

1940

Joseph F. Merrill v. Bailey & Sons Company;
Seymour N. Bailey and Emma Z. Bailey; J. W.
Summerhays & Sons Company; Colorado Animal
By-Products Company; Leona B. Whitehill; Robert
Bailey Whitehill; C. E. Summerhays; J. J.
Summerhays; and John Snowcroft & Sons
Company : Appellant's Abstract of Record

Utah Supreme Court

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Hurd & Hurd; Moyle, Richards & McKay; Judd, Ray, Quinney & Nebeker; Attorneys for Appellants; J. D. Skeen; E. J. Skeen; Attorneys for Respondent;

Recommended Citation

Abstract of Record, *Merrill v. Bailey & Sons Company et al*, No. 6219 (Utah Supreme Court, 1940).
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In the Supreme Court of the State of Utah

JOSEPH F. MERRILL,
Plaintiff and Respondent,

vs.

BAILEY & SONS COMPANY, a corporation;
SEYMOUR N. BAILEY and EMMA Z. BAILEY, his wife;
J. W. SUMMERHAYS & SONS COMPANY, a corporation;
COLORADO ANIMAL BY-PRODUCTS COMPANY, a corporation;
LEONA B. WHITEHILL, administratrix of the Estate of Bert N. Bailey, deceased;
ROBERT BAILEY WHITEHILL; C. E. SUMMERHAYS and J. J. SUMMERHAYS,
Defendants and Appellants.

JOHN SCOWCROFT & SONS COMPANY, a corporation,
Defendant not appealing.

APPELLANT'S ABSTRACT OF RECORD

ON APPEAL FROM THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR
SALT LAKE COUNTY, HON. P. C. EVANS, JUDGE.

HURD & HURD,
MOYLE, RICHARDS & MCKAY,
BAGLEY, JUDD, RAY & NEBEKER,
Attorneys for Appellant.

J. D. SKEEN and
E. J. SKEEN,
Attorneys for Respondent.

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In the Supreme Court of the State of Utah

JOSEPH F. MERRILL,
Plaintiff and Respondent,

vs.

BAILEY & SONS COMPANY, a corporation; SEYMOUR N. BAILEY and EMMA Z. BAILEY, his wife; J. W. SUMMERHAYS & SONS COMPANY, a corporation; COLORADO ANIMAL BY-PRODUCTS COMPANY, a corporation; LEONA B. WHITEHILL, administratrix of the Estate of Bert N. Bailey, deceased; ROBERT BAILEY WHITEHILL; C. E. SUMMERHAYS and J. J. SUMMERHAYS,
Defendants and Appellants.

JOHN SCOWCROFT & SONS COMPANY, a corporation,
Defendant not appealing.

No. 6219

APPELLANT'S ABSTRACT OF RECORD

TRANS.
PAGE

(Title of Court and Cause):

1

COMPLAINT.

Plaintiff complains of the defendants and
for cause thereof alleges:

1. Alleges corporate existence of several corporate defendants, and that Leona B. Whitehill is administratrix of estate of Bert N. Bailey, deceased.

2. That the plaintiff is the owner in fee simple of the following described real estate, located in Salt Lake County, State of Utah, to-wit:

The South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey.

3. That for more than seven years next preceding the commencement of this action, the plaintiff and his predecessors in interest have been in open, notorious, continuous and adverse possession of the said real estate described above under claim of right, and with hostility toward the claims of all other persons, and said possession has been exclusive except for the wrongful encroachments upon said property and trespasses thereon, which are hereinafter mentioned, and during said time, the plaintiff has paid all taxes legally levied and assessed against said real estate.

4. That the defendants and each of them assert and claim a right to use a portion of the real estate above described for roadways and particularly for the purpose of loading and unloading merchandise from and upon railroad cars and trucks which pass over and upon the plain-

tiff's said real estate; that during or about the year 1934, the defendants Bailey & Sons Company, Seymour N. Bailey and Emma Z. Bailey, his wife, wrongfully and without the consent of the plaintiff, constructed or caused to be constructed a concrete ramp or loading platform upon the Southwestern portion of said real estate, and the said defendants and also the defendants Colorado Animal By-Products Company, J. W. Summerhays and Company, and Leona B. Whitehill, Administratrix, assert and claim the right to maintain and use and are continuously using said ramp or loading platform, and assert and claim a right of way or easement over and upon the said real estate of the plaintiff; that the defendant John W. Scowcroft & Sons Company, a corporation, asserts and claims the right to drive trucks and other vehicles over and upon the western portion of said real estate of the plaintiff and are making constant use thereof, and said use is wrongful and in violation of the rights of the plaintiff.

5. That unless restrained by this court, the defendants will continue to trespass upon the real estate of the plaintiff and said trespasses
- 3 will be frequent and repeated, and unless this court makes and enters an order requiring the defendants to remove said concrete ramp or loading platform from the property of the plaintiff, the defendants will continue to wrongfully main-

tain and to use it, all to the irreparable damage of the plaintiff.

WHEREFORE, plaintiff prays for a decree of this court quieting his title to the land hereinabove described, against all claims of title to, interest in or easement over or upon said land asserted by the defendants or any of them.

Plaintiff further prays for a decree requiring the defendants to remove forthwith the concrete ramp or loading platform, which is located on the said real estate, and restraining and enjoining the defendants and each of them from driving trucks or other vehicles over or upon plaintiff's said real estate or from otherwise taking possession of or using all or any portion of plaintiff's said real estate for any purpose whatsoever.

4 Plaintiff prays for general relief and for costs of court incurred herein.

J. D. SKEEN,

E. J. SKEEN,

Attorneys for Plaintiff.

(Verification).

Filed August 26, 1938.

(Title of Court and Cause):

15 ANSWER OF DEFENDANTS, SEYMOUR N.
BAILEY AND EMMA C. BAILEY,
HIS WIFE.

Come now the defendants, Seymour N. Bailey and Emma Z. Bailey, his wife, herein sued as Emma C. Bailey, and for answer to the complaint of the plaintiff admit, deny and allege as follows:

I.

Admit the allegations contained in paragraph one of said complaint.

II.

Deny the allegations contained in paragraph two of said complaint, and on the contrary allege that Zion's Savings Bank & Trust Company, a Utah corporation, appears of record to be and is, as these defendants are informed, believe and therefore allege, the owner in fee simple of the real property in said paragraph two of plaintiff's complaint described, subject to the easements, rights of way and other rights and privileges hereinafter alleged.

III.

Answering paragraph three of said complaint, defendants deny the same, and each and

all of the allegations therein contained, and on the contrary allege that whatever, if any possession plaintiff or his predecessors in interest, if any, now has or have had of said described real property, and each and every part thereof during the period alleged, as well as for many years prior thereto, the same and that of each and all of them has been subject to and in full and complete recognition of the easement, rights of way and the other rights and privileges over and of and concerning the same, hereinafter alleged.

IV.

16 Answering paragraph four of said complaint, defendants admit that they as well as the other defendants to said action claim the right to use the said described real estate for the purpose alleged, as well as for other purposes, and admit that they as well as the other defendants to said action assert and claim easements and rights of way over and other rights and privileges of and concerning said described land, and admit and allege that these defendants, as well as the other defendants to said action and their predecessors in interest, are continuously using, and for more than thirty years prior to the commencement of said action have continuously used, said described land, and particularly the southern portion thereof, as a means of ingress and egress to and from lands abutting said described land on the south,

and for the loading and unloading of railroad cars on the railroad spur track situate on said described land, and for the maintenance of loading platforms and other facilities thereon, as well as for divers other purposes and in divers other ways; but defendants deny that their use of said described land, or any part thereof so used, is or has been wrongful or in violation of any rights of plaintiff, and on the contrary allege that their use of said land is and has been rightful, and under and pursuant to the grants and reservations, and the rights and privileges, made and reserved to said defendants and others by these defendants and their co-owner as the previous and common owners of said described land and other lands abutting the same on the south, for the use and benefit of the land owned by these defendants and other lands so abutting said described property on the south thereof, all as hereinafter more particularly alleged.

V.

Answering paragraph five, defendants admit that unless restrained by this Court, they will continue to use the said described land, or a portion thereof, and the trackage, loading platform and other facilities thereon, and will continue to maintain and use the same as they have in the past, but defendants deny that in so using said described land, or in so maintaining or

16A using the facilities thereon, they are trespassing upon or wrongfully using the same, and on the contrary allege that by the grants and reservations hereinbefore referred to and hereinafter more particularly alleged and described, they have the right and privilege to so use the said lands, and they own and have rights of way, easements and other rights and privileges for the use of the same, and the maintenance and use of the track-age, loading platforms, ramps and other facilities situate thereon, all for the use and benefit of their said lands abutting said described land on the south thereof.

VI.

Defendants deny generally each and every allegation in said complaint contained not hereinbefore specifically admitted or denied.

For a further answer, and by way of further defense to said complaint, defendants allege:

I.

That the defendant, Seymour N. Bailey, is now and has been for many years the owner in fee simple absolute of, and the defendant, Emma Z. Bailey, his wife, has now and has had for many years a statutory, contingent interest in and to an undivided one-half interest in and to the following described real property situate in Salt Lake County, Utah, to-wit:

Commencing 58.25 feet East of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, and running thence North 99.5 feet; thence East 40.75 feet; thence South 99.5 feet; thence West 40.75 feet to the place of beginning.

Subject to and together with a perpetual right of way in common with others to the South line of the said South $\frac{1}{2}$ of Lot 3, described in plaintiff's complaint, and the spur track, loading platforms, ramps, roadways or team tracks, and other facilities and rights of way situate thereon and more particularly hereinafter described, over a strip of ground described as follows, to-wit:

Commencing 99 feet East of the Northwest corner of said Lot 2, Block and Plat aforesaid, and running thence South 76 feet; thence West 40.75 feet; thence North 10.5 feet; thence East 32.75 feet; thence North 65.5 feet; thence East 8 feet to the place of beginning; to be kept open for loading and unloading goods, merchandise and other commodities from the platform along the south line of Lot 3, Block and Plat aforesaid; together with the right of maintaining a cover or roof over said platform at the North end of said right of way; and together also with the rights of way over and the rights and privileges of and concerning the South $\frac{1}{2}$ of Lot 3, hereinafter more particularly described;

and that these defendants are predecessors in interest of whatever, if any, title, right or interest plaintiff has or claims in or to said South $\frac{1}{2}$ of Lot 3, as well as of the other defendants to

said action owning lands adjoining said South $\frac{1}{2}$ of Lot 3 to the south thereof.

II.

17 That in or prior to the year 1906, the said defendant, Seymour N. Bailey, and the above named Bert N. Bailey, now deceased, as tenants in common, became the owners in fee simple absolute of the land described in paragraph two of plaintiff's complaint, viz., the South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey, and thereafter acquired and became the owners in fee simple absolute of certain lands immediately adjoining and abutting said land on the south and situate in Lot 2, Block 43, Plat "A", Salt Lake City Survey, including the lands now owned by these defendants hereinbefore described, and other lands now owned by other of the defendants to said action.

III.

That while they so owned said lands, viz., the said South $\frac{1}{2}$ of Lot 3 aforesaid, and certain of the lands so abutting the same on the south and situate in Lot 2 aforesaid, the said defendant, Seymour N. Bailey, and the said Bert N. Bailey constructed, or caused to be constructed and erected, upon the said South $\frac{1}{2}$ of Lot 3, a railroad spur track, certain loading platforms and ramps thereto, and a wagon or team track to the north of said

railroad spur track, and other facilities for the loading and unloading of railroad cars on such spur track, to and from and for the use and benefit of the lands so owned by them in said Lot 2, and the warehouses and other buildings and improvements then and thereafter constructed upon the same, and that said spur track, loading platforms, ramps, wagon road or team track, and other facilities, ever since and for more than thirty years heretofore have been and still are being so used.

IV.

- 18 That after constructing and erecting said spur track and loading platforms, roadways and other facilities, and while still owning the aforesaid lands in Lot 3, and while the said spur track, platforms, roadways and other facilities were open, visible and apparent, and in constant use thereon, the said defendant, Seymour N. Bailey, and the said Bert N. Bailey, from time to time, leased, conveyed away and otherwise aliened portions of their said lands in Lot 2, and the right of possession thereof, together with the right and privilege to use in common with them and their successors to their said lands in said Lot 2, the said spur track, loading platforms, ramps, wagon roads or team tracks, and other facilities so situate on said Lot 3, and to build, repair, maintain and rebuild the same.

V.

That in the year 1923, these defendants conveyed to the said Bert N. Bailey the undivided one-half interest of the defendant, Seymour N. Bailey, in and to the said South $\frac{1}{2}$ of Lot 3, described in paragraph two of plaintiff's complaint, reserving, however, the easements, rights and privileges aforesaid, in words and figures as follows, to-wit:

“Reserving, however, to the grantors the perpetual right to the maintenance and use of the platform now located on the Southern portion of said premises about 10 feet wide including the over-lapping roof for said platform including also the curve thereof along the railway spur as at present constructed, with full right to repair, reconstruct or rebuild the same within its present location.

“Also reserving the perpetual Right to the use of the trackage over all and along the South line of said premises and to the premises and to the team, track or auto drive along the said track, all to be used in connection and for the convenience of Lot 2, of said Block for the loading and unloading of merchandise.

“It is also hereby agreed that without the consent of grantor, Seymour N. Bailey, or his assigns, that no right shall be granted for the use of said railway spur beyond the East end of said Lot 3;”

19 and ever since said date, as well as prior thereto, these defendants have been and still are the own-

ers and in possession of the lands described in paragraph one of this further answer, together with the easements, rights of way and other rights and privileges over and concerning the said South $\frac{1}{2}$ of Lot 3, and the spur track, loading platforms, ramps, wagon roads or team tracks, and other facilities thereon, and that the same, and each and all of said easements, rights of way and other rights and privileges, and the use of said spur track and other facilities are necessary to the proper and convenient use and enjoyment of their said lands.

VI.

Defendants further say and allege that the defendant, Seymour N. Bailey, and the said Bert N. Bailey, hereinbefore referred to, are predecessors in interest of and to whatever, if any, title or interest plaintiff has or claims in or to the said South $\frac{1}{2}$ of Lot 3, described in plaintiff's complaint; that when plaintiff acquired such, if any, title or interest as he may have in or to said South $\frac{1}{2}$ of Lot 3, the said easements, rights of way, roadways or team tracks, loading platforms, ramps and other facilities above referred to and described were open, visible and apparent thereon, and in open and constant use by these defendants and the other owners of said lands in said Lot 2; that the deeds of conveyance above referred to and described, were open, visible and

apparent thereon, and in open and constant use by these defendants and the other owners of said lands in said Lot 2; that the deeds of conveyance above referred to, and each and all of them, as well as others granting or otherwise affecting said easements, rights of way and other facilities, were properly of record in the office of the County Recorder of Salt Lake County, Utah, wherein both parcels of said land are situate, and that in and by a deed of conveyance of said South $\frac{1}{2}$ of Lot 3, to plaintiff as a mesne conveyancer of the same to said Zion's Savings Bank & Trust Company, the present holder of the record title thereto, the said South $\frac{1}{2}$ of Lot 3, and the conveyance thereof, was expressly made and recited to be subject to the loading and trackage easements, and the other rights and privileges aforesaid; and whatever, if any, title or interest plaintiff has or claims in or to said South $\frac{1}{2}$ of Lot 3, the same is subject to the easements, rights of way aforesaid, and the rights and privileges of the owners of said lands in Lot 2, including

20 these defendants, to maintain and use the same, and the spur track, loading platforms and ramps, roadways or team tracks, and other facilities so constructed and situate thereon as aforesaid.

VII.

Defendants further say and allege that there has been erected on the north side of said spur

track at the east end thereof, and on said South $\frac{1}{2}$ of Lot 3, certain loading platforms other and in addition to those hereinbefore and in plaintiff's complaint mentioned and referred to, and that plaintiff has enlarged or caused the same to be enlarged to the south and extended to the west into and upon the said roadway or team track over which these defendants have a right of way as aforesaid, and so as to partially block and obstruct the same. That the enlargement and extension of said loading platform and the resultant obstruction of said roadway or team track is wrongful, unlawful and without right, and in violation of the rights of these defendants to the free use of said roadway or team track, and unless enjoined and restrained by order of this Court, plaintiff, if in anywise interested in said South $\frac{1}{2}$ of Lot 3, will continue to maintain said loading platform as so enlarged and extended, and to so block and obstruct said roadway or team track, all in violation of the rights of these defendants and to their irreparable damage.

WHEREFORE, defendants pray that plaintiff take nothing by his said complaint, and that their title to and rights in said easements and rights of way, and their right to maintain and use said spur track, loading platforms and ramps, and said roadway or team track, and other facilities so situate on said South $\frac{1}{2}$ of Lot 3, be forever quieted in them; that plaintiff, if in anywise

interested in said South $\frac{1}{2}$ of Lot 3, be required to forthwith remove from the said right of way over the same the said loading platform as so enlarged and extended, and that he be restrained and enjoined from maintaining the same or otherwise obstructing or interfering with said right of way and roadway or team track and these defendants' use thereof; and that they have and recover their costs and expenses of suit herein incurred, together with such other and further
 21 judgment, decree and relief as may be meet and proper, and equitable and just in the premises.

HURD & HURD,

*Attorneys for Defendants,
 Seymour N. Bailey and Emma
 Z. Bailey, his wife.*

(Verification).

Received copy of the foregoing Answer this
 26 day of September, 1938.

J. D. SKEEN,

E. J. SKEEN,

Attorneys for Plaintiff.

Filed September 27, 1938.

(Title of Court and Cause):

22 ANSWER OF DEFENDANT, BAILEY &
 SONS COMPANY.

The answer of the defendant, Bailey & Sons Company, is substantially the same as the answer of the defendants, Seymour N. Bailey and Emma Z. Bailey, his wife, except paragraphs 1, 5 and 6, which are as follows:

24 I.

That it is now and has been for many years the owner in fee simple absolute of the following described real property abutting the property described in plaintiff's Complaint on the south, to-wit:

Commencing at a point 83½ feet West from the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, and running thence North 10 rods; thence East 25¾ feet; thence South 10 rods; thence West 25¾ feet to the place of beginning, situate in Salt Lake County, Utah;

and that it is a predecessor in interest of other of the defendants to said action owning lands immediately adjoining the land described in plaintiff's Complaint to the south; it having heretofore conveyed certain of such lands to such other defendants, together with the easements, rights of way and other rights and privileges hereinafter more particularly described over and con-

cerning the land so described in plaintiff's Complaint.

26

V.

That in the year 1923, the said defendant, Seymour N. Bailey, sold, and he and his wife, the defendant, Emma Z. (C) Bailey, conveyed to the said Bert N. Bailey the undivided one-half interest of the defendant, Seymour N. Bailey, in and to the said South $\frac{1}{2}$ of Lot 3, described in paragraph 2 of plaintiff's complaint, reserving, however, the easements, rights and privileges aforesaid, in words and figures as follows, to-wit:

“Reserving, however, to the grantors the perpetual Right to the maintenance and use of the platform now located on the Southern portion of said premises about 10 feet wide including the over-lapping roof for said platform including also the curve thereof along the railway spur as at present constructed, with full right to repair, reconstruct or rebuild the same within its present location.

“Also reserving the perpetual Right to the use of the trackage over and along the South line of said premises and to the premises and to the team, track or auto drive along the said track, all to be used in connection and for the convenience of Lot 2 of said Block for the loading and unloading of merchandise.

“It is also hereby agreed that without the consent of grantor, Seymour N. Bailey, or his assigns, that no right shall be grant-

ed for the use of said railway spur beyond the East end of said Lot 3.”

VI.

That at the time of and as a part of the same transaction, and in part consideration for the conveyance alleged in the previous paragraph hereof, and while said spur track, loading platforms, ramps, wagon road or team track, and other facilities were, as aforesaid, open, visible and obvious upon the said South $\frac{1}{2}$ of Lot 3, and in open and continuous use, the said Bert N. Bailey and Leone Bailey, his wife, and the defendant, Seymour N. Bailey, and the defendant, Emma Z. (C.) Bailey, his wife, conveyed to this defendant its said land hereinbefore and in paragraph I of its further answer described, and other lands in
 27 said Lot 2 including and together with the aforesaid easements, rights of way and privileges, in words and figures as follows, to-wit:

“together with the trackage privilege now in use at the North end of said property.

* * *

“* * * Also a perpetual Right to the use of the railroad spur together with the team, track and auto drive along the North line thereof and the platform for loading and unloading from vehicles and cars, through and over a part of the South $\frac{1}{2}$ of Lot 3, of said Block and Plat as at present constituted, with a Right to repair, reconstruct or rebuild the same as shall

from time to time become necessary within its present location;”

and ever since said date this defendant has been and still is the owner and in possession of its said described lands, together with the easements, rights of way and other rights and privileges over and concerning said South $\frac{1}{2}$ of Lot 3, and the spur track, loading platforms, ramps, wagon roads or team tracks, and other facilities thereon, and that the same and each and all of said easements, rights of way and other rights and privileges, and the use of said spur track and other facilities, are necessary to the proper and convenient use and enjoyment of this defendant's said land.

(Verification).

Filed September 27, 1938.

Received copy of the foregoing Answer this 26 day of September, 1938.

J. D. SKEEN,

E. J. SKEEN,

29

Attorneys for Plaintiff.

(Title of Court and Cause):

ANSWER OF DEFENDANT, J. W. SUMMERHAYS & SONS COMPANY.

31

The answer of the defendant J. W. Summerhays & Sons Company is substantially the same

as the answer of the defendants Seymour N. Bailey and Emma Z. (C.) Bailey, his wife, and the answer of the defendant Bailey & Sons Company, except paragraphs 1, 5, 6, 7, 8 and the prayer of said answer which are as follows:

I.

33 That C. E. Summerhays and J. J. Summerhays, officers and directors of this defendant, are and have been for several years past the owners in fee simple absolute of the following described real property situate in Salt Lake County, Utah, to-wit:

Commencing at the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, and running thence North 99.5 feet; thence East 58.25 feet; thence South 99.5 feet; thence West 58.25 feet to the place of beginning.

Together with a perpetual right of way in common with others to the South line of the said South $\frac{1}{2}$ of Lot 3, described in plaintiff's complaint, and the rights of way, easements, spur track, loading platforms, wagon roads or team tracks and other facilities situate thereon, over the following described tract of land:

Commencing 99 feet East of the Northwest corner of Lot 2, Block and Plat aforesaid, and running thence South 76 feet; thence West 40.75 feet; thence North 10.5 feet; thence East 32.75 feet; thence North 65.5 feet; thence East 8 feet to the place of beginning, to be kept open for loading and unloading goods, merchandise and

other commodities from the platform along the South line of Lot 3, Block and Plat aforesaid; together with the right of maintaining a cover or roof over said platform at the North end of said right of way; and together also with a perpetual right to the use with others of the railroad spur track, loading platforms and ramps, and roadways or team tracks, and other facilities, over and upon said South $\frac{1}{2}$ of Lot 3, hereinafter more particularly described:

34 and this defendant occupies said property, and uses and claims the right to use the said easements or rights of way, and the said loading platforms, ramps, spur track and roadways and other facilities on said South $\frac{1}{2}$ of Lot 3, under the aforesaid owners thereof, C. E. Summerhays and J. J. Summerhays.

V.

35 That in the year 1923, the said defendant, Seymour N. Bailey sold, and he and his wife, the defendant, Emma Z. (C.) Bailey, conveyed to the said Bert N. Bailey the undivided one-half interest of the defendant, Seymour N. Bailey, in and to the said South $\frac{1}{2}$ of Lot 3, described in paragraph two of plaintiff's complaint, reserving, however, the easements, rights and privileges aforesaid, in words and figures as follows, to-wit:

“Reserving, however, to the grantors the perpetual Right to the maintenance and use of the platform now located on the

Southern portion of said premises about 10 feet wide including the over-lapping roof for said platform including also the curve thereof along the railway spur as at present constructed, with full right to repair, reconstruct or rebuild the same within its present location.

