

"Ordinarily after a merger by the unity of title to the dominant and servient estates the owner grants the former dominant estate to another, it passes without the former incidents unless they are revived by force of the grant itself, by such words of description as could bring them into being by way of a new grant; and conversely if he conveys the servient tenement there is no revival of the easement unless there is an express reservation in his favor. But although the old easement is not revived by the severance, yet a new easement may be granted by implication, if it is apparent, continuous, and necessary, upon the same principle and under the same circumstances that easements are granted by implication upon the severance of an estate originally entire."

POINT III.

THERE WAS AN IMPLIED EASEMENT OF NECESSITY WHICH AROSE BY IMPLICATION.

In Hellberg v. Coffin Sheep Co., 404 P.2d 770, 66 Wash.2d 664 (1965), the Court stated:

> "Implied easements appurtenant to land and easements of necessity arise by implication."
>
> "An 'easement of necessity' is an expression of public policy that will not permit property to be landlocked and rendered useless, and in furtherance of that policy the owner, or one entitled to beneficial use of landlocked property has right to condemn private way of necessity for ingress and egress. RCWA 8.24-010.-Id."

Again in 25 Am. Jur.2d 447, Sec. 34 Way of Necessity are generally described:

> "A way of necessity is an easement founded on an implied reservation. It arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is shut off from access to a road to the outer world by the land from which it is severad or by this land and the land of strangers. In such a situation there is an implied grant of a way across the grantor's remaining land across the portion of the land conveyed. The order in which two parcels of land are conveyed makes no difference in determining whether there is a right of way by necessity appurtenant to either.
>
> "A way of necessity results from the application of the presumption that whenever a party conveys property he conveys whatever is necessary for the beneficial use of the land he still possesses. Such a way is of common-law origin, and is presumed to have been intended by the parties. A way of necessity is also said to be supported by the rule of public policy that lands should not be rendered unfit for occupancy or successful cultivation. Whether a grant or reservation of a way of necessity should be implied, however, depends

on the terms of the conveyance and the facts of the particular use. The implication will not be made where it is shown that the parties did not intend it. Nor will an implied easement of necessity be judicially recognized where it is precluded by statute.

"Questions in respect of the permanency, apparency, and continuity of servitude, which are of importance in connection with easements implied on severance of property from the fact that a use had been imposed on one part of the properly for the benefit of another part, are not applicable to typical ways of necessity. There is a definite distinction between such an easement and a way of necessity, mainly because a way of necessity does not rest on a pre-existing use but on the need for a way across the granted or reserved premises."

See Restatement of the Law, Sec. 476, which states on page 2978:

"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 from the language of the conveyance. To draw an inference of intention from such circumstances, they 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 intenion into words, or perhaps more often, to parties who actually had formed no intention conscious to themselves. In the latter aspect the implication approaches in fact, if not in theory, crediting

> the parties with intention which they did not have, but which they probably would have had had they actually foreseen what they might have foreseen from information available at the time of the conveyance * * *."

In Chournos v. Alkema, 27 Utah 2d 244, 494 P.2d 950, Chief Justice Callister said at pages 274-8 as follows:

> "The evidence indicates that defendants and their predecessor in interest, Shelby, have had ownership and possession of this tract since 1943. Such circumstances negative the superior right to possession which plaintiff must prove to prevail in the instant action.
>
> "The trial court further determined that defendants had an easement across plaintiff's property in Section 29 to their tract located therein. The trial court found two alternative grounds upon which to support its determination, first, an easement by implication, second, a prescriptive easement.
>
> "The trial court found that in 1943 when Shelby acquired the tract from Fraziers, there was no other access to the strip; the road across Fraziers' property was apparent, obvious, and visible; Shelby used the road for access to the strip where he held and watered his cattle. The trial court further found that upon severance of the strip by Fraziers' conveyance to Shelby in 1943 with Fraziers' retaining the balance of their holdings in the southwest quarter of Section 29, there was created an easement by implication with respect to the use of the road in favor of the tract severed. Such easement was appurtenant thereto, and defendants acquired their rights to the easement at

the time Shelby conveyed the parcel by warranty deed to them.

> "The findings of the trial court comport with the requirements set forth to establish an easement by implication, namely, (1) unity of title followed by severance; (2) at the time of severance the servitude was apparent, obvious and visible; (3) the easement was reasonably necessary to the enjoyment of the dominant estate; and (4) the use of the easement must be continuous as distinguished from one use from time to time when the occasion arises."

It is also to be noted that the Warranty Deeds to the two pieces of land made by Mr. Price recited subject to existing easements and rights of way "of record." According to the testimony of defendant's own witness these documents were prepared by the legal department of the Union Pacific Railroad, and without any professional help to Mr. and Mrs. Price. (Tr. 237, Lines 23-30)

On February 24, 1948, a Receivers Deed was made from S. Q. Quinney, Receiver for the Utah-Idaho Central Railroad to William Howell to part of the roadbed of the Utah Idaho Central Railroad. Part of this property was in turn conveyed by William Howell and his wife to Charles W. Price and Ellen B. Price. Plaintiffs certainly intended a right of way and were mislead by defendants adding "of record."

On May 13, 1967, Price and his wife conveyed part of this land to the Union Pacific Railroad, "subject to existing easements and rights of way of record."

It is true that on that same date the exhibits will show a conveyance was made by quit claim deed of a

tract including several fragments and segments in this same area. No reservation of the easements and rights of way was made in this separate quit claim deed, but as the Court recited from the bench, that inasmuch as both instruments were dated the same date the Court should consider them as one instrument.

CONCLUSION

Plaintiff, therefore, respectfully submits that all of the necessary elements exist in the instant case and that it was the intention of the parties to create a way of necessity.

There was a unity of title as testified to by the Defendants' own witness. The entire tract, including the piece owned by the plaintiff and the tract now owned by the defendant constituted the roadbed of the old Utah-Idaho Central Railroad; that when it was divided, title was conveyed to William Howell, who in turn conveyed to Charles W. Price and his wife, Ellen B. Price, who in turn conveyed to the plaintiff.

In Wagner v. Fairlamb, 379 P.2d 165, 151 Colo 481 (1963), the Court said:

> "The three requirements to be met, generally before way of necessity exists are original ownership of entire tract by single grantor prior to division, necessity existing at the time of severance, and great necessity for the particular right-of-way.
>
> "That there was property which was involved in location of right-of-way of necessity in favor of southern tract over northern tract and which be-

longed to third person, whose rights had not been determined did not preclude existence of easement. -id."

It is to be noted in all of these conveyances, including the Warranty Deeds, of which the defendant has made so much claim, recited "subject to existing easements and rights of way of record." The Court can certainly disregard defendant's attempt to establish any other means of egress and ingress to the property, inasmuch as the attempts, including the pictures, certainly failed as to proof and at the present state of recording, plaintiff's property is landlocked and therefore becomes useless. This, we submit is contrary to public policy and most certainly was not the intention of the parties at the time of the making of the conveyance.

Respectfully submitted,

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