“Also reserving the perpetual Right to the use of the trackage over and along the South line of said premises and to the premises and to the team track or auto drive along the said track, all to be used in connection and for the convenience of Lot 2, of said Block for the loading and unloading of merchandise.

“It is also hereby agreed that without the consent of grantor, Seymour N. Bailey, or his assigns, that no right shall be granted for the use of said railway spur beyond the East end of said Lot 3.”

VI.

36 That at the time of and as a part of the same transaction, and in part consideration for the conveyance alleged in the previous paragraph hereof, and while said spur track, loading platforms, ramps, wagon road or team track, and other facilities were, as aforesaid, open, visible and obvious upon the said South $\frac{1}{2}$ of Lot 3, and in open and continuous use, the said Bert N. Bailey and Leona Bailey, his wife, and the defendant, Seymour N. Bailey, and the defendant, Emma Z. (C.) Bailey, his wife, conveyed to the defendant, Bailey & Sons Company, the said lands hereinbefore and in paragraph one of this

further answer described, and other lands in said lot, including and together with the aforesaid easements, right of way and privileges, in words and figures as follows, to-wit:

“together with the trackage privilege now in use at the North end of said property.

* * *

“* * * Also a perpetual Right to the use of the railroad spur together with the team, track and auto drive along the North line thereof and the platform for loading and unloading from vehicles and cars, through and over a part of the South $\frac{1}{2}$ of Lot 3, of said Block and Plat as at present constituted, with a Right to repair, reconstruct or rebuild the same as shall from time to time become necessary within its present location.”

VII.

That thereafter and by warranty deed dated March 26, 1935, and recorded September 21, 1937, in Book 206 of Deeds, page 218, the defendant, Bailey & Sons Company, conveyed to the above named C. E. Summerhays and J. J. Summerhays, the said property described in paragraph one of this further answer, together with a perpetual right of way for ingress and egress over the strip of ground in said Lot 2 hereinbefore and in said paragraph one described, and together also with the right to use the aforesaid easements, rights of way and privileges over and concerning said South $\frac{1}{2}$ of Lot 3 aforesaid, and which conveyance of said last mentioned easements, rights of

way and privileges is in words and figures as follows, to-wit:

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“Also, a perpetual Right to use, with others, of the Railway Spur, together with the Team, Truck and Auto Drive along the North line thereof and the Platform for loading and unloading from vehicles and cars through and over part of the South $\frac{1}{2}$ of Lot 3 of the said Block and Plat as at present constituted with the right to repair, reconstruct, or rebuild the same as shall from time to time become necessary within its present location,”

and ever since said conveyance, the said C. E. Summerhays and J. J. Summerhays have been and still are the owners and in possession of their said described lands, together with the easements, rights of way and other rights and privileges over and concerning said South $\frac{1}{2}$ of Lot 3, and the spur track, loading platforms, ramps, wagon roads or team tracks, and other facilities thereon, and that the same and each and all of said easements, rights of way and other rights and privileges, and the use of said spur track and other facilities, are necessary to the proper and convenient use and enjoyment of said C. E. Summerhays and J. J. Summerhays' said land.

VIII.

Defendant further says and alleges that the said Bert N. Bailey and the defendant, Seymour

N. Bailey, hereinbefore referred to, are predecessors in interest of and to whatever, if any, title or interest plaintiff has or claims in or to the said South $\frac{1}{2}$ of Lot 3, described in plaintiff's complaint, as well as to said C. E. Summerhays and J. J. Summerhays' said ownership of their said lands in said Lot 2; that when plaintiff acquired such, if any, title or interest as he may have in or to said South $\frac{1}{2}$ of Lot 3, the said easements, rights of way, roadways or team tracks, loading platforms, ramps and other facilities above referred to and described were open, visible and apparent thereon, and in open and constant use by the predecessors in interest of this defendant and the other owners of said lands in said Lot 2; and that the deeds of conveyance above referred to, and each and all of them, as well as others granting or otherwise affecting said easements, rights of way and other facilities, were properly of record in the office of the County Recorder of Salt Lake County, Utah, wherein both parcels of said Land are situate, and that in and by a deed of conveyance of said South $\frac{1}{2}$ of Lot 3, to plaintiff as a mesne conveyancer of the same to said Zion's Savings Bank & Trust Company, the present holder of the record title thereto, the said South
38 $\frac{1}{2}$ of Lot 3, and the conveyance thereof, was expressly made and recited to be subject to the loading and trackage easements, and the other

rights and privileges aforesaid; and whatever, if any, title or interest plaintiff has or claim in or to said South $\frac{1}{2}$ of Lot 3, the same is subject to the easements, rights of way aforesaid, and the rights and privileges of the owners of said lands in Lot 2, including the said C. E. Summerhays and J. J. Summerhays, to maintain and use the same, and the spur track, loading platforms and ramps, roadways or team tracks, and other facilities so constructed and situate thereon as aforesaid.

WHEREFORE, defendant prays that plaintiff take nothing by his said complaint, and that its rights in said easements and rights of way, and its right to maintain and use said spur track, loading platforms and ramps, and said roadway or team track, and other facilities so situate on said South $\frac{1}{2}$ of Lot 3, be forever quieted in it; and that it have and recover its costs and expenses of suit herein incurred, together with such other and further judgment, decree and relief as may be meet and proper, and equitable and just in the premises.

HURD & HURD,

*Attorney for Defendant,
J. W. Summerhays & Sons
Co.*

(Verification).

Received copy of the foregoing Answer this
26 day of September, 1938.

Filed September 27, 1938.

44 Defendant John Scowcroft & Sons Company
answered plaintiff's complaint, denying the ma-
49 terial allegations of said complaint and alleging
certain facts not before the court on this appeal.
The answer was duly verified and filed November
14, 1938.

(Title of Court and Cause):

54 ANSWER OF DEFENDANT COLORADO
ANIMAL BY-PRODUCTS COMPANY,
a corporation.

Comes now the defendant Colorado Animal
By-Products Company, a corporation, and in an-
swer to plaintiff's complaint on file herein affirms,
denies, and alleges as follows, to-wit:

1. Admits paragraph 1 of plaintiff's com-
plaint.

2. Answering paragraph 2 of plaintiff's com-
plaint, said defendant affirms that it has no in-
formation as to whether plaintiff is the owner in
fee simple of the real estate described in the said
paragraph, and therefore denies the same; and

in this connection this defendant alleges that Zion's Savings Bank & Trust Company, a Utah Corporation, appears of record to be the owner in fee simple of said real property.

3. Answering paragraph 3 of plaintiff's complaint, this defendant affirms that it has no information sufficient to form a belief as to whether the plaintiff has paid all taxes legally levied and assessed against the real estate described in said complaint, and therefore denies the same. This defendant denies each and every other allegation of the said paragraph 3.

55 4. Answering paragraph 4 of plaintiff's complaint, this defendant denies that during or about the year 1934 the defendant Bailey & Sons Company, Seymour N. Bailey and Emma Z. Bailey, his wife, constructed or caused to be constructed a concrete ramp or loading platform upon the southwestern portion of the real estate described in said complaint. This defendant is informed and believes and therefore alleges that the said concrete ramp was constructed prior to or in 1932, and has since that date been in constant, open and notorious use by this defendant. Further answering said paragraph 4, this defendant admits and alleges that it claims and asserts the right to use a portion of said south $\frac{1}{2}$ of Lot 3, Block 43, described in paragraph 2 of plaintiff's complaint, for the purposes alleged in plaintiff's com-

plaint, as well as for other purposes, and admits and alleges that it, as well as the other defendants in this action, asserts and claims easements and rights of way, and other rights and privileges on, over and along said south $\frac{1}{2}$ of Lot 3, and admits and alleges that this defendant, as well as the other defendants in said action, and their predecessors in interest, are continuously using, and for more than thirty years prior to the commencement of this action have continuously used, the south $\frac{1}{2}$ of said Lot 3, and particularly the southern portion thereof, as a means of ingress and egress to and from lands abutting said Lot 3 on the south, including the land of this defendant described in paragraph 7 of this answer, and for the loading and unloading of railroad cars on the railroad spur track situated on said described land, and for the maintenance of loading platforms and other facilities thereon, as well as for divers other purposes and in divers other ways; and this defendant denies that its use and the use by its predecessors in interest of the south $\frac{1}{2}$ of said Lot 3 for the purposes aforesaid, and for other purposes, is or has been wrongful or in violation of any rights of plaintiff; to the contrary, this defendant alleges that its use of said land is and has been rightful, and under and pursuant to the grants and reservations, and the rights and privileges, made and reserved to this

defendant and others by the predecessors in interest of this defendant and by previous and common owners of said south $\frac{1}{2}$ of Lot 3 and of other lands abutting the same on the south, for the use and benefit of the land described in paragraph 7 hereof now owned by this defendant, and for other
 56 abutting lands on the south thereof, all as hereinafter more particularly alleged.

5. Answering paragraph 5 of plaintiff's complaint, this defendant admits that unless restrained by this court it will continue to use the south $\frac{1}{2}$ of said Lot 3, Block 43, or a portion thereof, and the trackage, loading platform, and other facilities thereon, and will continue to maintain and use the same as it and its predecessors in interest have used the same in the past; and this defendant denies that in so using said south $\frac{1}{2}$ of said Lot 3, and in so maintaining and using the facilities thereon, it is trespassing upon or wrongfully using the same; to the contrary, this defendant alleges that by the grants and reservations hereinbefore referred to and hereinafter more particularly alleged and described, it has the right and privilege to so use said south $\frac{1}{2}$ of said Lot 3, Block 43, as aforesaid, and that it owns and has rights of way, easements, and other rights and privileges for the use of the same, and for the maintenance and use of the trackage, loading platforms, ramps, and other facilities located

thereon, all for the use and benefit of its lands described in paragraph 7 hereof which abut the same on the south thereof.

6. This defendant denies each and every allegation, matter or thing in said complaint contained not hereinbefore specifically admitted, modified or denied.

7. Further answering plaintiff's complaint, this defendant alleges that this defendant, Colorado Animal By-Products Company, a corporation, is the owner in fee simple absolute of an undivided one-half interest in and to the following described real property situate in Salt Lake City, Salt Lake County, State of Utah, to-wit:

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“Commencing at the northwest corner of Lot 2, Block 43, Plat ‘A’, Salt Lake City Survey, running thence East 99 feet, thence South 65.5 feet; thence West 99 feet; thence North 65.5 feet to point of beginning, subject to the following easements and rights of way with others over the following: Commencing 99 feet East of the Northwest corner of Lot 2, as aforesaid; thence South 65.5 feet; thence West 10 feet; thence North 65.5 feet; thence East 10 feet to beginning. To be kept open for loading, etc. along platform of south line of Lot 3. Together with right of maintaining roof over the north end of the said right of way. Together with and subject to reservations on record.

Subject to and together with a perpetual right of way in common with others

on, along and over the south $\frac{1}{2}$ of Lot 3, described in plaintiff's complaint, and the spur track, loading platforms, ramps, roadways or team tracks and other facilities and rights of way situate thereon; together with the right of maintaining a cover or roof over said platform at the north end of said right of way."

8. This defendant alleges that whatever possession plaintiff now has or his predecessors in interest ever had of said south $\frac{1}{2}$ of Lot 3, Block 43, is now, and for many years has been subject to and in full and complete recognition of the easements, rights of way over, and other rights and privileges in, to, over and concerning said South $\frac{1}{2}$ of said Lot 3, Block 43, hereinbefore and hereinafter described.

9. Further answering said complaint, and as its separate and additional defense thereto, this defendant alleges that in or prior to the year 1906 Seymour N. Bailey, one of the defendants herein, and Bert N. Bailey now deceased, as tenants in common, were the owners in fee simple absolute of the South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey the land now claimed by plaintiff; that thereafter they acquired and became the owners in fee simple absolute of certain lands immediately adjoining said land on the south situate in Lot 2, Block 43, Plat "A", Salt Lake City Survey, including the land now

owned by this defendant and described in paragraph 7 hereof and other lands now owned by other of the defendants in this action.

10. That thirty years ago, more or less, while said Seymour N. Bailey and Bert N. Bailey owned said South $\frac{1}{2}$ of Lot 3 aforesaid, together with certain of the land so abutting the same on the south and situated in Lot 2, as aforesaid, including the land now owned by this defendant and described in paragraph 7 hereof, they constructed and built upon said South $\frac{1}{2}$ of Lot 3, a railroad spur track, certain loading platforms and ramps, and a wagon or team track to the north and south of said railroad spur track, and other facilities for the loading and unloading of railroad cars on
58 such spur track, to and from and for the use and benefit of the lands so owned by them in Lot 2 immediately to the south thereof, a portion of which described in paragraph 7 hereof is now owned by this defendant, and for use in connection with the warehouses and other buildings and improvements then and thereafter constructed upon the same; that said spur track, loading platforms, ramps and wagon road or team track, and other facilities, have been ever since their construction, as aforesaid, open, visible, apparent and notorious, and have been in continuous use by this defendant and its predecessors in interest,

and by other defendants for more than thirty years last past and still are being so used.

11. That after constructing and erecting said spur track and loading platforms, roadways, and other facilities, and while still owning the afore-said South $\frac{1}{2}$ of Lot 3, and while said spur track, platform, ramps, roadways and other facilities were open, visible and apparent, and in constant use thereon, the defendant Seymour N. Bailey, and the said Bert N. Bailey, deceased, from time to time leased, conveyed away, and otherwise aliened portions of their said lands in Lot 2, and the right of possession thereof, together with the rights and privileges to use in common with them and their successors to their said lands in said Lot 2 the said spur track, loading platforms, ramps, wagon roads or team tracks and other facilities so situate on said Lot 3, and to build, repair, maintain and rebuild the same.

12. That in the year 1923 one of the defendants herein, Seymour N. Bailey, conveyed to Bert N. Bailey his undivided one-half interest in and to said South $\frac{1}{2}$ of Lot 3, now claimed by plaintiff herein, reserving, however, for use in connection with and for the convenience of Lot 2 in said Block 43, in which this defendant's grantor and said Seymour N. Bailey then owned, and in which

this defendant now owns an undivided one-half interest in words and figures as follows:

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“Reserving, however, to the grantors the perpetual right to the maintenance and use of the platform now located on the Southern portion of said premises about 10 feet wide including the overlapping roof for said platform including also the curve thereof along the railway spur as at present constructed, with full right of repair, reconstruct or rebuild the same within its present location.

“Also reserving the perpetual right to the use of the trackage over and along the South line of said premises and to the premises and to the team, track or auto drive along the said track, all to be used in connection and for the convenience of Lot 2, of said Block, for the loading and unloading of merchandise.

“It is also hereby agreed that without the consent of grantor, Seymour N. Bailey, or his assigns, that no right shall be granted for the use of said railway spur beyond the East end of said Lot 2”;

and ever since said date, as well as prior thereto, the predecessors in interest of this defendant were, and this defendant still is, the owners and in possession of the lands described in paragraph 7 of this answer, together with the easements, rights of way, and other rights and privileges over and concerning the said South $\frac{1}{2}$ of Lot 3, and the spur track, loading platforms, ramps, wagon roads or team tracks, and other facilities thereon, and

that the same, and each and all of said easements, rights of way, and other rights and privileges, and the use of said spur track and other facilities are necessary to the proper, reasonable and convenient use and enjoyment of the property now owned by this defendant.

13. That as hereinbefore alleged, defendant Seymour N. Bailey and said Bert N. Bailey now deceased, owned the South $\frac{1}{2}$ of said Lot 3, Block 43, aforesaid, and were the predecessors in interest of plaintiff's grantors in said property, and were also the owners of the property now owned by this defendant, and likewise at said time were the owners of the property now owned by the other defendants herein; that when plaintiff acquired such, if any, title or interest as he may have in said South $\frac{1}{2}$ of Lot 3 above described, the said easements, rights of way, roadways or team tracks, spur track, loading platforms, ramps and other facilities on the South $\frac{1}{2}$ of said Lot 3 in Block 43 were open, visible and apparent thereon, and in open and constant use by this defendant and the other owners of lands in said Lot 2; that the deeds of conveyance above referred to, and each and all of them, as well as others granting or otherwise affecting said easements, rights of way and other facilities, were properly of record in the office of the county recorder of Salt Lake County, Utah, wherein the lands of plain-

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tiff and the lands of this and the other defendants herein are situate, and plaintiff was charged with knowledge of the existence of the easements and rights of this defendant and the predecessors of this and the other defendants; and that the plaintiff knew and was informed of the existence of such easements as appears from deed of conveyance from Walter H. Dayton, et ux. to the plaintiff, dated August 28, 1928, and recorded in Book 80, Page 10 of the records of Salt Lake County, Utah, conveying the real property described in plaintiff's complaint, which deed provided, however, "subject to loading and trackage easements"; and that in and by a deed of conveyance of said South $\frac{1}{2}$ of Lot 3, as a mesne conveyance of the same to said Zion's Savings Bank & Trust Company, the present holder of the record title thereto, the said South $\frac{1}{2}$ of Lot 3, and the conveyance thereto, was expressly made and recited to be subject to the loading and trackage easements and the other rights and privileges hereinbefore described; and whatever, if any, title or interest plaintiff has or claims in or to said South $\frac{1}{2}$ of Lot 3, the same is subject to the easements, rights of way aforesaid, and the rights and privileges of the owners of said lands in Lot 2, including this defendant, to maintain and use the same, and the spur track, loading platforms and ramps, roadways or team tracks, and other facilities so constructed and situate thereon as aforesaid.

14. This defendant further alleges that there has been erected on the north side of said spur track at the east end thereof, and on the said South ½ of Lot 3, certain loading platforms other than
 61 and in addition to those hereinbefore and in plaintiff's complaint mentioned and referred to, and that plaintiff has enlarged or caused the same to be enlarged to the south and extended to the west into and upon the said roadway or team track over which this defendant has a right of way as aforesaid, and so as to partially block and obstruct the same; that the enlargement and extension of said loading platform and the resultant obstruction of said roadway or team track is wrongful, unlawful and without right, and in violation of the rights of these defendants to the free use of said roadway or team track, and unless enjoined and restrained by order of this court, plaintiff, if in any wise interested in said South ½ of Lot 3, will continue to maintain said loading platform as so enlarged and extended, and to so block and obstruct said roadway or team track, all in violation of the rights of this defendant and to his irreparable damage.

WHEREFORE, this defendant prays judgment as follows:

1. That plaintiff take nothing by his complaint herein;

2. That this court enter its decree finding and adjudging that the title of this defendant to, and its rights in, said easements and rights of way, and its right to maintain and use said spur track, loading platforms and ramps, and said roadway or team track, and other facilities so situate on said South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey, are valid and subsisting appurtenances to the real property of this defendant described in paragraph 7 of this answer;

3. That the title of this defendant in and to said easements and appurtenances be forever quieted in it as against the claims of the plaintiff to the end that the full, reasonable, and beneficial enjoyment thereof may be had without hindrance on the part of plaintiff;

4. That plaintiff, if in any wise interested in said South $\frac{1}{2}$ of Lot 3, be required to forthwith remove from the said right of way over the same the said loading platform as so enlarged and extended, and that he be restrained and enjoined from maintaining the same or otherwise obstructing or interfering with said right of way and roadway or team track and this defendant's use thereof;

5. That this defendant have and recover its costs and expenses in this suit incurred, together with such other and further judgment, decree and

relief as may be meet and proper and equitable and just in the premises.

MOYLE, RICHARDS & MCKAY,
*Attorneys for Defendant,
 Colorado Animal By-Pro-
 ducts Company, a corpora-
 tion.*

(Verification).

Received copy of the foregoing Answer this
 14th day of January, 1939.

J. D. SKEEN,
 E. J. SKEEN,
Attorneys for Plaintiff.

Filed January 14, 1939.

(Title of Court and Cause):

PETITION FOR LEAVE TO AMEND BY IN-
 TERLINEATION AND FOR AN ORDER
 AUTHORIZING THE JOINDER OF C. E.
 AND J. J. SUMMERHAYS AND ROBERT
 BAILEY WHITEHILL, AS ADDITION-
 AL PARTIES DEFENDANT.

63 The petition of the plaintiff above named re-
 spectfully shows to the court:

That the above entitled action was filed to
 quiet title to certain real estate located in Salt
 Lake City, Utah and to enjoin alleged repeated
 trespasses thereon.

That since the commencement of said action it has been brought to the plaintiff's attention that C. E. Summerhays and J. J. Summerhays are the owners and holders of the legal title to nearby real estate, and that they claim an interest in, or lien upon plaintiff's land which is described in the Complaint. That by reason thereof they are necessary and proper parties defendant in this cause.

That since the commencement of the above entitled action plaintiff has been informed and believes that Robert Bailey Whitehill is the owner of an interest in and to a part of Lot 2, Block 43, Plat A, adjacent plaintiff's land described in the Complaint and that the said Robert Bailey Whitehill claims an interest in and right of way over plaintiff's land. That the interest now owned by the said Robert Bailey Whitehill, plaintiff is informed and believes, was owned by Leona B. Whitehill as administratrix, but plaintiff is now informed and believes that Leona B. Whitehill has no interest in or claim against any of the plaintiff's said property.

WHEREFORE, plaintiff prays for leave to amend his Complaint herein by adding thereto the names C. E. Summerhays and J. J. Summerhays in the title thereof and by adding the names C. E. Summerhays and J. J. Summerhays after the words "J. W. Summerhays & Company" in paragraph 4 of the Complaint.

Plaintiff further prays for an order substituting Robert Bailey Whitehill as a party defendant in said cause in lieu of the defendant Leona B. Whitehill, administratrix, and for an order joining C. E. Summerhays and J. J. Summerhays as parties defendant.

J. D. SKEEN,

E. J. SKEEN,

Attorneys for Plaintiff.

(Verification).

Filed January 25, 1939.

66 Plaintiff's motion for leave to join additional parties as defendants and to amend the complaint by interlineation granted January 26, 1939.

(Title of Court and Cause):

ANSWER OF INTERPLEADED DEFENDANTS, C. E. SUMMERHAYS AND J. J. SUMMERHAYS, AND STIPULATION
67 CONCERNING SAME.

Come now the interpleaded defendants, C. E. Summerhays and J. J. Summerhays, and appear in said action, and as and for their answer to plaintiff's complaint herein adopt and reallege as fully as though here again set out in haec verba the admissions and denials, and each and all of the

allegations of the answer of the defendant, J. W. Summerhays & Sons Company, on file herein.

HURD & HURD,

*Attorneys for interpleaded
defendants, C. E. Summer-
hays and J. J. Summer-
hays.*

Stipulation endorsed on above Answer recites that Answer of J. W. Summerhays & Sons Company, and all admissions, denials, allegations and prayer shall also stand as Answer of interpleaded defendants, C. E. Summerhays and J. J. Summerhays, and that plaintiff's Reply to Company's Answer may stand as Reply thereto.

(Title of Court and Cause):

68 ANSWER OF ROBERT BAILEY WHITEHILL

By leave of court first had and obtained, comes now ROBERT BAILEY WHITEHILL (in lieu of Leona B. Whitehill, administratrix of the estate of Bert N. Bailey, deceased) and answering the complaint of plaintiff on file herein admits, denies and alleges:

1. Alleges that this defendant, ROBERT BAILEY WHITEHILL, is the owner in fee simple absolute of an undivided one-half interest in and to the following described real property

generally known as No. 463 South Third West Street and No. 372 West Fifth South Street, situate in Salt Lake City, Salt Lake County, State of Utah, more particularly described as follows:

Commencing at a point 6 rods North of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, and running thence North 4 rods; thence East 6 rods; thence South 10 rods; thence West $2\frac{1}{2}$ rods; thence North 6 rods; thence West $3\frac{1}{2}$ rods to the place of beginning, together with the tenements, buildings and appurtenances thereon and thereto in any way belonging or in any manner appurtenant, including the Cudahy Building and Gibson Building thereon situate.

Subject to and together with a perpetual right of way in common with others on, along and over the South $\frac{1}{2}$ of Lot 3, described in plaintiff's complaint, and the spur track, loading platforms, ramps, roadways or team tracks, and other facilities and rights of way situate thereon; together with the right of maintaining a cover or roof over said platform at the north end of said right of way;

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and that this defendant is the successor in interest of plaintiff's predecessors in interest in said South $\frac{1}{2}$ of Lot 3.

2. This defendant denies that he has any information sufficient to enable him to form a belief as to whether plaintiff is the owner of the south $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake

City Survey, and basing its denial upon that ground denies the same; and in this connection this defendant alleges that Zion's Savings Bank & Trust Company, a Utah corporation, appears of record to be the owner in fee simple of said real property.

3. This defendant alleges that whatever possession plaintiff now has or his predecessors in interest ever had of said South $\frac{1}{2}$ of Lot 3, Block 43, above described, is now, and for many years has been, subject to and in full and complete recognition of the easements, rights of way over, and other rights and privileges in, to, over and concerning said South $\frac{1}{2}$ of said Lot 3, Block 43, hereinbefore and hereinafter described.

4. This defendant admits and alleges that he claims and asserts the right to use a portion of said South $\frac{1}{2}$ of Lot 3, Block 43, above described, for the purposes alleged in plaintiff's complaint, as well as for other purposes, and admits and alleges that he, as well as the other defendants in this action, asserts and claims easements and rights of way, and other rights and privileges on, over and along said South $\frac{1}{2}$ of Lot 3, and admits and alleges that this defendant, as well as the other defendants in said action, and their predecessors in interest, are continuously using, and for more than thirty years prior to the commencement of this action have continuously used, the

South $\frac{1}{2}$ of Lot 3, and particularly the southern portion thereof, as a means of ingress and egress to and from lands abutting said Lot 3 on the south, including the land of this defendant described in paragraph 1 of this answer, and for the loading and unloading of railroad cars on the railroad spur track situated on said described land, and for the maintenance of loading platforms and other facilities thereon, as well as for divers other purposes and in divers other ways; and this defendant denies that his use and the use by his predecessors in interest of the South $\frac{1}{2}$ of said Lot 3 for the purposes aforesaid, and for other purposes, is or has been wrongful or in violation of any rights of plaintiff; to the contrary, this defendant alleges that his use of said land is and has been rightful, and under and pursuant to the grants and reservations and the rights and privileges, made and reserved to this defendant and others by the predecessors in interest of this defendant and by previous and common owners of said South $\frac{1}{2}$ of Lot 3 and of other lands abutting the same on the south, for the use and benefit of the land described in paragraph 1 hereof now owned by this defendant, and for other abutting lands on the south thereof, all as hereinafter more particularly alleged.

5. This defendant admits that unless restrained by this court he will continue to use the

South $\frac{1}{2}$ of said Lot 3, Block 43, or a portion thereof, and the trackage, loading platform, and other facilities thereon, and will continue to maintain and use the same as he and his predecessors in interest have used the same in the past; and this defendant denies that in so using said South $\frac{1}{2}$ of said Lot 3, and in so maintaining and using the facilities thereon, he is trespassing upon or wrongfully using the same; to the contrary, this defendant alleges that by the grants and reservations hereinbefore referred to and hereinafter more particularly alleged and described, he has the right and privilege to so use said South $\frac{1}{2}$ of said Lot 3, Block 43, as aforesaid, and that he owns and has rights of way, easements, and other rights and privileges for the use of the same, and for the maintenance and use of the trackage, loading platforms, ramps, and other facilities located thereon, all for the use and benefit of his lands described in paragraph 1 hereof which abut the same on the south thereof.

71 6. This defendant denies each and every allegation, matter or thing in said complaint contained not hereinbefore specifically admitted, modified or denied.

7. Further answering said complaint, and as his separate and additional defense thereto, this defendant alleges that in or prior to the year 1906 Seymour N. Bailey, one of the defendants

herein, and Bert N. Bailey now deceased, as tenants in common, were the owners in fee simple absolute of the South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey, the land now claimed by plaintiff; that thereafter they acquired and became the owners in fee simple absolute of certain lands immediately adjoining said land on the south situate in Lot 2 Block 43, Plat "A", Salt Lake City Survey, including the land now owned by this defendant and described in paragraph 1 hereof, and other lands now owned by other of the defendants in this action.

8. That thirty years ago, more or less, while said Seymour N. Bailey and Bert N. Bailey owned said South $\frac{1}{2}$ of Lot 3 aforesaid, together with certain of the land so abutting the same on the south and situated in Lot 2 as aforesaid, including the land now owned by this defendant and described in paragraph 1 hereof, they constructed and built upon said South $\frac{1}{2}$ of Lot 3 a railroad spur track, certain loading platforms and ramps, and a wagon or team track to the north and south of said railroad spur track, and other facilities for the loading and unloading of railroad cars on such spur track, to and from and for the use and benefit of the lands so owned by them in Lot 2 immediately to the south thereof, a portion of which described in paragraph 1 hereof is now owned by this defendant, and for use in connec-

tion with the warehouses and other buildings and improvements then and thereafter constructed upon the same; that said spur track, loading platforms, ramps and wagon road or team track, and other facilities have been ever since their construction, as aforesaid, open, visible, apparent and notorious, and have been in continuous use by this defendant and his predecessors in interest, and by other defendants for more than thirty years
 72 last past and still are being so used.

9. That after constructing and erecting said spur track and loading platforms, roadways, and other facilities, and while still owning the aforesaid South $\frac{1}{2}$ of Lot 3, and while said spur track, platform, ramps, roadways and other facilities were open, visible and apparent, and in constant use thereon, the defendant Seymour N. Bailey, and the said Bert N. Bailey, deceased, from time to time leased, conveyed away, and otherwise aliened portions of their said lands in Lot 2, and the right of possession thereof, together with the rights and privileges to use in common with them and their successors to their said lands in said Lot 2 the said spur track, loading platforms, ramps, wagon roads or team tracks and other facilities so situate on said Lot 3, and to build, repair, maintain and rebuild the same.

10. That in the year 1923 one of the defendants herein, Seymour N. Bailey, conveyed to Bert

N. Bailey his undivided one-half interest in and to said South $\frac{1}{2}$ of Lot 3, now claimed by plaintiff herein, reserving, however, for use in connection with and for the convenience of Lot 2 in said Block 43, in which this defendant and said Seymour N. Bailey then owned, and now each own, an undivided one-half interest in words and figures as follows:

“Reserving, however, to the grantors the perpetual Right to the maintenance and use of the platform now located on the Southern portion of said premises about 10 feet wide including the overlapping roof for said platform including also the curve thereof along the railway spur as at present constructed, with full right of repair, reconstruct or rebuild the same within its present location.

“Also reserving the perpetual right to the use of the trackage over and along the South line of said premises and to the premises and to the team, track or auto drive along the said track, all to be used in connection and for the convenience of Lot 2, of said Block for the loading and unloading of merchandise.

“It is also hereby agreed that without the consent of grantor, Seymour N. Bailey, or his assigns, that no right shall be granted for the use of said railway spur beyond the East end of said Lot 2”;

and ever since said date, as well as prior thereto, the predecessors in interest of this defendant

73 were, and this defendant still is, the owners and in possession of the lands described in paragraph 1 of this answer, together with the easements, rights of way, and other rights and privileges over and concerning the said South $\frac{1}{2}$ of Lot 3, and the spur track, loading platforms, ramps, wagon roads or team tracks, and other facilities thereon, and that the same, and each and all of said easements, rights of way, and other rights and privileges, and the use of said spur track and other facilities are necessary to the proper, reasonable and convenient use and enjoyment of the property now owned by this defendant.

11. That, as hereinbefore alleged, defendant Seymour N. Bailey, and said Bert N. Bailey now deceased, owned the South $\frac{1}{2}$ of said Lot 3, Block 43, aforesaid, and were the predecessors in interest of plaintiff in said property, and were also the owners of the property now owned by this defendant, and likewise at said time were the owners of the property now owned by the other defendants herein; that when plaintiff acquired such, if any, title or interest as he may have in said South $\frac{1}{2}$ of Lot 3 above described, the said easements, rights of way, roadways or team tracks, spur track, loading platforms, ramps, and other facilities on the South $\frac{1}{2}$ of said Lot 3 in Block 43 were open, visible and apparent thereon, and in open and constant use by this defendant and the other

owners of lands in said Lot 2; that the deeds of conveyance above referred to, and each and all of them, as well as others granting or otherwise affecting said easements, rights of way and other facilities, were properly of record in the office of the county recorder of Salt Lake County, Utah, wherein the lands of plaintiff and the lands of this and the other defendants herein are situate, and plaintiff was charged with knowledge of the existence of the easements and rights of this defendant and the predecessors of this and the other defendants; and that the plaintiff knew and was informed of the existence of such easements as appears from deed of conveyance from Walter H. Dayton, et ux. to the plaintiff, dated August 28, 1928 and recorded in Book 80, Page 10 of the records of Salt Lake County, Utah, conveying the real property described in plaintiff's complaint, which deed provided, however, "subject to loading and trackage easements"; and that in and by a deed of conveyance of said South $\frac{1}{2}$ of Lot 3, as a mesne conveyance of the same to said Zion's Savings Bank & Trust Company, the present holder of the record title thereto, the said South $\frac{1}{2}$ of Lot 3, and the conveyance thereto, was expressly made and recited to be subject to the loading and trackage easements and the other rights and privileges hereinbefore described; and whatever, if any, title or interest plaintiff has or claims in or to said South $\frac{1}{2}$ of Lot 3, the same is subject

to the easements, rights of way aforesaid, and the rights and privileges of the owners of said lands in Lot 2, including this defendant, to maintain and use the same, and the spur track, loading platforms and ramps, roadways or team tracks, and other facilities so constructed and situate thereon as aforesaid.

12. This defendant further alleges that there has been erected on the north side of said spur track at the east end thereof, and on the said South $\frac{1}{2}$ of Lot 3, certain loading platforms other and in addition to those hereinbefore and in plaintiff's complaint mentioned and referred to, and that plaintiff has enlarged or caused the same to be enlarged to the south and extended to the west into and upon the said roadway or team track over which this defendant has a right of way as aforesaid, and so as to partially block and obstruct the same; that the enlargement and extension of said loading platform and the resultant obstruction of said roadway or team track is wrongful, unlawful and without right, and in violation of the rights of these defendants to the free use of said roadway or team track, and unless enjoined and restrained by order of this court, plaintiff, if in any wise interested in said South $\frac{1}{2}$ of Lot 3, will continue to maintain said loading platform as so enlarged and extended, and to so block and obstruct said roadway or team track, all in violation

of the rights of this defendant and to his irreparable damage.

75 WHEREFORE, this defendant prays judgment as follows:

1. That plaintiff take nothing by his complaint herein;

2. That this court enter its decree finding and adjudging that the title of this defendant to, and his rights in, said easements and rights of way, and his right to maintain and use said spur track, loading platforms and ramps, and said roadway or team track, and other facilities so situate on said South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey, are valid and subsisting appurtenances to the real property of this defendant described in paragraph 1 of this answer;

3. That the title of this defendant in and to said easements and appurtenances be forever quieted in him as against the claims of the plaintiff to the end that the full, reasonable, and beneficial enjoyment thereof may be had without hindrance on the part of plaintiff;

4. That plaintiff, if in anywise interested in said South $\frac{1}{2}$ of Lot 3, be required to forthwith remove from the said right of way over the same the said loading platform as so enlarged and extended, and that he be restrained and enjoined from maintaining the same or otherwise obstruct-

ing or interfering with said right of way and roadway or team track and this defendant's use thereof;

5. That this defendant have and recover his costs and expenses in this suit incurred, together with such other and further judgment, decree and relief as may be meet and proper and equitable and just in the premises.

BAGLEY, JUDD, RAY & NEBEKER,

*Attorneys for Robert Bailey
Whitehill.*

(Verification).

Received copy of the foregoing answer this
24th day of February, 1939.

J. D. SKEEN & E. J. SKEEN,

Attorneys for Plaintiff.

Filed Feb. 24, 1939.

(Title of Court and Cause):

78 REPLY TO ANSWER OF J. W. SUM-
MERHAYS & SONS COMPANY.

Comes now the plaintiff and in reply to the answer of the defendant J. W. Summerhays & Sons Company, a corporation, denies, admits and alleges as follows, to-wit:

1. Denies all of the affirmative allegations of paragraph No. 2.

2. Denies all of the affirmative allegations of paragraph No. 3.

3. Denies all of the affirmative allegations of paragraph No. 4.

4. Denies all of the affirmative allegations of paragraph No. 5.

5. Admits that C. E. Summerhays and J. J. Summerhays are the owners of the land described in paragraph 1 of the further answer, but denies that they are the owners of the right of way described in said paragraph.

6. Admits the allegations of paragraph No. 2 of the further answer.

79 7. In reply to paragraph No. 3 of the further answer the plaintiff admits that a railroad spur track and certain lumber loading platforms not exceeding 10 feet in width were constructed on the plaintiff's land described in the complaint, and admits that said platforms and spur tracks have been used for many years, but denies all other allegations of said paragraph.

8. In reply to the allegations of paragraph No. 4 of the further answer, the plaintiff admits that Seymour N. Bailey and Bert N. Bailey leased and aliened portions of the said land in Lot 2, together with privileges to use the spur

track and loading platform located on Lot 3, but denies each and every allegation of said paragraph not specifically admitted.

9. Admits the allegations of paragraph No. 5 of the further answer.

10. In reply to paragraph No. 6 of the further answer, the plaintiff admits the execution and delivery of a deed to the defendants Bailey & Sons Company purporting to convey certain land to it which contained the language quoted in said paragraph, but denies all other allegations therein contained.

11. Admits that by warranty deed dated March 26, 1935, and recorded as stated in paragraph No. 7 of the further answer, certain real estate was conveyed by Bailey & Sons Company to C. E. Summerhays and J. J. Summerhays, and that said deed of conveyance purported to convey a right of way to said Summerhays over plaintiff's land, but plaintiff alleges that said deed of conveyance was ineffective insofar as the rights of way and privileges therein described were concerned, for the reason that the said grantor did not own or possess the right of way which it attempted to convey, but if the said Bailey & Sons Company owned any right of way upon plaintiff's land, it was the right to use the spur track and to use and maintain a lumber

loading platform located on the south part of Lot 3 not exceeding 10 feet in width.

80 Denies all other allegations of said paragraph.

12. Admits that Bert N. Bailey and Seymour N. Bailey are predecessors in interest of plaintiff and of the said C. E. Summerhays and J. J. Summerhays in the ownership of the lands involved herein, and admits that when plaintiff acquired title to the south half of Lot 3, a lumber platform not exceeding 10 feet in width and 75 feet in length was located on said land of the plaintiff, and was being used as a loading platform by the occupants of the property now owned by C. E. Summerhays and J. J. Summerhays, and admits that the conveyances referred to in said paragraph were of record, and admits the allegations of said paragraph as to the contents thereof, but denies all other allegations of said paragraph.

For a further reply to the answer of the defendant J. W. Summerhays & Sons Company, the plaintiff alleges that in the year 1923 at the time that the defendant Seymour N. Bailey and Emma C. Bailey, his wife, conveyed to Bert N. Bailey, plaintiff's predecessor in interest, an undivided one-half interest in and to the south half of Lot 3 described in the plaintiff's complaint, and at the time of the conveyance by the said Seymour N.

Bailey and Bert N. Bailey and their wives of a portion of said lot to the defendant Bailey & Sons Company there was situated on the south part of said Lot 3 a spur track and a loading platform. That said loading platform was constructed against the north wall of the building located on the north and west part of Lot 2, was made entirely of lumber and was approximately 10 feet wide and 75 feet long. That said lumber platform was used by the predecessors in interest of C. E. Summerhays and J. J. Summerhays for loading and unloading merchandise upon railroad cars, and that said loading platform remained the same insofar as manner of construction, material and area covered was concerned until during on or about the year 1932 when the defendants Bailey & Sons Company, Seymour N. Bailey and Emma C. Bailey, his wife, removed said lumber platform and wrongfully constructed in lieu thereof a concrete ramp and loading platform covering a much larger area than the said lumber platform and the defendant John Summerhays & Sons Company have no right or interest in or to plaintiff's property except the right to use a lumber platform 10 feet in width and 75 feet in length constructed upon the south part of plaintiff's land and attached to a building located on the northwest corner of Lot 2.

81 WHEREFORE plaintiff prays that the defendant J. W. Summerhays & Sons Company take

nothing by its counterclaim herein, and that a decree be entered as prayed in the complaint.

J. D. SKEEN & E. J. SKEEN,

Attorneys for Plaintiff

(Verification).

Received copy this 30 day of Jan., 1939.

HURD & HURD,

Attorneys for Defendant,

J. W. Summerhays & Sons Co.

Filed Mar. 1, 1939.

(Title of Court and Cause):

82 REPLY TO ANSWER OF SEYMOUR N.
 BAILEY AND EMMA C. BAILEY,
 HIS WIFE.

Comes now the plaintiff, and in reply to the answer and counter-claim of the defendants Seymour N. Bailey and Emma C. Bailey, his wife, denies, admits and alleges as follows, to-wit:

1. Denies all of the affirmative allegations of paragraph 2.

2. Denies all of the affirmative allegations of paragraph 3.

3. Denies all of the affirmative allegations of paragraph 4.

4. Denies all of the affirmative allegations of paragraph 5.

5. Admits the allegations of paragraph 1 of the further answer, except the allegations as to the ownership of a right of way over plaintiff's property.

6. Admits the allegations of paragraph 2 of the further answer.

83 7. In reply to paragraph 3 of the said further answer, the plaintiff admits that while the plaintiff's land and certain portions of Lot 2 were in common ownership, a railroad spur track and certain lumber loading platforms were constructed on the land which was later conveyed to the plaintiff, and that said improvements were used for the benefit of parts of the said land located in Lot 2, but denies all other allegations of said paragraph.

8. In reply to the allegations of paragraph 4 of the further answer, the plaintiff admits that Seymour N. Bailey and Bert N. Bailey leased portions of the land in Lot 2, together with privileges to use the spur track and loading platform located on Lot 3, but denies each and every allegation of said paragraph not specifically admitted.

9. In reply to paragraph 5 of the further answer, plaintiff admits the execution of the

deed to Bert N. Bailey as alleged, but denies all other allegations of said paragraph.

10. In reply to the allegations of paragraph No. 6 of the further answer, the plaintiff admits that the railroad spur track and a loading platform then constructed on the property which was afterwards conveyed to the plaintiff were visible, obvious and apparent, and admits the allegations of said paragraph as to the conveyances therein described, but denies all other allegations of the said paragraph.

11. Denies all of the allegations of paragraph 8 of the further answer.

For a further reply to the answer of the defendants Seymour N. Bailey and Emma C. Bailey, his wife, the plaintiff alleges that in the year 1923 at the time the defendants Seymour N. Bailey and Emma C. Bailey, his wife, conveyed to Bert N. Bailey an undivided one-half interest in and to the south half of Lot 3 described in the Complaint, the loading platform referred to in the answer of said defendants which was located on the south portion of plaintiff's said real estate was constructed entirely of lumber, was approximately 10 feet wide and was attached to and against a building located on the west
84 portion of Lot 2; that said platform did not exceed in length 75 feet; that the said loading platform remained the same in so far as manner of

construction, material and area covered were concerned until during on or about the year 1932, when the said defendants Seymour N. Bailey and Emma C. Bailey, his wife, and Bailey & Sons Company removed the said lumber platform and wrongfully constructed in lieu thereof a concrete ramp and loading platform covering a much larger area than the said lumber platform and by so doing wrongfully and unlawfully increased the burden of said easement upon the plaintiff's property and attempted to enlarge the servitude thereon.

WHEREFORE plaintiff prays that the defendants Seymour N. Bailey and Emma C. Bailey, his wife, take nothing by their Counter-Claim therein, and that a decree be entered as prayed in the Complaint.

J. D. SKEEN & E. J. SKEEN,
Attorneys for Plaintiff

(Verification).

Received copy this 30th day of Jan., 1939.

HURD & HURD,
*Attorneys for Defendants,
Seymour N. & Emma C. Bailey.*

Filed Mar. 1, 1939.

85 Reply to Answer of John Scowcroft & Sons
86 Company duly verified and filed March 1, 1939.

(Title of Court and Cause):

87 REPLY TO ANSWER OF ROBERT
 BAILEY WHITEHILL.

Comes now the plaintiff and in reply to the answer and counterclaim of the defendant Robert Bailey Whitehill denies, admits and alleges as follows, to-wit:

1. In reply to paragraph 1 of the answer, plaintiff admits that said defendant is the owner in fee simple of an undivided one-half interest in and to the real estate described in said paragraph, but denies that the said defendant is the owner of the right of way and easement described therein.

2. Denies all of the affirmative allegations of paragraph 2.

3. Denies all of the affirmative allegations of paragraph 3.

4. Denies all of the affirmative allegations of paragraph 4.

5. Denies all of the affirmative allegations of paragraph 5.

6. Admits the allegations of paragraph 7.

7. In reply to paragraph 8, plaintiff admits that many years ago a railroad spur track was constructed upon the South one-half of Lot 3 described in plaintiff's Complaint, and admits

that a loading platform was constructed upon said land at about the same time, but alleges that said loading platform was constructed of lumber and did not exceed 10 ft. in width, and that said loading platform was used for loading and unloading cars and wagons for the benefit of land then owned by Seymour N. Bailey and Bert N. Bailey.

88 Plaintiff denies all of the other allegations of said paragraph inconsistent with the admissions herein contained.

8. Admits the allegations of paragraph 9.

9. In reply to the allegations of paragraph 10, the plaintiff admits that the conveyance of land therein described was made by Seymour N. Bailey to Bert N. Bailey, but denies all other allegations of said paragraph.

10. In reply to the allegations of paragraph 11 of the further answer of said defendant, the plaintiff admits that the railroad spur track and the said loading platforms were open, visible and apparent upon the land now owned by plaintiff, and were being used for the benefit of said land in Lot 2 of said Block 43, and that the conveyances described in paragraph 11 were of record at the time the plaintiff acquired title to the real estate described in the Complaint and that the said Deed therein referred to was expressly made subject to loading and trackage easements, but

denies all of the other allegations of said paragraph.

11. Denies all of the allegations of paragraph 12.

For a further reply to the answer of the defendant Robert Bailey Whitehill, the plaintiff alleges that during the year 1923, at the time the defendant Seymour N. Bailey and Emma C. Bailey, his wife, conveyed to Bert N. Bailey the undivided one-half interest in and to the South one-half of said Lot 3 of Block 43, and at the time of the conveyance by the said Seymour N. Bailey and Bert N. Bailey and their wives of a portion of said Lot 2 in Block 43 to the defendant Bailey & Sons Company, the loading platform which was located in the South portion of plaintiff's said real estate was constructed entirely of lumber, was approximately 10 feet wide and was constructed against and attached to a building which was located on the West portion of said Lot 2, and that said platform remained the same insofar as manner of construction, material and area covered was concerned until during or about the year 1932, when the defendants Bailey & Sons
88½ Company, Seymour N. Bailey and Emma C. Bailey, his wife, removed the said lumber loading platform and wrongfully constructed in lieu thereof a concrete ramp and loading platform covering a much larger area than the said lumber platform;

that the use of the said platform and area covered thereby was greatly enlarged and the defendants wrongfully and unlawfully enlarged the servitude then existing upon and against the plaintiff's said property.

WHEREFORE plaintiff prays that the defendant Robert Bailey Whitehill take nothing by his answer and counter-claim and that a decree be entered as prayed in the Complaint.

J. D. SKEEN & E. J. SKEEN,
Attorneys for Plaintiff

(Verification).

Received copy of the foregoing this 28th day of February, 1939.

BAGLEY, JUDD, RAY & NEBEKER,
*Attorneys for Defendant,
Robert Bailey Whitehill.*

Filed Mar. 1, 1939.

(Title of Court and Cause):

89 REPLY TO ANSWER OF COLORADO
ANIMAL BY-PRODUCTS COMPANY.

Comes now the plaintiff and in reply to the answer of the defendant Colorado Animal By-Products Company, a corporation denies, admits and alleges as follows, to-wit:

1. Denies the affirmative allegations of paragraph 4.

2. Denies all of the affirmative allegations of paragraph 5.

3. Admits that the said defendant is the owner of real estate described in paragraph 7, but denies all of the allegations of said paragraph as to the ownership of rights of way or other easements upon or against plaintiff's property.

4. Denies the allegations of paragraph 8.

5. Admits the allegations of paragraph 9.

6. In reply to paragraph 10, the plaintiff admits that many years ago a railroad spur track was constructed upon the South one-half of Lot 3 of said Block 43 and admits that a loading platform was constructed upon his said land many years ago, but alleges that said platform was constructed entirely of lumber, did not exceed 10 feet in width and was used for the purpose of loading and unloading cars and wagons for the benefit of land then owned by Seymour N. Bailey and Bert N. Bailey, and admits that the said spur track and loading platform in this paragraph described were open, visible and apparent at the time the said real estate was conveyed to
90 plaintiff.

7. Admits the allegations of paragraph 11.

8. In reply to paragraph 12, the plaintiff admits that the conveyance therein described was made by Seymour N. Bailey to Bert N. Bailey, but denies all of the other allegations of said paragraph.

9. In reply to the allegations of paragraph 13, plaintiff admits that the said railroad spur track and said lumber loading platforms then in existence were open, visible and apparent upon plaintiff's land and were being used, and that said conveyances described in said paragraph were of record at the time that the plaintiff acquired the real estate described in the Complaint, and that the deed by which plaintiff acquired title was expressly made subject to loading and track-age easements, but denies each and every allegation of said paragraph not specifically admitted.

10. Denies all of the allegations of paragraph 14 of the answer.

For a further reply to the answer of the defendant Colorado Animal By-Products Company, a corporation, the plaintiff alleges that during the year 1923 at the time the defendant Seymour N. Bailey and Emma C. Bailey, his wife, conveyed to Bert N. Bailey an undivided one-half interest in and to the South one-half of Lot 3 described in the plaintiff's Complaint, and at the time of the conveyance by the said Seymour N. Bailey and Bert N. Bailey, and their wives, of a portion

of said Lot 2 to the defendant Bailey & Sons Company, the loading platform which was located in the South portion of plaintiff's said real estate was constructed entirely of lumber, was approximately 10 feet wide, and was attached to and against the North wall of a building which was located upon the West portion of Lot 2, and that said platform remained the same insofar as manner of construction, material and area were concerned until during or about the year 1932, when the defendants Bailey & Sons Company, Seymour N. Bailey and Emma C. Bailey, his wife, removed the said lumber platform and wrongfully constructed in lieu thereof a concrete ramp and loading platform covering a much larger area than
 91 the said lumber platform; that the use of the plaintiff's land for purposes of a right of way and other purposes was greatly enlarged and increased and the servitude upon and against the plaintiff's said property was wrongfully and unlawfully enlarged by this defendant and others.

WHEREFORE plaintiff prays that the defendant Colorado Animal By-Products Company, a corporation, take nothing by its answer and counter-claim herein, and that a decree be entered as prayed in the Complaint.

J. D. SKEEN & E. J. SKEEN,

Attorneys for said Plaintiff.

(Verification).

Received copy of the foregoing this 28th day of February, 1939.

Filed Mar. 1, 1939.

(Title of Court and Cause):

92 **REPLY TO ANSWER OF BAILEY
& SONS COMPANY.**

Comes now the plaintiff, and in reply to the answer and counter-claim of the defendant Bailey & Sons Company, denies, admits and alleges as follows, to-wit:

1. Denies all of the affirmative allegations of paragraph 2.

2. Denies all of the affirmative allegations of paragraph 3.

3. Denies all of the affirmative allegations of paragraph 4.

4. Denies all of the affirmative allegations of paragraph 5.

5. Admits the allegations of paragraph 1 of the further answer.

6. Admits the allegations of paragraph 2 of the further answer.

7. In reply to paragraph 3 of the further answer, the plaintiff admits that a railroad spur track and certain lumber loading platforms not

exceeding 10 feet in width were constructed on the plaintiff's property which is described in the complaint, and admits that the said spur track and loading platforms have been used, but denies all other allegations of paragraph number three.

93 8. In reply to the allegations of paragraph 4 of the further answer, the plaintiff admits that Seymour N. Bailey and Bert N. Bailey leased portions of the said land in Lot 2, together with privileges to use the spur track and loading platform located on Lot 3, but deny each and every other allegation of said paragraph.

9. Admits the allegations of paragraph 5 of the further answer.

10. In reply to paragraph 6 of the further answer, plaintiff admits the execution of a deed to the defendant Bailey & Sons Company, a corporation, which contained the language therein quoted, but denies all other allegations of said paragraph.

11. In reply to the allegations of paragraph 7 of the further answer, the plaintiff admits that the said railroad spur track and loading platform were open, visible and apparent thereon, and were being used, and that the said conveyances were of record at the time the plaintiff acquired the real estate described in the complaint, and that the deed by which the plaintiff acquired title was expressly made subject to

loading and trackage easements, but denies all other allegations of said paragraph.

12. Denies all of the allegations of paragraph 8 of the further answer.

94 For a further reply to the answer of the defendant Bailey & Sons Company, a corporation, the plaintiff alleges that in the year 1923 at the time the defendant Seymour N. Bailey and Emma C. Bailey, his wife, conveyed to Bert N. Bailey the undivided one-half interest in and to the S $\frac{1}{2}$ of Lot 3, described in the plaintiff's complaint, and at the time of the conveyance by the said Seymour N. Bailey and Bert N. Bailey and their wives of a portion of the said Lot 2 to the defendant Bailey & Sons Company, the loading platform, which was located in the south portion of plaintiff's said real estate, was constructed entirely of lumber, was approximately 10 feet wide and was constructed against and attached to a building which was located upon the west portion of Lot 2, and that said platform remained the same insofar as manner of construction, material and area covered until, during or about the year 1932, when the defendants Bailey & Sons Company, Seymour N. Bailey and Emma C. Bailey, his wife, removed the said lumber platform and wrongfully constructed in lieu thereof a concrete ramp and loading platform, covering a much larger area than the said lumber platform,

and wrongfully and unlawfully enlarged the servitude upon the plaintiff's said property.

WHEREFORE plaintiff prays that the defendant Bailey & Sons Company, a corporation, take nothing by its Counter-claim and that a decree be entered as prayed in the complaint.

J. D. SKEEN & E. J. SKEEN,
Attorneys for Plaintiff

(Verification).

Receiver copy this 30 day of Jan., 1939.

HURD & HURD,
*Attorneys for Defendant,
Bailey & Sons Company.*

Filed Mar. 1, 1939.

(Title of Court and Cause):

99 NOTICE OF AND MOTION FOR JUDGMENT
AND DECREE ON THE PLEADINGS.

To the above named plaintiff and to J. D. Skeen and E. J. Skeen, his attorneys:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE that the defendants, Bailey & Sons Company, Seymour N. Bailey and Emma Z. Bailey, his wife, and J. W. Summerhays & Sons Company, and the interpleaded defendants, C.

E. Summerhays and J. J. Summerhays, intend to and will at the time the above entitled cause is called for trial, and they do hereby respectfully move said Court for judgment and decree in their respective favors upon the pleadings and as prayed in their respective answers to plaintiff's complaint herein, upon the grounds and for the reasons that plaintiff's Reply to the Answers of said defendants and said interpleaded defendants, and each of them, is and constitutes an admission of the claims, demands and defenses of defendants and interpleaded defendants, and each of them, in said action and as set up in their respective answers therein, and that plaintiff's said Replies are, and each of them is, a complete departure from plaintiff's Complaint in said action, and constitute an attempt to set up, rely upon and litigate an entirely new, separate, and distinct cause of action or causes of action from that attempted to be alleged in plaintiff's said Complaint.

HURD & HURD,

*Attorneys for said defendants
and interpleaded defendants
above named.*

Received copy of the foregoing Notice and Motion this 3rd day of April, 1939.

J. D. SKEEN & E. J. SKEEN,
Attorneys for Plaintiff

Filed Apr. 6, 1939.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on Tuesday, April 4, 1939, at 10:00 A. M., the above-entitled cause came on for trial before Honorable P. C. Evans, one of the Judges of the Third Judicial District Court of the State of Utah, in and for Salt Lake County, sitting without a jury; the respective parties being represented by counsel, as follows:

For the Plaintiff:

J. D. Skeen, Esq. and E. J. Skeen, Esq.

For the Defendants:

Bailey & Sons Company, a corporation;
Seymour N. and Emma Z. Bailey; J. W.
Summerhays & Sons Company, a corporation;
C. E. Summerhays and J. J. Summerhays,
by Messrs. Hurd & Hurd, by
E. D. Hurd, Esq.

Colorado Animal By-Products Company, a
corporation, by Messrs. Moyle, Richards
& McKay, by Mr. E. M. Bagley.

Leona B. Whitehill, Administratrix of the
Estate of Bert N. Bailey, Deceased, and
Robert Bailey Whitehill, by Messrs.
Bagley, Judd, Ray & Nebeker, by Mr. E.
M. Bagley.

John Scowcroft & Sons Company, a corporation, by Emerson C. Willey, Esq.

WHEREUPON, the following proceedings were had:

Mr. Hurd, in behalf of the defendants Bailey and Sons Company, Seymour N. Bailey and his wife, J. W. Summerhays & Sons Company and C. E. Summerhays and J. J. Summerhays, moved the court for judgment on the pleadings. Mr. Bagley, in behalf of the defendants Robert Bailey Whitehill and Colorado Animal By-Products Company, and Mr. Willey, in behalf of John Scowcroft & Sons Company, joined in the same motion. The motion was argued by counsel and denied by the court.

Thereupon, E. H. MERRILL, a witness called on behalf of the plaintiff on examination by Mr. Skeen, testified as follows:

My name is E. H. Merrill and I reside at Salt Lake City. I am an engineer. I graduated from the University of Utah School of Mines and Engineering in 1932 and have been actively engaged in practicing engineering since that time. I am acquainted with the property consisting of Lots 2 and 3, Block 43, Plat A, Salt Lake City Survey. It is my understanding that my father owns the South half of Lot 3, Block 43 and I have made a rather detailed investigation of conditions ex-

isting on the property. I prepared the map marked
 "Exhibit A". The map is drawn to the scale of
 one inch equals ten feet. The top of the map is
 north. The street on the west of Lot 2 and the
 151 south half of Lot 3 is 3rd West Street and the
 street shown on the south of Lot 2 is 5th South
 Street. The South half of Lot 3 bordering on 3rd
 West Street has a footage of $82\frac{1}{2}$ feet, 56 feet of
 which is covered by a concrete ramp, which is
 designated on the map by lines spaced one-eighth
 of an inch apart and running in a northwesterly
 and southeasterly direction. The map shows the
 ramp to extend easterly 50 feet from the west
 edge of Lot 2.

The tracks of the Union Pacific Railroad Com-
 pany are shown on the map extending from the
 northwest corner of the South half of Lot 2 in
 the shape of a curve to the south portion of the
 South half of Lot 2 and extending to the east side
 of Lot 2.

The map shows the building now occupied by
 Globe Grain & Milling Company, which is located
 in the northeast corner of the South half of Lot
 2; shows a building in the southwest corner of
 152 Lot 3 occupied by the Colorado Animal By-Pro-
 ducts Company, J. W. Summerhays & Sons Co.
 and Valvoline Products; shows that approximate-
 ly 100 feet east of the west line of Lot 2 is an old
 building extending approximately 50 feet easter-

ly, occupied by Scowcroft Manufacturing & Wholesale Grocers; shows a new building constructed in 1938 occupied by the Scowcroft Manufacturing & Wholesale Grocers adjoining the old Scowcroft building and extending for a distance of approximately 89 feet east; shows a building occupied by the Western Iron & Bronze Works located in the southeast corner of Lot 2; shows an old wooden fence between the south line of Lot 3 and the north line of Lot 2 extending from a point approximately 37 feet east of the south edge of the old Scowcroft building to a point approximately 38 feet east of that building; shows a large tree located on the line dividing the property of Lots 2 and 3 at a point approximately 51 feet east of the east side of the old Scowcroft building.

153 This map accurately represents the structures and buildings and is drawn to scale and shows the property line. (plaintiff's Exhibit "A" received).

The approximate heights of the concrete ramp on the west edge is on the level with the sidewalk and the top of the railroad company rails. At a distance of approximately 13½ feet east from the west edge of the property line the concrete ramp has an elevation of approximately two feet. At a distance of approximately 50 feet east from the west edge of the property line the concrete ramp has an elevation of 4 feet. At the point where the elevation of the ramp is two feet to the point

where the elevation of the ramp is four feet is a one-foot concrete retaining wall.

The horizontal lines shown on the map in the vicinity of the south line of Lot 3 indicate a wooden covering over a portion of the platform.

154 The area shown to the east of the concrete ramp shaded with broken lines running diagonally in a south-westerly, north-easterly direction indicate an old wooden platform that is now in existence.

The diagonal lines back of the old Scowcroft building running in a north-westerly and south-easterly direction indicate a new four foot loading platform.

All of the buildings indicated have been on the premises since I became familiar with it about nine years ago, except the new Scowcroft building which was constructed in 1938.

158 There are two doors in the rear of the old Scowcroft building which are used to take materials into that building. The materials are then trucked back and forth between the old Scowcroft building and the new Scowcroft building.

159 Exhibits B to I, inclusive, are photographs taken on January 22, 1939. Exhibit B was taken with the kodak directed in a southerly direction and at a point in Lot 3 north of the building shown on the map as occupied by Colorado Animal By-

Products Company and shows a part of the concrete ramp and a portion of the wooden platform immediately east of the concrete ramp.

160 Exhibit "C" was taken with the kodak directed in an easterly direction, and located at approximately in the center of Third West Street, and is the center of the South half of Lot 3.

Exhibit "D" was taken with the kodak directed in a southeasterly direction, at a point approximately twenty feet north of the northeast corner of the building occupied by the Colorado Animal By-Products Company.

Exhibit "E" was taken with the kodak directed in a southeasterly direction, with the observer located at approximately the intersection of the railroad company tracks and the west property line of Lot 3.

Exhibit "F" is a picture taken with the observer standing at approximately the same location, with the kodak directed in a southeasterly direction.

Exhibit "G" was taken with the kodak directed in an easterly direction, with the observer being approximately in the center of Third West Street, and approximately in a line with the property line between Lot 2 and Lot 3.

Exhibit "H" was taken with the kodak directed in a southwesterly direction, with the observer

being located in approximately the center of the South half of Lot 3.

Exhibit "I" was taken with the kodak directed in a southeasterly direction with the observer located approximately twenty feet from the west line of Lot 2, and adjoining the railroad tracks at that point.

These pictures all show actual conditions existing along the south line of Lot 3 and the north line of Lot 2.

161 (Plaintiff's Exhibits "B" to "I" received.)

162 JOSEPH F. MERRILL, the plaintiff, a witness called in his own behalf on examination by Mr. Skeen, testified as follows:

My name is Joseph F. Merrill and I reside at Salt Lake City. I am the plaintiff in this case. I am the owner of the real estate involved in this controversy described as the South half of Lot 3, Block 43, Plat A. I bought the property in 1928.

MR. HURD objected to all of this testimony as not the best evidence. The objection was overruled.

163 Plaintiff's Exhibit "J", an abstract of title, offered in evidence. The abstract at entry 46 shows a warranty deed dated August 28, 1928, and on entry 47 appears a warranty deed from Joseph F. Merrill or Emily T. Merrill, his wife, to Zion's Savings Bank and Trust Company.

164 I submitted a writing to Zion's Savings Bank and Trust Company indicating what should be done with the property on my death.

165 Exhibit "K" purports to be a quitclaim deed from Zion's Savings Bank and Trust Company to myself, dated August 15, 1938. (Plaintiff's Exhibit "K" received.)

165 When I bought the property I examined the premises and remembered distinctly seeing platforms. As I remember it, there was a platform about 10 feet wide.

Exhibit "L" purports to be a map and shows the approximate size and location of the lumber platform.

MR. BAGLEY: I object to this as incompetent, irrelevant and immaterial. He can describe the property he saw, but not with reference to this map.

THE COURT: Well, he has already done that. If this is of any value it would be merely to illustrate his testimony.

MR. SKEEN: Yes, to illustrate his testimony.

MR. HURD: May we have added to the objection as made, adopting so much of it as made, and add the further ground, there is no proper foundation laid for the use of the map and the

map has not been identified and we object to it on the ground that it is incompetent.

THE COURT: Objection may be overruled.

167 MR. SKEEN: We offer in evidence plaintiff's Exhibit "L".

MR. BAGLEY: I object to it as incompetent, irrelevant and immaterial.

MR. HURD: Same objection.

MR. BAGLEY: No showing as to what it purports to represent, or when it was made, or by whom it was made.

MR. HURD: We join in the objection, and add to it the ground that it is incompetent and no proper foundation been laid for its reception.

MR. WILLEY: We join in that objection, your Honor.

THE COURT: The witness has only said that represents what he observed in 1928, when he purchased it. It is only by way of illustration.

MR. SKEEN: That is our purpose in offering it, your Honor.

THE COURT: The objection will be overruled.

168 Exhibits "M" and "N" indicate the location of the lumber platform which I saw in 1928. They

are maps obtained from the map makers of insurance property.

MR. HURD: We object to that and move to strike the witness's answer as incompetent.

THE COURT: As far as his answer is concerned, it would only serve the same purpose as if he would make the drawings himself but his drawings obtained from some other source would have no probative value, unless further identified.

MR. HURD: Your Honor is admitting them, I take it then, as this witness's testimony and not as independent evidence, at all.

THE COURT: Yes, that is all.

169 Mr. Joseph F. Merrill, on cross-examination
by Mr. Bagley, testified:

That he looked over the premises before he
bought the property in 1928; that he was not
170 located on the property and was not there daily
thereafter; that he drove by the property several
times a year but that his examinations of the
property were more or less casual as he drove
171 past; that the old original platform that was there
when he bought the property is shown in Exhibit
"I".

172 On cross-examination by Mr. Hurd, Joseph F.
Merrill testified that he went away in the summer
of 1933 and did not return until October, 1936, and
that he did not obtain possession of the deed from

Zion's Savings Bank and Trust Company, Exhibit "K" until the fall of 1938.

173 On re-direct examination Joseph F. Merrill testified that there was no structure from the point where the railroad entered his property to the south side of his property line but that there were
174 some steps from the platform that terminate a few feet within the property line. The steps were in the neighborhood of 10 feet wide and there was a V-shaped structure that went out paralleling the railroad track which is still there. In October, 1936 I first learned that the concrete ramp had been placed on my property.

176 TAYLOR H. MERRILL, a witness called on behalf of the plaintiff, on examination by Mr. Skeen, testified as follows:

My name is Taylor H. Merrill and I reside at Salt Lake City. I have been familiar with the property involved in this law suit since the fall of 1928. I saw the property right after my father purchased it. I observed a wooden platform north of the building now occupied by Colorado Animal By-Products Company, which ran out to the railroad track. The platform was about 10 feet wide and there were steps leading down from the west end of the platform to within about 5 or 10 feet of the west property line. I recollect the platform as being substantially as shown on Exhibit "L".

177 I had charge of the property for a few years commencing in 1933.

A concrete ramp was built in 1933. When I first saw it it had been completed.

178 On cross-examination by Mr. Hurd, Mr. Taylor H. Merrill testified that the Globe Milling Company building was occupied by his father's tenant and that his father had charge of the collection of the rents until August, 1933; that after August 1933 he had charge of the property, collected the rents and visited the property about once every
179 three or six months; that during the summer of 1934 he first observed the ramp had been constructed and that he did not complain to any of the defendants about the ramp.

180 Plaintiff rests.

Mr. Hurd offered in evidence abstract of title No. 77394 prepared by Utah Savings and Trust Abstract Company covering a part of Lot 3, Block 43, Plat A, certified under date of September 8, 1938. The abstract was received in evidence.

181 JONAS RYSER, a witness produced on behalf of the defendant, on examination by Mr. Hurd, testified as follows:

My name is Jonas Ryser and I live in Salt Lake City. I am Secretary of Bailey & Sons Company and have held that position continuously since 1914.

182 MR. HURD: Now, calling your attention, Mr. Ryser, to a piece of property known as the South half of Lot 3, Block 43, Plat A and an adjoining piece of property known as Lot 2, of the same block and plat, the property being situated running east from Third West Street between Fourth and Fifth South Streets in Salt Lake City, I will ask you if you are familiar with that property.

A. I know it off by heart.

Q. How long have you been familiar with that property?

A. Since 1914. Every day, except Sunday and holidays, I pass that piece of property up from 1914 to 1936.

183 Exhibit "7" portrays in a general way the situation and location of the improvements, spur, track and loading platforms and other facilities on those two properties as they exist today. (Exhibit "7" received.)

The Northwestern Hide & Fur Company building, the Seymour Bailey building, and the platform were all built before I went with Bailey & Sons Company. The Scowcroft building and the platform adjoining it was built in 1920.

184 We had a hay shed when I first went with Bailey & Sons built right up to the north line of the South half of Lot 3. I have drawn a sketch of

the hay shed in pencil on Exhibit "7". In the east end we kept eight head of horses and our wagons.

185 The platform of the Globe Mills building has been extended. The two pencil marks indicate the original platform. We used to unload cars right into the Globe Mills building.

The railroad spur was on the property at that time and there was a concrete team track on the north side of the spur track about ten to twelve feet wide which followed the curve of the spur track. The team track was built long before 1914 and was used to load and unload from the track.

186 The concrete team track extended from the sidewalk to the original platform of the Globe Mills building. There was concrete put in a space west of the Globe Mills building so we could turn around in front of the Globe Mills. This space is marked "concrete" on Exhibit "7".

187 In 1914 there was a little red brick house with some chicken coops located where the Scowcroft building now stands.

Commencing at the northeast corner of the Northwestern Hide and Fur Company building there was a wooden platform on stilts. The platform extended along the curve of the spur track to the west and there was a V-shaped jog to the south. There was a platform up against the build-

ing that had a ramp. At the edge of the building there were some steps which extended about 7 feet up to the platform. The steps extended north about four or five feet. The stairs led to the platform which was $3\frac{1}{2}$ feet high from the ground.

189 The platform extended north from the steps 32 feet then jogged to the east about 10 feet. There was a ramp coming from this platform up to the level of the unloading doors of the building.

190 The ramp sloped onto the platform to the west, north and to the east. The upper platform was 6 to 8 feet wide and it was elevated above the rest of the platform two or three feet.

191 The wooden platform extended further north, closer to the tracks, than the cement is today. The outline I have drawn on Exhibit "7" to the north of the Northwestern Hide & Fur Company building portrays in a general way the location and extent of the platform as it existed in 1914. It is marked "original wood platform." The upper platform is marked "original raised platform and ramps."

193 The Valvoline Products building is called the Seymour N. Bailey building and the Northwestern Hide & Fur Company building was called the Cudahy building.

194 There is a right of way 10 or 12 feet wide that we used to load and unload our cars into the

Seymour N. Bailey building. The "L" on the map, which is marked "right of way" borders the Summerhays & Sons building on one end, the Seymour N. Bailey building on the north and runs east of the Northwestern Hide building out to the loading platform. The right of way is walled off from the rest of the buildings so it is in the nature of a hallway.

195 I determined the measurements which I have
 given of the platform from some marks which are
 on the building and from my recollection of where
 196 the old ramp was from seeing it every day for
 twenty-five years.

197 Exhibit "1" is a picture of the building of
 the Northwestern Hide, called the Colorado
 Animal By-Products building, which was the
 Cudahy building when I first went with Bailey &
 Sons. It is a view taken from the north end show-
 ing very plainly the step marks of the building
 and the places where the cement was filled when
 the up-rights were taken from the old platform.
 Exhibit "1" accurately portrays the situation
 198 there as it existed at the time the picture was taken
 with respect to the part of the building and other
 surroundings which are shown. The picture was
 taken last Saturday.

Exhibit "2" is a picture taken last Saturday
 showing the north side of the Northwestern Hide

and Fur building, which was known as the Cudahy building, and showing the Globe Mills building.

199 Exhibit "3" is a picture showing the northwest corner of the building, the spur track, and the western part of the ramp. It also shows the indentations in the building made by the old platform steps. It accurately portrays the part of the building and surroundings shown there.

199 Exhibit "4" is a picture taken from the northwest corner of the South half of Lot 3. It shows the platform as it was last Saturday and also shows the concrete roadway which follows the spur track down to the warehouse.

200 Exhibit "5" shows the wooden part of the old platform built long before I went with Bailey & Sons. Exhibit "5" shows a portion of the platform as it was in 1914 but the platform originally came out some 18 inches or 2 feet closer to the spur track.

Exhibit "6" shows the northwest corner of the old Cudahy building now occupied by Colorado Animal By-Products Company showing the marks of the old ramp and the level of the old platform and the stairway going down to the edge of the building. The marks on the building which appear to be some cement plaster indicates where the old platform was taken away from the building.

201 (Exhibits "1" to "6" received.)

202 In 1916 there was a little ramp built up for the Gibson-Evans Company—a little higher than the original ramp. There were no changes in the coverage of the old platform but there were parts built on the old platform for elevation purposes only. The area marked "original wood platform" has been covered from 1914 up to the present time. A part of the wood was replaced with concrete around June, 1933.

When I first went there in 1914 the Cudahy Packing Company leased the building now occupied by the Colorado Animal By-Products Company for their business, the meat business, and they used the platform in the rear, backing their wagons up against the platform from the north and against the platform from the west to load and unload meat. Other parts of the platform were used by Bailey & Sons Company to load and unload grain and products that we carried. We have had up as high as three cars of bags there at one time that were unloaded to teams to the north. I have seen the time when the platform would have as high as five wagons backed against it, one in that jog from the north, that 10 feet; also from the west and the north and the wagons would back up across the spur track from the north against the north side of the platform.

204 The surface to the west and north of the old original wood platform was earth covered with cinders.

205 We would unload hay from railroad cars to the north right into the hay shed and unload grain and seed to the south into the warehouse. The "concrete team track" was used by the teams in loading and unloading and the cement place in front of the Globe Mills building was used to turn around so they would not get mired in the mud. The concrete team track was used for loading and unloading purposes. Our delivery wagons were kept in the back and our teams used the concrete team track continuously.

206 The hay shed remained there until it was burned down by a fire in 1918. Since that time the team track has been used continually as an auto drive. We could not do without it.

The "L" shaped right of way is still used to convey material from the platform at the spur track to the Seymour Bailey and Summerhays property. It has been used that way since 1914 and is the only means of access to the loading platform and railroad spur.

207 The original platform was built of heavy timber on stilts. There were heavy joists turned on edge and on top of that were laid heavy plank-ing.

208 The upper platform was built in much the
same manner.

209 Mr. Ryser, on cross-examination by Mr. Wil-
ley, testified that the platform north of the Scow-
croft building was built at the same time the build-
ing was constructed in 1920. The old Scowcroft
building was formerly leased by the Simmons Bed
210 Company who used the team track north of the
spur track to unload mattresses from the car to
trucks. They loaded and unloaded from both the
north and south of the track.

213 Mr. Ryser, on cross-examination by Mr.
Skeen, testified that the building now occupied by
the Colorado Animal By-Products Company was
occupied by Gibson-Evans Company from 1916 to
1920. Kelly Springfield Tire Company then oc-
cupied the building three or four years until the
present occupants moved in.

Exhibit "N" shows a fair representation of
the building occupied by Gibson-Evans Company.
It does not fairly represent the building that
215 Bailey occupied because it does not show the right
of way. They did not examine it very closely. It
is a fair representation of the building that the
Simmons people occupied. The building shown
216 as the Wasatch Wholesale Grocery Company
building is now the Merrill building. The platform
216 west of the building indicated in yellow is about
right. The yellow spot on the south of the build-

ing might represent a platform but it is not where the platform was. A building is shown marked "Autos". It was built in 1919 after the hayshed burned down. I don't see anything wrong with the auto building. The spot marked "H" indicates a little steel warehouse where we kept an automobile. The map shows about the location of that. The map does not show the right of way passage into the hay and grain warehouse and does not show the south platform of the Globe Mills building correctly. It should be more in the center of the building.

Exhibit "M" shows the building occupied by the Gibson Commerical Company accurately, except it doesn't give the right of way. The right of way made an L shape; it extended south and then west. It is all right except that and the platform. Whoever made that never saw that platform. The Bailey & Sons building is shown all right except the right of way on the inside of the building. The Simmons Company building is accurate. The Wasatch Wholesale Grocer Company building platform should be a little to the west. The garage where we kept the autos is all right. There is no platform in front of the garage. The little place to the west, marked "h", is made of sheet iron and wood and is accurate.

Exhibit "L" shows the spur running in on the Bailey property. The track went further east

than is shown on the map and would strike the east end of the Merrill building. The proportion of the Merrill building is not accurate. It is out of proportion to the garage. The Gibson Commercial Company building is accurately represented, except there is no right of way indicated. The passageway that is not indicated extends from the loading platform south across the end of the Gibson building and is 10 feet wide and then extends east and west back of the Gibson building into the corner building and is 12½ to 13 feet wide. The Simmons Bed Company building looks out of proportion on the map. The Wasatch Wholesale Grocery Company building is out of proportion on the map. No considerations have been given to the proportions on the map at all. The Exhibits "L", "M" and "N" are accurate with the exceptions of my corrections or suggestions.

222 Whoever made the platform indicated on Exhibit "L" never saw it. Whoever diagramed that platform never saw it because he did the same thing with that platform as was done with the garage and the same with the right of way, he did not get the platform in here far enough west, he did not get the garage in position; they plotted it just to show the thing was there without regard to the proportion.

223 Exhibit "M" does not show the platform immediately north of the Gibson Commercial Build-

ing right. The man who made that never saw it. The map is all right with these exceptions, that the platform there should be a little to the west; it does not show the right of way at all; he had the idea that it was there but he left it off entirely.

224 Exhibit "N" is accurate with the exception that the passageway is not on there and the platform was further west. I say the party who drew that never saw the ramp. He probably passed there and got a vague idea but did not show the jog there.

225 The Cudahy Company received meat in car-load lots and used teams to deliver to different customers around the city. I have seen as many as five wagons backed up to the platform at one time, two from the west immediately north of the steps, and three wagons backed up from the north.

226 The platform to which they backed up was a continuation of the wooden platform that is there now. Cinders were put in to the west and north of the platform to fill up the holes made by the horses and wagons. We had to get load after load of cinders. On the north side there was a cement

228 driveway and we would put cinders between the cement driveway and the hayshed. The spur track was immediately north of the platform and was filled in with planks. If there was a hole we put cinders in.

A small portion of the platform was covered by a roof. The roof covered a small portion of the ramp but not all of it. The ramp ran along the north side of the building about 10 feet wide with a roof over it. That ramp was a platform built on top of the general platform.

229 When I made the measurements last Saturday I made them from post marks made indelible on the building and from marks where the steps had been.

230 Cudahys would get a car of meat. They would unload it onto four-wheeled hand trucks hauled by man-power, which would go on the platform and then around to the ramp and up the ramp into the building. The main platform wasn't as high as the doorway in the main building and they necessarily had to have the ramp. They had the ramp on both sides. The ramp on the east side of the platform still remains intact the same as the west side was. The Cudahy wagons would back up
231 from the north to load the meat. Five is the most I have seen but there is plenty of room for six of them there. The crosses I have put on Exhibit "7" would indicate where the wagons would back up to the platform.

232 Exhibit "6" shows where the steps dove-tailed into the main body of the platform and then there was a ramp going to the door. The roof

just extended over the ramp. The ramp was about ten feet wide.

Mr. Ryser, on re-direct examination by Mr. Hurd, testified:

The platform on the south side of the Globe Mills building was enlarged not longer than three years ago. The platform originally was in front of the door along toward the center of the building. All of the part marked "loading platform", which is west of the part marked "original platform" on Exhibit "7" was added some two or three years ago.

Mr. Ryser, on re-direct examination by Mr. Bagley, testified:

233 I went with Bailey Company in 1914 and have been with them continuously since. Each day my work had to do with the building here, the passageway referred to and the platform and tracks. I was familiar with the conditions as they existed and the position, location and size of the platform during all of that time. I wish I had a dime for every time I walked over it.

234 HEBER M. PETERSON, a witness produced on behalf of the defendant, on direct examination by Mr. Hurd, testified:

My name is Heber M. Peterson and I live in Salt Lake City. I am a carpenter and builder. In 1933 I had occasion to do some work on the South

half of Lot 3, which runs east from Third West Street between Fourth and Fifth South Streets.

235 I tore out the ramp or loading platform and built forms for a cement ramp and loading platform. I was employed by Mr. Dipple, a cement contractor who did the work there. I was down there again last Saturday and fixed the location where the old platform which I tore out was. I made some measurements as to what the old platform measured north and south. At the shortest point it measured 32 feet and then there was a 10 foot jog at right angle and then there was about four feet towards the track. The westerly line of the platform was about 7 feet, 8 inches east of the westerly line of the Northwestern Hide & Fur Company building. There was a stairway in connection with the platform which I tore out.

238 Exhibit "6" shows markings on the building of the stairway which I tore out. Other marks there indicate the risers and stringers. Exhibit

239 "7" shows a pencil line going north 32 feet from the Northwestern Hide & Fur Company building, then going east a distance of about 10 feet, then north a distance of about 4 feet, then following the curve of the railroad spur around to the northeast corner of the Northwestern Hide & Fur Company building. It is marked "original wood platform" and portrays in a general way the size of the platform, which I tore out in 1933.

240 The platform was constructed of stringers
running north and south. There were two sets of
stringers. The first set was 18 feet long with one
end embedded in the building. The stringers ran
at right angles to the building. I measured the
first stringers when I took them out and they meas-
ured 18 feet. A second set of stringers abutted
241 against the 18 feet stringers and ran still further
north about 14 feet, 6 inches.

Exhibit '6'' shows the line of the old wooden
platform which I tore out. Another line goes up
242 on an angle and shows a ramp which was con-
structed on top of the platform and ran up to the
doors. There was another little platform on top
of the ramp. There was a ramp there the same
as the ramp on the east and I tore it down in 1933.

Mr. Peterson, on cross-examination by Mr.
Skeen, testified:

243 There were two stringers, one 18 feet long
and one 14 feet long, which ran north from the
building. The platform was level on top and
244 dropped off perpendicular at the west. I do not
know how far the west of the platform was from
the sidewalk, but it was about 8 feet east of the
corner of the building. I set the form for the re-
taining wall on the ramp next to the railroad
track. There was no form out toward the side-
walk. I do not know how long the platform which
I took out had been there.

246 Mr. Peterson, on re-direct examination by Mr. Hurd, testified that he was not employed by the Bailey Company and never had been.

247 MR. BAGLEY: I assume it is understood that all the evidence that is now going in is for the benefit of and offered by all of the defendants.

THE COURT: Oh, yes. No doubt about that.

WILLIAM I. RICHARDS, a witness produced on behalf of the defendants, on examination by Mr. Hurd, testified:

My name is William I. Richards and I have lived in Salt Lake City all my life. I am employed as City Salesman at the retail store of Bailey & Sons Company. I have worked there since 1910. I was warehouse foreman for about 15 years. I am acquainted with the warehouse property of Bailey & Sons, the property which has been referred to as the South half of Lot 3 and Lot 2 in Block 43, Plat A. I have been familiar with that
248 property for 29 years. My work as warehouse foreman required that I be on the property every day from 8 o'clock in the morning until 6 at night, except Sundays and holidays. When I started to
249 work for Bailey & Sons in 1910 there was a hay shed and a building now occupied by Globe Mills. There was also a platform along the warehouse, which is indicated on Exhibit "7" as "loading platform."

250 Exhibit "L" shows the Globe Mills building and some pencil marks indicate a "loading platform." Within those pencil marks is written the words "original platform", which indicated the size and location of the platform as it was in 1910. Exhibit "7" shows pencil marks on the west side of the Globe Mills building with the words "original platform" written there which indicate the location and size of the platform as it existed in 1910. The Superior Bag Company Garage was not there at that time. There was a hay shed, which is indicated in pencil marks, "hay shed" on Exhibit "7". The pencil marks portray in a general way the location, size and extent of the hay shed. There was a railroad spur track at that time in the same
251 location as it exists today. The concrete team track shown on Exhibit "7" was put in about two years after I started to work there. It was paved from the sidewalk on Third West Street back to the West side of the Globe Mills building including where the garage is now built.

252 The team track as it was originally constructed was about 12 or 14 feet wide.

On the south side of the spur track there was a wooden platform. The easterly-most point of the platform extended to the northeast corner of the Northwestern Hide & Fur Company building and from that point extended West along the side of the building to some stairs at the northwest

- corner of the building. The stairs extended from the corner of the building to the platform, a distance of 7 feet, 8 inches. The platform extended north from the building a distance of 32 feet; then extended east 10 feet, then north, to a point probably 4 feet from the spur track and then followed along the line of curve of the spur track to the northeast corner of the Northwestern Hide & Fur
- 253 Company building. The pencil outlines on Exhibit "7" which are marked "original wood platform, 1914", illustrates in a general way the location, size and area covered by the platform as it existed in 1910.
- 254 The platform came to within 7 feet, 8 inches of the northwest corner of the Northwestern Hide and Fur Company building. The building was then occupied by the Cudahy people.
- 255 The platform was about $3\frac{1}{2}$ feet high. On the top of this platform along the side of the building there was a short platform that was up even with the bottom of the doors and on each end of the wooden platform there was an incline. The upper platform was raised off the basic, original platform about $3\frac{1}{2}$ to 4 feet. It was in front of the two doors and extended north of the building to a width of about 6 or 8 feet.
- 256 On the westerly-most portion of the lots marked "Scowcroft & Sons" on Exhibit "7" there was located a dwelling house. At one time

I rented a part of this house and lived there a year or so.

257 There was a building, which is marked on Exhibit "7", "Seymour N. Bailey", and the same building is there today. The Northwestern Hide & Fur Company building was there and was occupied by Cudahy Packing Company. There was a right of way passage-way from the loading
258 platform south of the spur track down to the Seymour N. Bailey property. The passage-way was about 10 feet wide. The building on the corner of Third West and Fifth South marked, "Summerhays & Sons", was constructed in about 1915 and the L-shaped passage-way shown on Exhibit "7" was extended into that building.

259 About 1916 or 1917 a barn was built at the end of the hay shed. In 1918 a fire destroyed the hay shed and barn, except for a part located at the northwest corner which was used for a garage for awhile.

260 Some garages have been built in front of the Globe Mills building and the Globe Mills building platform was extended in the last two years. The garage marked "Superior Bag Company" was built right after the fire. With the exceptions I have mentioned, the South half of Lot 3 north of the spur track is about the same as it was in 1910 when I was first employed there. The con-
261 ditions on the south side of the spur track existed

from 1910 up to about three years ago when they took away a part of the wood platform and replaced it with cement.

The block marked on Exhibit "7" as "loading platform" to the north of the west Scowcroft & Sons parcel was put in at the time the building was constructed which was about 1918. The Simmons Bed Company used to occupy that building.

262 There are marks on the north side of the Northwestern Hide & Fur Company building which indicate where the old platform and stairs were. Exhibit "6" is a picture of the northwest corner and north side of the Northwestern Hide & Fur Company building now called the Colorado Animal By-Products Company and is the building that was occupied by the Cudahy Packing Com-
263 pany in 1910. The picture shows the marks on the wall of the building which indicate the incline that led up to the second platform, the top of the first platform and the stairs which extended from the top of the first platform to the level of the ground. Those marks indicate the location of the platform as it existed in 1910 up until the time it was replaced with the concrete.

264 The wooden platform in 1910 extended out from the north side of the building for about 32 feet. Then there was a jog which extended east for 10 feet and then it extended north again over to about four feet from the railroad tracks

and then followed the curve of the spur track. There used to be teams back up to the platform from the west and from the north to load and unload. That condition existed from 1910 right up to the present time. The spur track was used for unloading railroad cars. The railroad cars would be spotted at the platform and sometimes we would unload the railroad cars to wagons on the north of the track and sometimes we would unload the railroad cars to the platform and into the warehouse. The concrete team track was used to drive in and back into the platform. When railroad cars would come in with hay we would put a couple of planks right from the car door and extend them down into the hay shed and we would slide the bales of hay from the railroad car into the hay shed. We have also unloaded hay from the railroad cars to the north onto our wagons.

We used the team track in driving teams and later trucks into the front of the Globe Mills building and out again. The use of the area marked on Exhibit "7", "concrete team track", has continued from 1910 right up to the present time. It is still used to drive trucks in there to turn around and to load and unload from the box cars.

We used practically all of the South half of Lot 3 in pulling our teams in, backing up to the platforms, and in our other operations. The

major portion of the area to the north of the railroad spur track has been used for turning the teams and trucks around and backing them into the platform and cars. We used all of the area west of the old original wood platform in backing the teams and trucks up to the platform. We would put in two wagons from the west, one
 268 from the north in the jog and we could spot more wagons along the track to the north. The area to the west and north of the 10 foot jog was all used in pulling the trucks and wagons in. That area is being used today by wagons or trucks driving across it and has been so used all the time since 1910.

269 Exhibit "1" shows the northwest corner of the Northwestern Hide & Fur Company building, which used to be occupied by Cudahy's. That building is set right up to the west property line. The teams, and later trucks, used to back right over the area west of the old wood platform as they now back up over the ramp. It used to get pretty muddy there sometimes. The part that is unpaved, which is northwest of the corner of the building, pretty well illustrates the condition the ground was in before it was paved. We used to try to fill up the holes occasionally with cinders. It got muddy there all the time. All the drainage accumulated there.

The area east of the Northwestern Hide & Fur Company building and north of the Scowcroft

property was used on both sides of the railroad track. If we had to load wagons we would have them back right up to the wood platform, if there were not any railroad cars to prevent them from doing so. The area north of the Scowcroft property was used the same as the area north of the Northwestern Hide & Fur Company building for loading and unloading on both sides. I
 271 have seen big furniture vans back into the platform north of the Scowcroft building and load up furniture or mattresses. The whole area was used in backing in and turning in. They would back up the trucks to the railroad cars and when the railroad cars were not there, would back across the tracks to the platform.

272 Mr. Richards, on cross-examination by Mr. Skeen, testified: I made the measurements I have been giving last Saturday. I did not have any occasion to make any measurements before that time. There was nothing on the concrete ramp indicating where the old platform was but there were holes in the building where it showed the beams had rested. There is an old wood platform there at this time and we had the two points to measure from, the marks on the building and the corner of the old wood platform. The other dimensions of the platform I am going by memory. It is so plain with me working there for nearly 25 years that I remember just the condition of the platform.

273 I did not measure the size of the area west of the present wooden platform. The platform began 7 feet, 8 inches east of the northwest corner of the building and ran north 32 feet, thence east 10 feet, thence north to a point about 4 feet of the railroad spur track.

275 I made those measurements last Saturday with Mr. Ryser. We knew right where the platform was at. We knew just where the corner was on account of being used to the platform down there. We could size it up because we had been there so long. We knew right where it was at. We knew right where it should be; we knew right where the platform used to be. We knew the jog extended about 10 feet east because there
 276 was only just room enough for a team to back in there. The wagons would back into the whole frontage. They would back against the 32 foot platform and the horses heads would be out over the sidewalk. It is about 6 or 7 feet from the building to the sidewalk and about 8 to 10 feet from the corner of the building to the platform. We had a flat hay wagon and some small bedded wagons. If we used the larger wagons we would have them facing north, the horses extending north, because it did not take up so much room on the sidewalk. The over-all distance from the back of a wagon to the horses head would be about 16 or 18 feet. The platform was level and perpendicular on the west side.

277 The north side of the platform was cut off
at one time so a man on a box car could get better
clearance.

278 There was another runway put on the higher
platform, the second platform, that extended
north from the top platform. Except as I have
stated, the outside boundaries of the platform
were never changed from 1910 until 1933 when
the concrete ramp was put in.

280 MR. SKEEN: I show you plaintiff's Ex-
hibit "L".

MR. HURD: Just a minute. I am going
to object to the use of those exhibits on cross-
examination as being improper cross-examina-
tion, for this reason, they are not admitted, if
your Honor please, as maps or drawings of this
area down here. There has been no foundation
laid to show their authenticity, or anything of
that kind. They were admitted by your Honor
solely upon the theory or for illustrating the testi-
mony of the witnesses, the Merrills, and I object
to it, to this, as not proper cross-examination, and
incompetent, and not being proper to examine one
witness upon the testimony of some other wit-
ness, and that is all these maps profess to be,
under your Honor's ruling and their admission in
evidence.

THE COURT: For the same purpose they
may be used on cross-examination, and upon the
same theory. The objection will be overruled.

282 Exhibit "L" does not show the garage accurate. The Simmons Bed Company building is shown just as long as the other building. I know there is a jog in there back of the Simmons Bed Company. The runway in the Northwestern Hide & Fur Company building is not shown. I would say the map is out of proportion and is not correct. I think the map is all inaccurate. There is not any runway shown where we could unload our cars into the corner warehouse. The railroad track does not extend far enough. That is not correct. The platform does not look right to me. It should extend out further to the west.

Exhibit "N" does not show the runway into the corner Bailey building. It does not show where the platform was. It should be 32 feet north, thence east 10 feet and thence north out to within 4 feet of the track.

285 MR. SKEEN: I call your attention to a map in the exhibit, (Exhibit O) and I will ask you to look at that and state whether or not, as you remember the situation, it is an accurate map of the structures upon the ground?

A. Well, I don't know. I haven't studied it.

Q. I want you to look at it.

MR. BAGLEY: What is the document to which you are referring, Mr. Skeen?

MR. SKEEN: It is one of the files of the Public Service Commission, and this is a map.

MR. BAGLEY: The map is attached to what?

MR. SKEEN: Map attached to the file and a petition for permission to construct this spur.

MR. BAGLEY: I object to it as incompetent, irrelevant and immaterial, no foundation having been laid.

MR. HURD: Not proper cross-examination.

MR. SKEEN: It is for the purpose of testing his memory, and the accuracy of his testimony.

MR. BAGLEY: You just can't pick up anything and test a witness' credibility with it, without some foundation having been laid with reference to it, even pretend it to be accurate.

MR. SKEEN: I can test his recollection and the accuracy of his credibility. I think it refers to the map.

MR. BAGLEY: Not without some foundation that the document about which you are examining purports to be something authentic.

THE COURT: If he were offering this exhibit as something authentic, and the basis for your claim, of course before it could be admitted for that purpose it would have to be iden-

tified by the person who drew it. However, for the purpose of cross-examination, the objection may be overruled.

287 Exhibit "O" shows the building where the Bedding Company used to be. One of the Bailey houses appears to be accurately located. The corner house building marked "Bailey & Sons" and the Gibson Commercial Company building appear to be accurately located. I don't know whether the Macaroni Company building is accurately located, or not.

288 The garage is surely out of proportion. The platform does not look right. No, sir, it is not right. I know it is not right because I used to work on it all the time.

MR. SKEEN: Now, Mr. Richards, I want you to look at this map which the clerk has marked Exhibit "P".

MR. HURD: I am going to object to that as irrelevant, incompetent, immaterial, no proper foundation, and the map is not authenticated or identified. It is not in evidence; not proper cross-examination.

THE COURT: When the time comes to offer it, then you may make that objection, that it has not been authenticated.

MR. HURD: I am making that objection to the use of it in examining this witness, as being

not proper cross-examination and incompetent, irrelevant, immaterial, and the map has not been authenticated.

THE COURT: The objection will be overruled.

Exhibit "P" shows the Wasatch Wholesale Grocery building correctly. The garage, as shown on the map, is not accurate because it is so big. The garage is about 32 feet wide and about 50
291 feet long. It looks out of proportion to me on the map. I have not measured the garage and it may be as narrow as 18 feet. I would say the length of 52 feet, shown by the map, is all right. I would say that the size of the garage is inaccurate.

The platform is not accurately shown. It does not extend out far enough. The platform is not right. It extended out further. It says
294 "10" there, but it is not right. The figure "34" on a line running parallel with the building is not right. The jog in the structure next to the
295 building is out of place. The jog should be further west. The jog should be 24 feet further west. The map does not show any stairs in front
296 of the Gibson and Evans building. When a wagon backed into the platform from the west you might have to turn the horses a little to keep them off the sidewalk. Two wagons could be backed in
297 from the west against the portion of the platform

that projected farther west. One wagon could be backed into the jog. It was customary to back teams in that way at the time the warehouse was being built. It would be about 17 or 18 feet from the sidewalk to the platform and that portion of ground was used during all the time the platform stood before it was changed to concrete.

M. A. JENSEN, a witness produced on behalf of the defendants, on examination by Mr. Hurd testified as follows:

My name is M. A. Jensen. I have lived in Salt Lake City all my life. I have been employed by Bailey & Sons Company as a truck driver on and off for the last twenty years. Prior to that time I was employed by Cudahy Packing Company. When I was employed with the Cudahy Packing Company their place of business was on Third West, just north of Fifth South, the building which the Colorado Animal By-Products Company now occupies. That building is known as the Northwestern Hide & Fur Company building.

The first year of my employment with Cudahy I was in the warehouse unloading cars and the next two years I was driving a team. I am familiar with the property known as the South half of Lot 3 and Lot 2 in Block 43, Plat "A". From 1913 to 1916 I was employed by Cudahy unloading cars from the railroad spur track and taking meats and other products from

the cars into the warehouse, which is the Northwestern Hide & Fur Company building. We would take meats and other products from the warehouse out to the cars and to trucks. The platform extended west on the building to some steps, the marks of which are shown on Exhibit "6". The marks below the brick line indicate the top of the platform. The platform extended to a point about 8 feet east of the northwest corner of the building. A runway went up to another platform on the level of the two doors. The covering shown on Exhibit "2" covered the second platform. The west door is in the same location as it was when Cudahy occupied the building.

304 There was a ramp from the west up to the second platform. The location of the ramp is shown in Exhibit "6". The platform extended west to a point where the steps go down, as shown in Exhibit "6". The platform extended north about 32 feet. There was plenty of room for two wagons to back into the platform. The platform then jogged back to the east about 10 feet and then to the north to a point within three or four feet of the spur track. The roof shown in Exhibit "2" covered the upper platform but there was no cover on the platform to the west of that. The cover stands today just as it did in 1913. The spur track is in the same position as it was in
306 1913. There was a hay shed north of the spur track.

It stood in a position as indicated in pencil marks on Exhibit "7". There was a concrete team track or driveway that extended from the street back to the square concrete in front of the garage and the Globe Mills building. The concrete driveway was about 10 or 12 feet wide.

308 I would unload hams and bacon from railroad refrigerator cars onto two-wheel hand trucks. We would weigh them on scales which were located about in front of the east door of the building up against the upper platform. The scales were built right in the lower platform. Sometimes the railroad car would be set on the west end. The two-wheel hand trucks were operated over the whole portion of the platform.

310 After I started to drive a team, the same procedure was followed by other men there. If there was a railroad car on the track, we would back our wagons up to the west of the platform and get our load. There were three delivery wagons. We would pull over the curb, swing around and back into the platform from the west as I have indicated on Exhibit "7". There was plenty of room for two wagons on the west side. Then we would come in on what is marked "con-
311 crete driveway" and pull to the north and then back in south up against the jog in the platform or against the north side of the platform. We
312 would back up against the whole northerly and

313 westerly edge of the platform. That practice continued the whole time I was connected with the property and after I worked for Bailey & Sons.

After I went to work for Bailey & Sons we would unload hay from the railroad cars into the hay shed. I would pull a big freight wagon along side the railroad cars and we would drag the hay from the cars right into the hay shed. We had two long planks about 20 feet long that we would put from the doors of the hay shed to the railroad
314 car and slide the bales into the hay shed. This practice was followed until the hay shed burned down.

After the hay shed burned down we used to pull in there and turn around and back up to the platform to load and unload our wagons. That use has continued to the present time. The occu-
315 pants of the properties marked, "Northwestern Hide & Fur", "Summerhays & Sons", "Seymour N. Bailey" and "Scoweroft & Sons" used the right of way in the way I have described.

Before the concrete ramp was put in the ground west of the platform was level. It was covered with a few cinders and in wet weather there were pretty bad holes. Holes would be made by the horses feet and the wagon wheels. Exhibit "1" shows a strip near the curb line which appears to be unpaved and is broken up.

full of holes and very rough. The whole area west of the platform used to be in much that condition only we kept filling up the holes with cinders. We had to put planks in between the tracks on the north.

316 Mr. Jensen, on cross-examination by Mr. Skeen, testified:

 I have worked for Bailey & Sons for twenty years. The work has not been so steady the last seven years. I saw the measurements made last Saturday. Mr. Bailey, Mr. Ryser, Mr. Richards were there and made the measurements. I determine the width of the wooden platform that
317 was removed because I was so used to driving the teams that I just knew how much room there was there and then there were also the marks on the wall.

318 It took 15 or 20 feet in length to back the wagons into the platform. There was plenty of room to have two wagons in there and we would leave the teams turned to the side.

319 You could cross over the sidewalk and go north or northeast and drive right over the tracks. The space was level so you could drive back and forth.

321 Exhibit "Q" shows the Cudahy building, the spur track, the hay shed, and the platform. The platform is not shown correctly and the runway

to the Cudahy building is not shown. The platform should extend further west. The platform was not changed or re-built while I worked for Bailey & Sons, except that it was cut off along the spur track to give clearance to a man on the side of a box car.

322 When Kelly-Springfield Tire Company occupied the building they had a runway from the top platform that ran down to the car so they could roll their tires right into the car. The runway was about in the center of the old platform and came right even with the west door.

324 The whole platform was about 32 feet wide on the west edge. I saw the distance measured Saturday. From the building to the place where the platform made the jog the distance was 32 feet. The platform is not shown correctly on
325 Exhibit "Q". It should come out 32 feet, then east 10 feet, and then north.

It was stipulated between counsel that the spur track was built at or about May, 1907.

Defendants rest.

ARNOLD EVANS, a witness produced on behalf of the plaintiff in rebuttal, testified on direct examination by Mr. Skeen as follows:

327 My name is Arnold Evans. I have lived in Salt Lake City all my life. I am employed by Kelly-Springfield Tire Company and was em-

ployed by that company in 1926 as office manager. At that time Kelly-Springfield Tire Company had a warehouse located in the Bailey building on Third West Street.

There was a platform extending out from the building about 10 feet with steps leading from Third West up to the platform. After that it extended out almost to the spur track.

Q. And which side of the first door was the extension?

A. I think on the east side.

We built a ramp out to the spur track to roll tires in and out of the cars. The ramp was built over the top of the platform that was there and sloped down to the level of the railroad car door. The ramp was built out to the railroad track leaving clearance for the cars. We merely had to drop an iron sheet from the railroad car door to the ramp in order to walk across. The
329 ramp sloped from the entrance of the building to the north. It was straight up and down on the west side. Exhibit "Q" is a fair representation of the structures on the ground in the immediate vicinity when I went to work with Kelly-Springfield Tire Company.

330 I would say the map represents accurately the platform north of the building marked "Gibson & Company". A ramp was made by Kelly-

Springfield Tire Company from the first door from Third West north right out to the spur track which was, I would say, 6 feet wide.

MR. SKEEN: We offer in evidence Exhibit "Q", that portion showing the Bailey & Sons, the spur track and the platform.

MR. HURD: We object to it as incompetent, irrelevant and immaterial, no proper foundation laid for it, no showing as to its authenticity or accuracy.

THE COURT: The objection may be overruled.

331 I have marked in red pencil on Exhibit "R" the ramp built by Kelly-Springfield Tire Company. The ramp was built of lumber and had stringers which supported planks. I did not build the ramp and would not care to state the dimensions of the stringers. The ramp extended from
332 the west side of the west door to the platform that previously existed there.

MR. SKEEN: We offer in evidence Exhibit "R".

Q. I show you a map marked Exhibit "P", and I call your attention to a group of buildings indicated on the map as the Bailey Buildings, Bailey & Sons Building, the spur track, and I will ask you to observe the spur track and what is indicated as a platform, and state whether or not,

in your judgment, that is an accurate representation of the platform that you saw there in 1926?

A. I wouldn't want to testify to the accuracy. It looks very similar.

Q. It looks similar?

A. Yes.

333 Exhibit "P" is a fair representation of the shape of the platform. The platform was about 9 or 10 feet wide on the west end.

MR. SKEEN: We offer in evidence Exhibit "P".

MR. BAGLEY: Object to it as incompetent, irrelevant and immaterial, no proper foundation having been laid.

THE COURT: What would be a proper foundation?

MR. BAGLEY: He offers the whole map, your Honor.

MR. SKEEN: Well, that part of it, of course, pertaining to this suit as to which he has testified.

MR. BAGLEY: It contains a lot of things that are not pertinent to anything that this witness has testified to.

THE COURT: Well, that, of course, would be disregarded. All parts of the map which have

no reference to this case will be disregarded, of course.

MR. BAGLEY: And this witness has said he couldn't testify to the accuracy of this map. He says it looks like it.

334 THE COURT: Well, that is some evidence. If the engineer who made the map is here and describes his methods of taking the measurements, and how the map was made, it would, of course, be more satisfactory as to its accuracy, but that is not absolutely essential. It only goes to the weight.

MR. BAGLEY: Yes, but here is a witness who says, "I won't testify as to whether that is accurate, but it looks like it." Now, I think that is not sufficient to admit a map. That is the basis of my objection.

THE COURT: I think the objection will be overruled.

MR. BAGLEY: Exception.

MR. SKEEN: My attention is called to the fact that your Honor did not rule on the offer of Exhibit "R".

THE COURT: Was it offered?

MR. HURD: We object to Exhibit "R" on the ground that it is incompetent, irrelevant and immaterial, no proper foundation has been laid,

and there is no evidence authenticating the drawing or its accuracy, in any particular whatsoever.

THE COURT: The objection will be overruled.

335 There were some steps leading down from the narrow part of the platform to within two feet of the present sidewalk on Third West and from the sidewalk back to the part that widened out, I should say, would be 30 feet. There was one jog to the east. We used to back our truck up to the platform and large transportation trucks were backed in there. Garrett & Company and Orange Transportation backed in there with trucks and trailers.

Mr. Evans, on cross-examination by Mr. Hurd, testified:

336 I was down to this property this morning. It was the first time I have been on the property since 1931. The company moved in the building in 1926. We backed trucks into the platform that was there and loaded the trucks to and from the platform. Heavier equipment backed in there and loaded to and from the platform. That use was constant all of the time we were there. The trucks would pull in a driveway which was immediately north of the building, pull up to the north and
337 back into the platform. The trucks would back up to the platform along the side of the building and that was done frequently, practically every day.

I did not observe that the trucks would pull over
339 the spur track. The spur track was smooth where
340 it crossed the sidewalk but beyond the sidewalk
to the east there was quite a bump. I don't recall
that there was any concrete north of the spur
track. I don't know about any concrete back by
the Globe Mills building, I was never back there.

341 The elevation of the original platform was
about three to three and one-half or four feet.
The platform was reached by a set of stairs which
was the same width as the platform.

342 The Kelly-Springfield Company built a ramp
which extended from the west door to the spur
track, I should say about 25 or 30 feet. The ramp
was about 5 feet wide. The ramp was built short-
ly after we went there and that was the only con-
struction placed there by Kelly-Springfield Tire
Company.

343 One side of the ramp extended down to the
ground and if I recall, the other one extended
down to the platform that then existed there. The
incline was built a foot or 18 inches above the
basic platform. The original platform continued
east of the ramp and followed the shape of the
spur track.

344 The original platform came to the east edge
of where we built our ramp. The original plat-
form followed the curve of the track and was with-

in possibly 18 inches or 2 feet from the track. There were two platforms at the entrance of the door, a lower one and a higher one, one built on top of the other. The upper platform had a ramp going down to each side of it, one going east and one going west. The west door had a ramp coming up from the west flattening out and going down to the east, which was built over the nine foot platform that was there. The upper platform was possibly four feet wide. Immediately to the east of where we built our ramp the platform was ten feet wide.

Mr. Evans, on cross-examination by Mr. Bagley, testified:

Most of the trucks loaded and unloaded on the ramp that we built. They might have been loaded anywhere on the platform. I would not say for sure that the steps west of the platform extended the full width of the platform.

The trucks would come in the driveway north of the building, pull to the north on the ground east of the sidewalk, and unload at the north end of the platform.

I have seen trucks back across the tracks to the platform and be facing north and be loaded that way. I have never observed the cement truck track north of the spur track.

350 There was a ramp running down on each side of the upper platform that was in front of the west entrance. One ramp went to the east and one went to the west and extended down to the basic platform.

351 There was an upper platform with two ramps, one extending east and one extending west, in front of each of the north doors.

352 The ramp which we built extended north 25 or 30 feet to within 18 inches or 2 feet of the spur track.

353 The west edge of the platform at the point where the jog connected with it was in the neighborhood of 30 feet wide north and south.

354 WILLARD SNOW, a witness produced on behalf of the plaintiff, in rebuttal, on examination by Mr. Skeen, testified:

My name is Willard Snow. I am employed by Kelly-Springfield Tire Company as office manager. I have been with the company since 1926.

355 At that time the company had its warehouse at 463 South Third West. In 1926 I was shipping clerk and truck driver. I observed a platform directly north of the Bailey warehouse building occupied by the Kelly-Springfield Tire Company. There were some steps leading up to the platform from the platform almost at the corner of the building. The platform was about, I imagine,

around 10, maybe 11, feet wide and then from this main platform there was another little ramp probably 5 feet wide leading up to the west door. There was a ramp directly from the west door at right angles right out to the tracks that had just been built by the company when I entered their employment. The platform ran at right angles from the west door directly out to the spur track and was probably 6 feet wide and about 25 or 30 feet long. The old platform that connected with this ramp went off east and followed the spur track around over to the end of Bailey's building.

There were no structures on the space from the west side of the west door to the track on the north and sidewalk on the west, except the platform 10 or 11 feet at the north of the building. At times I would back up at the farther end of this ramp built down to the tracks.

The Garrett Transfer trucks loaded at our warehouse and would back up to the north platform and at times would back up to the ramp, going out to the spur track. (Plaintiff's Exhibit "R" received.)

Exhibit "P" fairly represents the platform, exclusive of the new ramp that the Kelly-Springfield Tire Company put in at the time I was there.

MR. HURD: We object to that as incompetent, irrelevant and immaterial, calling for a conclusion of the witness. It attempts to get in

evidence a document concerning which, or map concerning which there has no foundation been laid, and, therefore, it is incompetent.

THE COURT: The objection will be overruled.

Mr. Snow, on cross-examination by Mr. Hurd, testified:

360 When I went down there my company had
built a ramp from the west door right down to the
railroad track. In front of the west door there
was already a platform that was raised above the
361 main, or basic, platform, about 4, maybe 4½ feet.
That upper platform was about 5 feet wide and
had a ramp on it extending to the west down to
362 the main platform, and a ramp extending to the
east down to the main platform. There was a
passageway extending south from the loading
363 platform down into the Bailey building. I know
there was a platform in front of both doors but
as to the condition of the ramp on each one I could
not say. The ramps extended out from the build-
ing about 5 feet and ran down to the main plat-
form. The ramp that Kelly-Springfield Tire Com-
364 pany built extended at right angle from the build-
ing and ran from the west door directly north
364 right out to the spur track. To the east of that
ramp the basic platform extended out to the spur
track. The east part of the Kelly-Springfield

ramp was built on the basic platform and covered a part of it.

366 I drove a truck and used to back the small International delivery truck up to the platform directly north of the building, parallel to and west of the Kelly-Springfield ramp.

367 We would sometimes come in the driveway immediately north of the building, cross the sidewalk, make a circle toward the north and back up toward the south against the platform. At times we had two or three trucks against the platform.

368 There is another driveway just to the north of the one by the building and we would sometimes drive in from Third West, back over the tracks and up to the platform. Trucks from the size of
369 transports to the little three-quarter ton truck we had all used this area to the north and to the west of the Kelly-Springfield ramp. There was no obstruction in there at the time and all of that area was used by our trucks and the trucks of other people we were doing business with. There may have been a concrete driveway north of the spur track. It looked like a lot of dirt to me. There may have been cement underneath it.

370 Exhibit "3" shows the spur track and the adjoining driveway just as it was in 1926.

Exhibit "6" shows the markings of a set of stairs. That was the location of the stairs as

they were in 1926. The cement and plaster markings show the location of the platform.

Mr. Snow, on cross-examination by Mr. Bagley, testified:

We used the Kelly-Springfield ramp mostly for unloading cars of tires. We would push the tires from the car up the incline. The main platform was about $3\frac{1}{2}$ feet from the ground and the second platform up to the door was $3\frac{1}{2}$ to $4\frac{1}{2}$ feet higher. The incline that the Kelly-Springfield Tire Company put in was about 25 or 30 feet long. The north edge of the incline was the north edge of the platform and the incline joined at the top of the upper platform, which was 6 feet wide. The east edge of the ramp was the old original wooden platform and the lower platform extended just a little under the Kelly-Springfield ramp. I would say the Kelly-Springfield ramp and the upper platform were about 30 feet long. The steps on the west side were not quite the length of the platform. They were about 4 feet wide. The platform was 10 or 11 feet wide.

E. H. MERRILL, a witness called by the plaintiff, in rebuttal, on examination by Mr. Skeen, testified:

The distance from the west side of the west door to the west side of the Bailey building is approximately 36 feet. The width of the west door is 6 feet. The distance from the north side of the

building to the north end of the wooden platform that is there at the present time is 23 feet. The distance from the west side of the building to the east side of the concrete sidewalk is 6.7 feet.

378 I am employed by the Public Service Commission of the State of Utah. Exhibit "Q" is a portion of the files of the Public Service Commission.

Q. I call your attention to a map constituting a part of the file, and I will ask you if that shows the South half of Lot 3, of Block 43, Plat A, Salt Lake City Survey?

MR. HURD: Just a minute. We object to that as incompetent, irrelevant and immaterial. The map speaks for itself as to what it shows; not the best evidence.

379 THE COURT: He may answer.

A. Yes.

Q. I will ask you whether it shows a structure north of the building located on the northwest corner of Lot 2 of Block 43, Plat A known as the Bailey building?

MR. BAGLEY: I object to that as incompetent, irrelevant and immaterial as to what the record in that case shows. We can't import that case bodily into this one.

THE COURT: The objection will be overruled.

MR. BAGLEY: Exception.

A. It does.

MR. SKEEN: We offer in evidence the file marked Exhibit "Q".

MR. BAGLEY: I object to it as incompetent, irrelevant and immaterial.

MR. SKEEN: You have examined it, haven't you?

MR. BAGLEY: Yes. It doesn't relate to anything involved in this controversy. It has nothing to do with the property here involved. Incidentally on a map attached to that is this building, but there is nothing to show that the map was designed or drawn by anybody who had in mind or cared anything about the situation here involved, and second, that it is injecting here into this proceeding another proceeding, collateral issue, and is incompetent for any purpose in connection with this case.

MR. HURD: We would like to add the further objection that it is hearsay.

380 THE COURT: I don't understand what it has to do with the case.

MR. SKEEN: It is a public document and it shows these buildings, and shows the platform.

MR. HURD: A public document?

MR. SKEEN: It is.

MR. HURD: A private document filed by the Oregon Short Line Railroad.

MR. SKEEN: It is a document that is filed in the office of the Public Utilities Commission, and it is certified by a public official as being correct.

THE COURT: Well, the objection will be overruled.

(Discussion.)

THE COURT: I am inclined to overrule the objection, but at the same time you may have to argue the effect of that, whether it is actually admissible as a public document.

MR. BAGLEY: Exception.

Mr. Merrill, on cross-examination by Mr. Bagley, testified:

381 The concrete ramp extends from the old wooden platform to the sidewalk. The area from the property line to the sidewalk is covered by a part of the ramp involved in this case.

(Title of Court and Cause):

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ENTERED ORDER

Dated July 6, 1939.

P. C. Evans, Judge.

This case having been heretofore tried before this Court sitting without a jury, argued and submitted by respective counsel, and by the Court taken under advisement, it is now by the Court ordered that the plaintiff have judgment against the defendants in accordance with the prayer of the complaint.

P. C. EVANS, *Judge.*

(Title of Court and Cause):

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

This cause having come on regularly for hearing before the Honorable P. C. Evans, one of the judges of the above entitled Court, J. D. Skeen and E. J. Skeen appearing as attorneys for the plaintiff; Hurd and Hurd appearing as attorneys for the defendants, Bailey & Sons Company, a corporation, and Seymour N. Bailey and Emma Z. (C.) Bailey, his wife, J. W. Summerhays & Sons Company, a corporation, C. E. Summerhays and J. J. Summerhays; Emerson C.

Willey appearing as attorney for John Scowcroft & Sons Company, a corporation; Bagley, Judd, Ray & Nebeker appearing as attorneys for the defendant, Robert Bailey Whitehill; Moyle, Richards & McKay appearing as attorneys for the defendant, Colorado Animal By-Products Company, a corporation and the Court having heard the evidence adduced on behalf of the parties hereto and being fully advised in the premises, now makes the following:

FINDINGS OF FACT.

1.

116 That the defendant, Bailey & Sons Company is a corporation organized and existing under the laws of the State of Utah with its principal place of business at Salt Lake City, Utah; that the defendant, J. W. Summerhays & Sons Company, is a corporation organized and existing under the laws of the State of Utah with its principal place of business at Salt Lake City, Utah; that the defendant, John Scowcroft & Sons Company, is a corporation organized and existing under the laws of the State of Utah with its principal place of business at Ogden, Utah; that the defendant, Colorado Animal By-Products Company, is a corporation organized and existing under the laws of the State of Utah with its principal place of business at Salt Lake City, Utah.

2.

That the plaintiff is the owner in fee simple of the following described real estate located in Salt Lake County, State of Utah:

The South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey.

3.

That for more than seven (7) years next preceding the commencement of this action, the plaintiff and his predecessors in interest have been in open, notorious, continuous and adverse possession of the said real estate described above under claim of right, and with hostility toward the claims of all other persons, and said possession has been and now is exclusive, except for certain easements in favor of the defendants, which are hereinafter particularly described, and except for certain wrongful encroachments and trespasses upon said property, hereinafter described, and during said time the plaintiff has paid all taxes legally levied and assessed against said real estate.

4.

That the defendant, Bailey & Sons Company, a corporation, is now and has been for many years the owner in fee simple of the following described

real property abutting the plaintiff's property on the South, to-wit:

Commencing at a point $83\frac{1}{2}$ feet West from the Southeast corner of Lot 2, Block 43, Plat "A" Salt Lake City Survey, and running thence North 10 rods; thence East $25\frac{3}{4}$ feet; thence South 10 rods; thence West $25\frac{3}{4}$ feet to the place of beginning.

5.

That the defendant, John Scowcroft & Sons Company, a corporation, is the owner in fee simple of the following described real estate abutting plaintiff's property on the South, to-wit:

Commencing 99 feet East of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, thence East $57\frac{3}{4}$ feet; thence North 10 rods; thence West $57\frac{3}{4}$ feet; thence South 10 rods to the place of beginning, together with the appurtenances pertaining thereto, including all trackage rights, together with right of way for loading and unloading cars over Oregon Short Line Spur Track.

Also:

Commencing $9\frac{1}{2}$ rods East from the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, thence North 10 rods; thence East $3\frac{1}{2}$ rods; thence South 10 rods; thence West $3\frac{1}{2}$ rods to the beginning.

Also:

Commencing at a point 7 rods West of the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East 32 feet; thence South 10 rods; thence West 32 feet to the beginning.

6.

That the defendant, Robert Bailey Whitehill is the owner in fee simple of an undivided $\frac{1}{2}$ interest in and to real estate abutting plaintiff's property on the South and particularly described as follows, to-wit:

Commencing at a point 6 rods North of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, and run. th. North 4 rods; thence East 6 rods; thence South 10 rods; thence West $2\frac{1}{2}$ rods; thence North 6 rods; then West $3\frac{1}{2}$ rods to the place of beginning, together with the tenements, buildings and appurtenances thereon and thereto in any way belonging or in any manner appurtenant, including the Cudahy Building and Gibson Building thereon situate.

7.

That the defendants, J. J. Summerhays and C. E. Summerhays, are owners in fee simple of the following described real estate, to-wit:

Commencing at the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake

City Survey and running thence North 99.5 feet; thence East 58.25 feet; thence South 99.5 feet; thence West 58.25 feet to the place of beginning, together with a right of way in common with others over the following described real estate, to-wit:

Commencing 99 feet East of the Northwest corner of Lot 2, Block and Plat aforesaid and running thence South 76 feet; thence West 40.75 feet; thence North 10.5 feet; thence East 32.75 feet; thence North 65.5 feet; thence East 8 feet to the place of beginning.

8.

That the defendant, Colorado Animal By-Products Company, a corporation, is the owner in fee simple of an undivided $\frac{1}{2}$ interest in real estate abutting plaintiff's real estate on the South,
119 and particularly described as follows, to-wit:

Commencing $99\frac{1}{2}$ feet North of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, and running thence North 65.5 feet; thence East 99 feet; thence South 65.5 feet; thence West 99 feet to the place of beginning, subject to the following easements and right of ways over the following:

Commencing 99 feet East of the Northwest corner of Lot 2, as aforesaid; thence South 65.5 feet; thence West 10 feet; thence North 65.5 feet; thence East 10 feet to place of beginning.

9.

That the defendants, Seymour N. Bailey and Emma Z. (C.) Bailey, his wife, are the owners in fee simple of an undivided $\frac{1}{2}$ interest in and to the following described real estate:

Commencing 58.25 feet East of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, and running thence North 99.5 feet; thence East 40.75 feet; thence South 99.5 feet; thence West 40.75 feet to the place of beginning, together with a right of way in common with others over and upon the following described real estate, to-wit:

Commencing 99 feet East of the Northwest corner of said Lot 2, Block and Plat aforesaid, and running thence South 76 feet; thence West 40.75 feet; thence North 10.5 feet; thence East 32.75 feet; thence North 65.5 feet; thence East 8 feet to the place of beginning, to be kept open for loading and unloading goods, merchandise and other commodities from the platform along the south line of Lot 3, Block and plat aforesaid.

10.

That for many years prior to the 9th day of August, 1923, one Bert N. Bailey and the Defendant, Seymour N. Bailey, were owners in fee simple of the South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey, now owned by the

plaintiff and the following described real estate in Lot 2 of said Block and Plat:

Commencing at a point $83\frac{1}{2}$ feet West from the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey and running thence North 10 rods; thence East $25\frac{3}{4}$ feet; thence South 10 rods; thence West $25\frac{3}{4}$ feet to the place of beginning.

Commencing at a point 6 rods North of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, and running thence North 4 rods; thence East 6 rods; thence South 10 rods; thence West $2\frac{1}{2}$ rods; thence North 6 rods; thence West $3\frac{1}{2}$ rods to the place of beginning, together with the tenements, buildings and appurtenances thereon and thereto in any way belonging or in any manner appurtenant, including the Cuday Building and Gibson Building thereon situate.

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Commencing at the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey and running thence North 99.5 feet; thence East 58.25 feet; thence South 99.5 feet; thence West 58.25 feet; to the place of beginning, together with a right of way in common with others over the following described real estate, to-wit:

Commencing 99 feet East of the Northwest corner of said Lot 2, Block and Plat aforesaid, and running thence South 76 feet; thence West 40.75 feet; thence North 10.5 feet; thence East 32.75 feet; thence North 65.5 feet; thence East 8 feet to the place of beginning to be kept open for loading and unloading goods, merchandise and other commodities from the platform

along the south line of Lot 3, Block and Plat aforesaid:

Commencing 99 feet East of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence East $57\frac{3}{4}$ feet; thence North 10 rods; thence West $57\frac{3}{4}$ feet; thence South 10 rods to the place of beginning.

11.

By a deed dated the 9th day of August, 1923, the defendant, Seymour N. Bailey, sold and he and his wife, the defendant, Emma Z. (C.) Bailey, conveyed to the said Bert N. Bailey an undivided $\frac{1}{2}$ interest in and to the South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey now owned by the plaintiff, which said deed contained a reservation in words and figures as follows, to-wit:

"Reserving, however, to the grantors the perpetual right to the maintenance and use of the platform now located on the Southern portion of said premises about 10 feet wide including the overlapping roof for said platform including also the curve thereof along the railway spur as at present constructed, with full right to repair, reconstruct or rebuild the same within its present location.

"Also reserving the perpetual right to the use of the trackage over and along the South line of said premises and to the team, truck or auto drive along the said track all to be used in connection and for the conveyance of Lot 2, of said Block for the loading and unloading of merchandise.

“It is also hereby agreed that without the consent of grantor, Seymour N. Bailey or his assigns, that no right shall be granted for the use of said railway spur beyond the East end of said Lot 3.”

12.

That on or about the 9th day of August, 1923, the said Bert N. Bailey and Leona Bailey, his wife, and the defendant, Seymour N. Bailey and the defendant, Emma Z. (C.) Bailey, his wife, conveyed to the defendant, Bailey & Sons Company, the following described real estate, to-wit:

Commencing at a point $83\frac{1}{2}$ feet West from the Southeast corner of Lot 2, Block 43, Plat “A”, Salt Lake City Survey, and running thence North 10 rods; thence East $25\frac{3}{4}$ feet; thence South 10 rods; thence West $25\frac{3}{4}$ feet to the place of beginning, together with trackage privilege now in use at the North end of said property, subject to 1923 taxes which grantees assume and agree to pay.

Also:

Commencing at the Southwest corner of Lot 2, Block 43, Plat “A”, Salt Lake City Survey, and running thence North 99.5 feet; thence East 58.25 feet; thence South 99.5 feet; thence West 58.25 feet to the place of beginning.

Also a perpetual right to the use of the railroad spur together with team, truck and auto drive along the north line thereof and the platform for loading and unload-

ing from vehicles and cars through and over a part of said Lot 3 of said block and plat as at present constituted with a right to repair, reconstruct or rebuild the same as shall from time to time become necessary within its present location.

Also a perpetual right of way for ingress, egress and regress for all purposes over the following strip of ground, to-wit:

Commencing 99 feet East of the Northwest corner of Lot 2, Block and Plat aforesaid, and running thence South 76 feet; thence West 40.75 feet; thence North 10.5 feet; thence East 32.75 feet; thence North 65.5 feet; thence East 10 feet to the place of beginning.

13.

That at the time of the execution of said deeds there was located on the South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", of Salt Lake City Survey, a railroad spur track and loading platform; that at said time as it does now, the said spur track curved across the Southwest corner of said Lot 3 and extended easterly along the South boundary to the East boundary of said Lot, and at the time of execution of the said deeds, the said loading platform was constructed of lumber, was about 4 feet high and covered the following described land in Lot 3:

Beginning at a point 7.3 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence North 10.7 feet; thence East 34 feet; thence

North 14.6 feet; thence South approximately 70 degrees East 61.2 feet following the curve of the Oregon Short Line Tracks and on the South side thereof; thence South 5.0 feet to the south side of said Lot 3; thence West 91.7 feet to point of beginning. Also steps to said platform extending 7 feet West and 5 feet North from the Southwest corner of said platform.

That at the time of the execution of said deeds, there was a roof extending over that portion of the said South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", described as follows, to-wit:

Beginning at a point 29 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence North 11.5 feet; thence East 57 feet; thence South approximately 78 degrees East 13 feet; thence South approximately 6.6 feet to the South line of said Lot 3; thence West 69 feet to point of beginning.

- 122 At said time there was located on the easterly part of the South $\frac{1}{2}$ of said Lot 3, a warehouse which was served by said spur track and which warehouse is now owned by the plaintiff.

14.

That during or about the year 1932, the defendants, Bailey & Sons Company, a corporation, Seymour N. Bailey and Emma Z. (C.) Bailey, his wife, wrongfully and without the knowledge and

consent of the plaintiff constructed, or caused to be constructed, upon plaintiff's said property, a concrete ramp or loading platform which occupies all of that portion of plaintiff's property South of the said spur tracks and West of a point 56½ feet East of the Western boundary of said Lot 3; that Bailey & Sons Company, a corporation, Seymour N. Bailey and Emma Z. (C.) Bailey, his wife, C. E. Summerhays, J. J. Summerhays, Colorado Animal By-Products Company, a corporation, and Robert Bailey Whitehill, and each of them asserted and claimed the right to perpetually maintain and use the said concrete ramp for the purpose of driving trucks, wagons and other vehicles over and upon said ramp for loading and unloading purposes and to exclude the plaintiff from the use of that portion of his said premises covered by said ramp, that the construction, maintenance and use of said ramp by the said defendants has increased the burden upon plaintiff's property to his injury and was and is wrongful.

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15.

That the defendants, and each of them, except the defendant, John Scowcroft and Sons Company, are the owners of the perpetual right of the use and maintenance of a loading platform

approximately 4 feet high over and upon the following described part of plaintiff's land, to-wit:

Beginning at a point 7.3 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence North 10.7 feet; thence East 34 feet; thence North 14.6 feet; thence South approximately 70 degrees East 61.2 feet following the curve of the Oregon Short Line tracks and on the South side thereof; thence South 5.0 feet to the South side of said Lot 3; thence West 91.7 feet to point of beginning. Also steps to said platform extending 7 feet West and 5 feet North from the South west corner of said platform.

16.

That the defendants, Bailey & Sons, a corporation; Seymour N. Bailey and Emma Z. (C.) Bailey, his wife, J. W. Summerhays & Sons Company, a corporation, Colorado Animal By-Products Company, a corporation, Robert Bailey Whitehill; C. E. Summerhays and J. J. Summerhays are the owners of the perpetual right to use a roof over plaintiff's land particularly described as follows, to-wit:

Beginning at a point 29 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence North 11.5 feet; thence East 57 feet; thence South approximately 78 degrees East 13 feet; thence South approximately 6.6 feet to the South line of said Lot 3; thence West 69 feet to point of beginning.

with full right to repair, reconstruct or rebuild said platform and roof within the location described above; that the defendants are also the owners of the perpetual right to use of the spur track over and across the Southwest corner of plaintiff's said land and that portion of plaintiff's land between the south side of said spur track and the south boundary of plaintiff's said land in connection with and for the convenience of those parts of Lot 2 of the said Block 43, Plat "A", Salt Lake City Survey which are owned by the said defendants, except the defendant, John Scowcroft & Sons Company, a corporation.

17.

That the said John Scowcroft & Sons Company is the owner of the easements and privileges described in the foregoing paragraph solely for the use and benefit of the following described real estate, to-wit:

Commencing 99 feet East of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, thence East $57\frac{3}{4}$ feet; thence North 10 rods; thence West $57\frac{3}{4}$ feet; thence South 10 rods to the place of beginning.

That the defendant, John Scowcroft & Sons Company have no other right, title or interest in or to plaintiff's said real estate and particularly have no easement, right of way, license or other

interest in said real estate for the use and benefit of the following described real estate:

Commencing $9\frac{1}{2}$ rods East from the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East $3\frac{1}{2}$ rods; thence South 10 rods; thence West $3\frac{1}{2}$ rods to the place of beginning.

Also:

Commencing at a point 7 rods West of the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East 32 feet; thence South 10 rods; thence West 32 feet to the place of beginning.

18.

That except as herein specifically described the defendants have no interest in or title to plaintiff's said real estate and particularly have no easement, right of way, license or other interest in or to said land for the use and benefit of all or any part of Lot 2, Block 43, Plat "A", Salt Lake City Survey or other land.

From the foregoing Findings of Fact the Court now draws the following:

CONCLUSIONS OF LAW.

1.

That the plaintiff is entitled to a decree of this court quieting his title to the following real

estate located in Salt Lake County, State of Utah,
to-wit:

The South $\frac{1}{2}$ of Lot 3, Block 43, Plat
“A”, Salt Lake City Survey

subject only to the easements and right of ways
hereinafter specifically described.

2.

That the defendants, Seymour N. Bailey and Emma Z. (C.) Bailey, his wife, C. E. Summerhays, J. J. Summerhays, Colorado Animal By-Products Company, a corporation, Bailey & Sons Company, a corporation, and Robert Bailey Whitehill, are entitled to use, maintain, repair, rebuild or reconstruct a loading platform upon the following described portion of plaintiff's land:

Beginning at a point 7.3 feet East of the Southwest corner of Lot 3, Block 43, Plat “A”, Salt Lake City Survey; thence North 10.7 feet; thence East 34 feet; thence North 14.6 feet; thence South approximately 70 degrees East 61.2 feet following the curve of the Oregon Short Line tracks and on the South side thereof; thence South 5.0 feet to the South side of said Lot 3; thence West 91.7 feet to point of beginning. Also steps to said platform extending 7 feet West and 5 feet North from the Southwest corner of said platform.

That said defendants are entitled to maintain, repair and use the overlapping roof above said plaintiff's land described as follows:

Beginning at a point 29 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence North 11.5 feet; thence East 57 feet; thence South approximately 78 degrees East 13 feet; thence South approximately 6.6 feet to the South line of said Lot 3; thence West 69 feet to point of beginning.

That said defendants are entitled to use that portion of plaintiff's land lying south of the Oregon Short Line spur track for loading and unloading wagons, trucks and other vehicles to and from said platform and that said rights are not exclusive of like rights of the plaintiff, all for the use and benefit of the following described land, to-wit:

Commencing at the Northwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, thence South 10 rods; thence East 6 rods; thence North 10 rods; thence West 6 rods to place of beginning.

3.

That the defendant, John Scowcroft & Sons Company, a corporation, is entitled to the use of that portion of the plaintiff's premises lying between the Oregon Short Line spur track and the south boundary of the said Lot 3, Block 43, Plat "A", Salt Lake City Survey for loading and

unloading cars upon said spur track for the use and benefit of the following described real estate, to-wit:

Commencing 99 feet East of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence East $57\frac{3}{4}$ feet; thence North 10 rods; thence West $57\frac{3}{4}$ feet; thence South 10 rods to the place of beginning, together with the appurtenances pertaining thereto, including all trackage rights, together with right of way for loading and unloading cars over Oregon Short Line spur track.

- 126 That the defendant, John Scowcroft & Sons Company, a corporation, has no right to or interest in or easement upon the plaintiff's said real estate for the use and benefit of the following described real estate to-wit:

Commencing $9\frac{1}{2}$ rods East from the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, thence North 10 rods; thence East $3\frac{1}{2}$ rods; thence South 10 rods; thence West $3\frac{1}{2}$ rods to the beginning.

Commencing at a point 7 rods West of the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East 32 feet; thence South 10 rods; thence West 32 feet to the beginning.

4.

That the defendant, Bailey & Sons Company, a corporation, has an easement upon that portion

of plaintiff's premises lying South of the said spur track for purposes of loading and unloading cars for the use and benefit of the following described real estate, to-wit:

Commencing at a point $83\frac{1}{2}$ feet West from the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey, and running thence North 10 rods; thence East $25\frac{3}{4}$ feet; thence South 10 rods; thence West $25\frac{3}{4}$ feet to the place of beginning.

4.

That the plaintiff is entitled to a decree of this court adjudging and decreeing that the defendants, and each of them have no right, title or interest in or to said plaintiff's land except as described in the foregoing conclusions of law; that the said easements are not exclusive to the defendants; that the plaintiff has a right to the use of his property subject only to the rights of the said defendants to make joint use of said land to the extent and for the purposes herein specifically stated and the defendants have no right to erect or maintain any structure whatsoever upon the land of the plaintiff, except as described in paragraph two of the conclusions of law, or in any way to obstruct or interfere with the joint use of said right of way and spur track by the plaintiff and his successor in interest; that the concrete ramp or loading platform now upon plaintiff's premises described in the foregoing

Findings of Fact which was erected about the year 1932 constitutes an invasion of plaintiff's rights, exceeds the rights of the defendants to the use of said lands for the purposes specified herein and said structure was wrongfully constructed and maintained.

5.

That the defendants, and each of them, are the owners of the right to the use in common with the plaintiff of the Oregon Short Line spur track, which said track curves across the southwest corner of plaintiff's said land and extends easterly along the south boundary thereof, for purposes of loading and unloading railroad cars for the use and benefit of the lands hereinabove described except the defendant, John Scowcroft & Sons Company, a corporation, has no right to use the said spur track for any purpose whatsoever for the use and benefit of the following described real estate, to-wit:

Commencing $9\frac{1}{2}$ rods East from the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East $3\frac{1}{2}$ rods; thence South 10 rods; thence West $3\frac{1}{2}$ rods to the beginning.

Commencing at a point 7 rods West of the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East 32 feet; thence South 10 rods; thence West 32 feet to the beginning.

6.

128 That the plaintiff is entitled to a decree of this court requiring the said defendants, Bailey & Sons Company, a corporation, Seymour N. Bailey and Emma Z. (C.) Bailey, his wife, Robert Bailey Whitehill, J. J. Summerhays, C. E. Summerhays and the Colorado Animal By-Products Company, a corporation, to forthwith remove the said concrete ramp or loading platform from all of said plaintiff's real estate, except that covering the following described area, to-wit:

Beginning at a point 7.3 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence North 10.7 feet; thence East 34 feet; thence North 14.6 feet; thence South approximately 70 degrees East 61.2 feet following the curve of the Oregon Short Line track and on the south side thereof; thence South 5.0 feet to the South side of said Lot 3; thence West 91.7 feet to point of beginning. Also steps to said platform extending 7 feet West and 5 feet North from the Southwest corner of said platform.

Dated this 14th day of August, 1939.

P. C. EVANS, *Judge.*

Attest:

WILLIAM J. KORTH, *Clerk.*

By HOGANSON.

Filed Aug. 14, 1939.

(Title of Court and Cause):

105 DEFENDANTS' OBJECTIONS AND PROPOSED AMENDMENTS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

Come now the defendants, Bailey & Sons Company, Seymour N. Bailey and Emma Z. (C.) Bailey, his wife, J. W. Summerhays & Sons Company, C. E. Summerhays and J. J. Summerhays, and object to the Findings of Fact, Conclusions of Law and Decree as proposed by the plaintiff, and to the whole thereof, upon the grounds and for the reasons that said proposed Findings of Fact, Conclusions of Law and Decree are not supported by and contrary to the evidence, and that the same are and contain findings, conclusions and proposed adjudications outside and beyond the issues in said cause, and that the same are contrary to and against law, and do not contain findings upon material issues in said cause, and that said proposed Findings, Conclusions and Decree, or some of them, purport to find and be predicated upon purported facts and claims of which there is no evidence in said cause.

Defendants further separately and specifically object to the following proposed Findings of Fact, Conclusions of Law and portions of said proposed Decree, as follows and upon the following grounds, to-wit:

1. Object to proposed Finding of Fact No. 2 upon the ground and for the reason that the same is contrary to and not supported by the evidence, and wholly fails to find or take into consideration defendants' rights in said described property.

2. Object to proposed Finding of Fact No. 3 upon the ground and for the reason that the same is not within the issues in said cause, is contrary to and not supported by the evidence, particularly and specifically in that plaintiff has not been in
 106 open, notorious or continuous adverse possession
 383 of said described property with hostility toward the claims of these defendants, but on the contrary plaintiff's said described property has been in open, notorious and continuous use by defendants and their predecessors in interest for the period proposed to be found, as well as for many years prior thereto, for the driving of trucks and other vehicles over and upon the same, and for the loading and unloading of merchandise and other commodities to and from the platforms along the south line of said property, and to and from the buildings and warehouses adjoining said property on the south.

3. Object to proposed Finding of Fact No. 11 on the ground and for the reason that the same is contrary to the evidence and false to the record in said case, particularly in that the words "and

to the premises'' are attempted to be stricken from the reservation in the deed therein mentioned and described, and which quoted words appear and are embodied in such reservation in said deed.

4. Object to proposed Finding of Fact No. 13 on the ground and for the reason that the same is contrary to and not supported by the evidence, and particularly in that there is no evidence to support or upon which a finding might be based that the loading platform therein referred to, or the roof therein mentioned, covered the area therein described by metes and bounds, and said proposed Finding appears to be based and predicated upon matters and claims of which there is no evidence in the record in said cause.

5. Object to proposed Finding of Fact No. 14 upon the ground and for the reason that the same is contrary to and not supported by the evidence, and particularly in that there is no evidence whatsoever that the concrete ramp or loading platform therein referred to was wrongfully constructed, or that plaintiff is thereby excluded from any rightful use of the portion of his said lands covered thereby, or that the construction, maintenance or use thereof has increased the burden upon plaintiff's property, or that the construction or maintenance of the same is wrongful or without right.

107 6. Object to proposed Findings of Fact Nos.
384 15, 16 and 17, upon the ground and for the reason
that the same, and each of them, are contrary to
and not supported by the evidence, and partic-
ularly are the same contrary to and not supported
by the evidence in limiting the defendants' ease-
ment and right to the maintenance and use of
plaintiff's said property to the areas in said
proposed Findings described, and that there is no
evidence whatsoever upon which said proposed
Findings may be predicated, or which would au-
thorize the Court to find that defendants are only
entitled to use and maintain platforms, roofs,
easements or other facilities over and upon the
areas in said proposed Findings described, and
said proposed Findings appear to be based and
predicated upon matters and claims of which
there is no evidence in the record in said cause.

7. Object to proposed Finding of Fact No.
18 on the ground and for the reason that the same
is contrary to and not supported by the evidence
in said cause, constitutes but a mere conclusion
and is against law.

8. Object to proposed Findings of Fact Nos.
13, 14, 15, 16, 17 and 18, and separately as to
each of them, upon the further ground and for the
further reason that said proposed Findings of
Fact, and each of them, are not within the issues
in said cause, and are contrary to the Court's

finding and order for judgment in said action, and there is no pleading or prayer for relief authorizing any such finding.

9. Object to proposed Conclusion of Law No. 1, upon the ground and for the reason that the same is contrary to, and not supported by the evidence or the Findings of Fact, and that the same is against law.

10. Object to proposed Conclusion of Law No. 2 upon the ground and for the reason that the same is contrary to and not supported by the evidence or the Findings of Fact, and the same is against law, not within the issues in said cause, and appears to be based and predicated upon matters and claims not in issue in said cause and concerning which there is no evidence in the case.

108 11. Object to proposed Conclusion of Law
385 No. 3 upon the ground and for the reason that the same is contrary to and not supported by the evidence or proposed Findings of Fact, is against law and not within the issues in said cause.

12. Object to proposed Conclusion of Law No. 4 upon the ground and for the reason that the same is contrary to and not supported by the evidence or proposed Findings of Fact, is against law and not within the issues in said cause.

13. Object to proposed Conclusion of Law No. 5 (4) upon the ground and for the reason that

the same is contrary to and not supported by the evidence or the Findings of Fact, and is against law, is not within the issues in said cause, and embodies matters not supported by any pleading or prayer for relief in said action.

14. Object to proposed Conclusion of Law No. 6 (5) upon the ground and for the reason that the same is contrary to and not supported by the evidence, is against law and not within the issues in said cause, and the portion of said proposed Conclusion proposing to limit the defendants' right to the use of plaintiff's said land to the portion therein described is contrary to and not supported by the evidence and is against law and not within the issues.

15. Object to proposed Conclusion of Law No. 6 upon the ground and for the reason that the same is contrary to and not supported by the evidence or the proposed Findings of Fact, and is against law, not within the issues and purports to be based and predicated upon matters and claims of which there is no evidence in said case.

16. Object to the proposed Decree on the ground and for the reason that the same is contrary to and not supported by the evidence or the Findings of Fact or Conclusions of Law; that the same is against law and not within the issues in said cause, and purports to be based and predi-

cated upon and to adjudge matters and claims of which there is no evidence or pleading or prayer for relief to support.

And defendant proposes that if any Findings of Fact, Conclusions of Law or Decree be made and entered herein that the same be limited to the issues presented by the pleadings in said cause, and to findings upon and adjudication of plaintiff's claims to title to the lands described in his complaint in said action, and that such Findings, 109 Conclusions and Decree be limited to and embody 386 only a finding and adjudication that plaintiff is the owner of the real property described in his complaint, subject to the easements, rights of way and other rights and privileges asserted by defendants and mentioned, referred to and described in the Deeds of conveyance of said lands and lands owned by defendants in the lot adjoining plaintiff's said lands on the south, described as Lot 2, Block 43, Plat "A", Salt Lake City Survey.

And defendants further propose, while expressly objecting thereto, that if any Findings of Fact, Conclusions of Law or Decree be made or entered concerning the nature and extent of defendants' easements and rights of way over and other rights in plaintiff's property, that the same include and embody Findings, Conclusions and Decree to the effect and adjudging that defendants have and are entitled to a right of way and easement over plaintiff's entire property to the

west of his warehouse building thereon for the loading and unloading of merchandise and other commodities to and from the loading platforms along the south line of said property, and to and from the warehouses and buildings adjoining plaintiff's said property on the south, and for the convenience, use and benefit of Lot 2 of Block 43, Plat "A", Salt Lake City Survey.

That said Findings of Fact, Conclusions of Law and Decree, if any be made and entered, also find, adjudge and declare that defendants are entitled to maintain and use the concrete ramp or loading platform, now situate on said property, in common with plaintiff, and that in constructing and maintaining the same, defendants were acting within the rights and authority conferred upon them by their deeds of conveyance to their several parcels of land in said Lot 2, and that the same has not unreasonably increased the burden upon plaintiff's said land.

HURD & HURD,

Attorneys for said Defendants.

Received copy of the foregoing Objections and Proposed Amendments this 7th day of August, 1939.

J. D. SKEEN & E. J. SKEEN,

Attorneys for Plaintiff

Filed Aug. 8, 1939.

387 Thereafter and on August 14, 1939, without ruling upon said objections and proposed amendments, the court signed, filed and entered its Findings of Fact, Conclusions of Law and Decree as proposed by plaintiff and served upon attorneys for defendants.

(Title of Court and Cause):

DECREE.

110 This cause having come on regularly for hearing before the Honorable P. C. Evans, one of the judges of the above-entitled Court, J. D. Skeen and E. J. Skeen appearing as attorneys for the plaintiff; Hurd and Hurd appearing as attorneys for the defendants, Bailey & Sons Company, a corporation, and Seymour N. Bailey and Emma Z. (C) Bailey, his wife, J. W. Summerhays & Sons Company, a corporation, C. E. Summerhays and J. J. Summerhays; Emerson C. Willey appearing as attorney for John Scowcroft & Sons Company, a corporation; Bagley, Judd, Ray & Nebeker appearing as attorneys for the defendant, Robert Bailey Whitehill; Moyle, Richards & McKay appearing as attorneys for the defendant, Colorado Animal By-Products Company, a corporation and the Court having heard the evidence adduced on behalf of the parties hereto, the Court having made its Findings of Fact and Conclusions of Law and being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED:

That the plaintiff is the owner in fee simple of the following real estate located in Salt Lake County, State of Utah and particularly described as follows, to-wit:

The South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey

and plaintiff's title to said real estate is hereby quieted, subject only to the easements and right of ways hereinafter specifically described.

That the defendants, Seymour N. Bailey and Emma Z. (C) Bailey, his wife; C. E. Summerhays; J. J. Summerhays; Colorado Animal By-Products Company, a corporation, and Robert Bailey Whitehill are entitled to use, maintain, repair, rebuild or reconstruct a loading platform upon the following described portion of plaintiff's land:

Beginning at a point 7.3 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence North 10.7 feet; thence East 34 feet; thence North 14.6 feet; thence South approximately 70 degrees East 61.2 feet following the curve of the Oregon Short Line tracks and on the South side of said tracks; thence South 5.0 feet to the South side of said Lot 3; thence West 91.7 feet more or less to point of beginning. Also steps, 5 feet wide, extending 7 feet West from the Southwest corner of said platform.

That said defendants are entitled to maintain, repair and use the overlapping roof above that portion of plaintiff's land particularly described as follows, to-wit:

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Beginning at a point 29 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence North 11.5 feet; thence East 57 feet; thence South approximately 78 degrees East 13 feet; thence South approximately 6.6 feet to the South line of said Lot 3; thence West 69 feet to point of beginning.

That said defendants are entitled to use that portion of plaintiff's land lying South of the Oregon Short Line Spur Track for the purpose of loading and unloading cars and for loading and unloading trucks, wagons, and other vehicles to and from the loading platform hereinabove described, and that said rights are not exclusive of like rights of the plaintiff. That said uses of plaintiff's land shall be for the benefit of the following described land in Lot 2 and no other:

Commencing at the Northwest corner of Lot, Block 43, Plat "A", Salt Lake City Survey; thence South 10 rods; thence East 6 rods; thence North 10 rods; thence West 6 rods to place of beginning.

IT IS FURTHER ORDERED, ADJUDGED
AND DECREED:

That the defendant, John Scowcroft & Sons
Company, a corporation, is entitled to the use of

that portion of plaintiff's premises lying between the Oregon Short Line Spur track and the South boundary line of Lot 3, Block 43, Plat "A", Salt Lake City Survey for loading and unloading railroad cars upon the said spur track for the use and benefit of the following described premises, to-wit:

Commencing 99 feet East of the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence East 57-3/4 feet; thence North 10 rods; thence West 57-3/4 feet; thence South 10 rods to the place of beginning, together with the appurtenances pertaining thereto, including all trackage rights, together with right of way for loading and unloading cars over Oregon Short Line Spur Track.

That the defendant, John Scowcroft & Sons Company, a corporation, has no right or title to interest in or easement upon the plaintiff's said real estate for the use and benefit of the following described land:

112

Commencing 9½ rods East from the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East 3½ rods; thence South 10 rods; thence West 3½ rods to the beginning.

Commencing at a point 7 rods West of the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East 32 feet; thence South 10 rods; thence West 32 feet to the beginning.

That the defendant, Bailey & Sons Company, a corporation, has an easement over and upon that portion of plaintiff's land lying South of the Oregon Short Line Spur Track for the purpose of loading and unloading to and from railroad cars on said spur track for the use and benefit of the following described real estate, to-wit:

Commencing at a point $83\frac{1}{2}$ feet West from the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; and running thence North 10 rods; thence East $25\frac{3}{4}$ feet; thence South 10 rods; thence West $25\frac{3}{4}$ feet to the place of beginning.

That the defendants, and each of them, are the owners of the right to the use in common with the plaintiff of the Oregon Short Line Spur Track which said track curves across the Southwest corner of plaintiff's said land and extends easterly along the South boundary thereof for purposes of loading and unloading railroad cars for the use and benefit of the lands hereinabove described, except the defendant, John Scowcroft & Sons Company, a corporation, has no right to use the said spur track for any purpose whatsoever for the use and benefit of the following described real estate, to-wit:

Commencing $9\frac{1}{2}$ rods East from the Southwest corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East $3\frac{1}{2}$ rods; thence South

10 rods; thence West $3\frac{1}{2}$ rods to the beginning.

Commencing at a point 7 rods West of the Southeast corner of Lot 2, Block 43, Plat "A", Salt Lake City Survey; thence North 10 rods; thence East 32 feet; thence South 10 rods; thence West 32 feet to the beginning.

IT IS FURTHER ORDERED, ADJUDGED
AND DECREED:

113 That the defendants, and each of them, have no right, title or interest in and to plaintiff's said land, except as hereinabove described; that said easements are not exclusive to the defendants; that plaintiff has a right to the use of his property subject only to the right of the said defendants to make joint use thereof to the extent and for the purposes hereinabove specifically stated and no others, and the defendants have no right to erect or maintain any structure whatsoever upon the said land of the plaintiff except the loading platform herein specifically described or to obstruct or interfere with the joint use of said right of ways, loading platform and spur track by the plaintiff, his successors or assigns, and that the concrete ramp or loading platform now upon the plaintiff's premises, which said platform was erected about the year 1932 and which covers all of plaintiff's land located South of the Oregon Short Line Spur Track and West of a point $56\frac{1}{2}$

feet East of the Western boundary of said Lot 3, Block 43, Plat "A", Salt Lake City Survey, constitutes an invasion of plaintiff's rights, exceeds the right of the defendants to use plaintiff's land for the purposes herein specifically set forth and said structure was wrongfully constructed and is being wrongfully maintained.

**IT IS FURTHER ORDERED, ADJUDGED
AND DECREED:**

That the defendants, Bailey & Sons Company, a corporation; Seymour N. Bailey and Emma Z. (C.) Bailey, his wife; Robert Bailey Whitehill; C. E. Summerhays; J. J. Summerhays and the Colorado Animal By-Products Company, a corporation, forthwith remove the said concrete ramp or loading platform from all of plaintiff's said real estate, except the following described area, to-wit:

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Beginning at a point 7.3 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence North 10.7 feet; thence East 34 feet; thence North 14.6 feet; thence South approximately 70 degrees East 61.2 feet following the curve of the Oregon Short Line Tracks and on the South side thereof; thence South 5 feet to the South side of said Lot 3; thence West 91.7 feet more or less to point of beginning. Also steps, five (5) feet wide, extending 7 feet West from the Southwest corner of said platform.

IT IS FURTHER ORDERED, ADJUDGED
AND DECREED:

That the plaintiff have judgment against the defendants, and each of them for his costs herein expended.

Dated this 14th day of August, 1939.

P. C. EVANS,
Judge.

Filed August 14, 1939.

129 Written Notice of Judgment was served upon
defendants August 15, 1939, and filed August 15,
1939.

131 Thereafter Notice of Intention to Move and
387 Motion for New Trial was served and filed separately on behalf of all defendants August 19, 1939, upon the following grounds:

1. Insufficiency of the evidence to justify the decree or decision, and that it is against law.

2. Error in law occurring at the trial and excepted to by the party making the application.

388 Thereafter and on September 23, 1939, pursuant to notice, defendants' Motion for a New Trial came on for hearing before said Court, the Honorable P. C. Evans, Judge thereof, and the said Motion was made upon the minutes of the Court upon the grounds stated in said Notice of

Intention to Move for New Trial, and the following proceedings were then had and took place:

“Counsel present: Mr. E. J. Skeen, Mr. Joseph Hurd, Mr. Emerson C. Willey and Mr. Thornley K. Swan.

MR. HURD: If your honor please, I don't care to argue the motion that has been filed. I will submit that, but there are two things I would like this morning.

The decree, as it is signed, and the findings as they are signed contain a description, paragraph six of the conclusion of law, which purports to set out by metes and bounds that portion of the property of the South Half of Lot 3, which the court has found that these defendants are entitled to maintain a concrete ramp and loading platform on. I have a transcript of the evidence in the case, which I have gone over very carefully. I can not find anywhere in the transcript, nor, as I recall the maps as they were introduced in evidence—I have seen them also—anything that would indicate any support for the description that is contained in the conclusions and in the decree. I understand that after the decision was announced by the court certain surveys and measurements were made on the property from which this description was obtained, and I would like the record to show that. I don't know whether Mr. Skeen will admit it, or not.

The other thing is this, I want the court to fix the amount of the supersedeas bond pending appeal. I think that is controlled by Section 104-41-16 of the code (which counsel read). I discussed that with Mr. Skeen and suggested to him a five hundred dollar bond and he suggested a thousand dollar bond. I want the court to fix that and give us a few days, say five days, in which to furnish that bond.

MR. SKEEN: I have no objection to the time suggested. I think, however, your Honor it should be at least a thousand dollar bond.

(Discussion as to amount of bond).

THE COURT: The court will fix the bond in the sum of one thousand dollars, and you may furnish either a surety or personal bond.

MR. HURD: And may we have five days—that would be until and including the 28th—in which to furnish the bond,

389 MR. SKEEN: I have no objection to that.

THE COURT: Yes. Now, how about this description?

MR. SKEEN: Now, as to this description I will state that this description is taken from the plats and maps in evidence, and I suppose what counsel has reference to, one of the plaintiff's agents went down and rechecked the plats and

maps that are in evidence, on the ground down there, and those are the measurements. I guess your clients must have seen the agent.

MR. HURD: You made certain surveys and measurements on the ground itself after the decision was announced by the court?

MR. SKEEN: Yes, I will admit—I don't see its materiality, but the maps that were in evidence were taken down and checked, or copies of them were taken down and checked with the property again. But the description is made from the maps and not from the survey.

MR. HURD: Not from the survey that was made at that time?

MR. SKEEN: That is right.

MR. HURD: But you did make a survey and measurements?

MR. SKEEN: Well, I think Eugene Merrill took a tape measure and went down and rechecked the measurements that he had made on his original map, and which is in evidence, and which also appears in the railroad maps and the insurance maps in evidence.

MR. HURD: So the record will be clear on this, Mr. Skeen, this description commences 7.3 feet East of the Southwest corner of Lot 3, Block 43, Plat "A", Salt Lake City Survey; thence

North 10.7 feet; thence East 34 feet; thence North 14.6 feet; thence South approximately 70 degrees East 61.2 feet following the curve of the Oregon Short Line track and on the south side thereof; thence South 5.0 feet to the south side of said Lot 3; thence West 91.7 feet to the point of beginning. Also steps to said platform extending 7 feet West and 5 feet North from the Southwest corner of said platform. Now, if I understand you correctly you maintain that the starting point, 7.3 feet East of the Southwest corner of Lot 3, was obtained from those maps in evidence?

MR. SKEEN: Yes, the description was taken from the maps. I think most of the distances appear in writing right on the maps. In some a scale was used to determine them.

MR. HURD: The same is true of the dimensions of the platform, where the court fixed the dimensions of the platform that the defendants were entitled to maintain on the property, in the decree?

MR. SKEEN: Yes.

390 THE COURT: Let the motion for a new trial be denied.

MR. SWAN: May the record show that the defendant, Leona B. Whitehill, administratrix of the estate of Bert N. Bailey, Deceased, and Robert Bailey Whitehill, join in the motion of Mr. Hurd, and ask that this be made a part of the record.

MR. WILLEY: May the same be done, your Honor, in behalf of the Scowcroft & Sons Company.

THE COURT: You did join in the motion.

MR. WILLEY: In the written motion, but equally in Mr. Hurd's statement here and motion to the court.

THE COURT: Yes. Very well, let the record so show.

MR. HURD: Let the record show our exception to the Court's order denying our Motion for a New Trial.

MR. SWAN: May we have the same exception.

MR. WILLEY: And the same exception on behalf of defendant, Scowcroft & Sons Company.

135 Entered order of September 23, 1939, recites Motion of defendants for a new trial came on for hearing, was argued and denied, and amount of supersedeas bond fixed in sum of \$1000.00 to be filed within five days.

The court made extensions of time within which to settle the bill of exceptions up to and including January 15, 1940, within which time said bill of exceptions was served, settled and filed pursuant to notice duly served as shown by transcript pages 137-142.

392 Bill of Exceptions proposed and served upon counsel for plaintiff and upon counsel for all appealing defendants and defendant John Scowcroft & Sons Company, December 15, 1939, and by written stipulation it was agreed that the same might be allowed and settled without notice as and for a full, true and correct Bill of Exceptions in said cause, and thereupon the same was presented to and settled by the Judge who tried said cause, and his certificate thereto attached Jan. 3, 1940.

(Title of Court and Cause):

143 To the above named plaintiff and to J. D. Skeen and E. J. Skeen, his attorneys, to the above named defendant, John Scowcroft & Sons Company, and to Emerson C. Willey, its attorney, and to the Clerk of said Court:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the above named defendants, Bailey & Sons Company, Seymour N. Bailey and Emma Z. Bailey, his wife, J. W. Summerhays & Sons Company, Colorado Animal By-Products Company, Leona B. Whitehill, Administratrix of the Estate of Bert N. Bailey, Deceased, Robert Bailey Whitehill, C. E. Summerhays and J. J. Summerhays, intend to and do hereby, severally and each for himself and not for the other, appeal to the Supreme Court of the State of Utah

from the judgment or Decree made and entered by the above entitled District Court of the Third Judicial District in and for Salt Lake County, State of Utah, in the above entitled cause, on or about and bearing date of August 14, 1939, in favor of plaintiff and against defendants, and which judgment or decree, by its terms and among other things, purports to limit defendants' easements over, along and across plaintiff's lands in said decree described to that portion thereof lying south of the railway spur track thereon, and to require the removal from said lands of certain concrete paving and a concrete ramp thereon, all
144 as more fully set forth in the said decree which became final by an order of said Court, made and entered on, to-wit: September 23, 1939, overruling defendants' Motion for a New Trial of said action; and said defendants intend to and do hereby severally appeal from the whole and each and every part of said judgment and decree adverse to them and their several and respective rights and claims of right of easement and right of way in and to and over and upon said lands.

The appeal hereby taken is several and separate by and as to each of the said defendants hereby appealing, and is not joint by or as to either or any of said defendants, as fully and to the same extent as if each of said appealing defendants had served and filed his own individual

and separate notice of appeal, and no defendant, by this notice or otherwise, joins with him any other defendant or defendants as a party appellant to his appeal.

Dated this 18th day of December, 1939.

Said notice is duly signed by attorneys for all appellants and was duly served upon counsel for plaintiff, counsel for all appellants and counsel for defendant, John Scowcroft & Sons Company, December 18, 1939, and duly filed December 19, 1939.

Transcript on Appeal duly certified by the Clerk of the District Court and transmitted to the above entitled Supreme Court January 13, 1940.

(Title of Court and Cause):

ASSIGNMENTS OF ERROR.

Comes now the above named defendants and appellants, and severally each for himself and not for the other assigns the following errors relied upon for a reversal of the judgment appealed from, to-wit:

1. That the Court erred in overruling and denying the motion of defendants and appellants for judgment on the pleadings, to which ruling exception was duly taken. (Tr. 147-148; Ab. 78).

2. That Finding of Fact No. 2 is contrary to and not supported by the evidence, and wholly fails to find or take into consideration the rights of said defendants and appellants in the real estate in controversy. (Tr. 117; Ab. 141).

3. That Finding of Fact No. 3 is not within the issues in said cause, and is contrary to and not supported by the evidence in that plaintiff and respondent has not been in open, notorious or continuous adverse possession of the real property described in Finding of Fact No. 2, but on the contrary said described property has been in open, notorious and continuous use by appellants and their predecessors in interest for very many more than seven years prior to the commencement of this action, for the driving of wagons, trucks and other vehicles over the same, and the loading and unloading of merchandise to and from the platform maintained on the south part of said property, and to and from the warehouses adjoining said property on the south. (Tr. 117; Ab. 141).

4. That Finding of Fact No. 11 is contrary to and not supported by the evidence and is false to the record herein for the reason that the words "and to the premises" are attempted to be stricken from the reservation in the deed in said finding of fact mentioned and described, and which quoted words appear and are in fact embodied in such reservation in said deed. (Tr. 120; Ab. 147).

5. That Finding of Fact No. 13 is contrary to and not supported by the evidence, and particularly the finding that the loading platform in said finding of fact referred to, or the roof therein mentioned, covered the area therein described by metes and bounds, and said finding of fact appears to be based and predicated upon matters and claims of which there is no evidence in the record herein. (Tr. 121; Ab. 149).

6. That Finding of Fact No. 14 is contrary to and not supported by the evidence in that there is no evidence whatsoever that the concrete ramp or loading platform therein referred to was wrongfully constructed, or that respondent is thereby excluded from any rightful use of the portion of said lands covered thereby, or that the construction, maintenance or use thereof has increased the burden upon respondent's property, or that the construction or maintenance of the same is wrongful or without right. (Tr. 122; Ab. 150).

7. That Findings of Fact Nos. 15 and 16, and each of them, are contrary to and not supported by the evidence, particularly in limiting appellants' easement and right to the maintenance and use of respondent's said property to the areas in said Findings of Fact described, and that there is no evidence whatsoever in the record that appellants are only entitled to use and maintain

platforms, roofs, easements or other facilities over and upon the areas in said Findings of Fact described, and said Findings of Fact, and each of them, appear to be based and predicated upon matters and claims of which there is no evidence whatsoever in the record herein. (Tr. 123; Ab. 151).

8. That Finding of Fact No. 18 is contrary to and not supported by the evidence, and said finding constitutes but a mere conclusion and is against law. (Tr. 124; Ab. 154).

9. That the Court's Finding of Fact No. 16 is contrary to and not supported by the evidence, and is against law. (Tr. 123; Ab. 152).

10. That Findings of Fact Nos. 13, 14, 15, 16 and 18, and each of them, are not within the issues in this case, and are contrary to the Court's finding and order for judgment in said cause, and there is no pleading or prayer for relief authorizing such findings or any of them. (Tr. 121, 122, 123, 124; Ab. 149, 150, 151, 152).

11. That the Court's Conclusion of Law No. 1 is contrary to and not supported by the evidence or the Findings of Fact, and the same is against law. (Tr. 125; Ab. 154).

12. That the Court's Conclusion of Law No. 2 is contrary to and not supported by the evidence or the Findings of Fact, and the same is against

law, not within the issues in said cause and appears to be based and predicated upon matters and claims not in issue in said cause and concerning which there is no evidence in the record. (Tr. 125; Ab. 155).

13. That the Court's Conclusion of Law No. 4 is contrary to and not supported by the evidence or the Finding of Fact, and is against law and not within the issues in said cause. (Tr. 126; Ab. 157).

14. That the Court's Fifth Conclusion of Law, also designated "No. 4", is contrary to and not supported by the evidence or the Findings of Fact, and is against law and not within the issues in said cause, and embodies matters not supported by any pleading or prayer for relief in said action. (Tr. 127; Ab. 158).

15. That the Court's Sixth Conclusion of Law, designated "No. 5", is contrary to and not supported by the evidence, or the Findings of Fact, and is against law and not within the issues in said cause. (Tr. 127; Ab. 159).

16. That the Court's Seventh Conclusion of Law, designated "No. 6", is contrary to and not supported by the evidence or the Findings of Fact, and is against law. (Tr. 128; Ab. 160).

17. That the judgment and decree of the Court is erroneous, contrary to law and contrary to and not supported by the evidence or by the

Findings of Fact or the Conclusions of Law, or any of them. (Tr. 110; Ab. 169).

18. That the Court erred in permitting the respondent, Joseph F. Merrill, over appellants' objection, to testify as to the purpose for which he and his wife deeded to Zion's Savings Bank & Trust Company the property described in Exhibit "K". (Tr. 163-165, Ab. 83, 84).

19. The Court erred in permitting the respondent, Joseph F. Merrill, over appellants' objection, to testify that the map, Exhibit "A", showed the approximate size and locations of the lumber platforms referred to, upon the ground and for the reason that said testimony was incompetent, irrelevant and immaterial, and no proper foundation had been laid for the use of the map, and the same had not been identified. (Tr. 166; Ab. 79).

20. The Court erred in admitting in evidence Exhibit "L", over appellants' objection, on the ground and for the reason that said exhibit is incompetent, irrelevant and immaterial, and no proper foundation was laid for its admission. (Tr. 167; Ab. 85).

21. The Court erred in permitting the witness and respondent, Joseph F. Merrill, over appellants' objection, to testify that the Exhibits "M" and "N" indicated the location of the lum-

ber platforms referred to by the witness as he saw them in 1928. (Tr. 168; Ab. 85).

22. The Court erred in permitting, over appellants' objection, the cross-examination of the appellants' witness, William I. Richards, as to Exhibit "L" and the other exhibits of maps and drawings, on the ground and for the reason that Exhibit "L" and the other maps and drawings were admitted in evidence solely as illustrating the testimony of respondent's witnesses, Joseph F. Merrill, E. H. Merrill and Taylor H. Merrill, and not as evidence of the facts purported to be shown upon such maps and drawings. (Tr. 280, 281; Ab. 113).

23. The Court erred in admitting in evidence, over appellants' objection, respondent's Exhibit "O", for the reason that there was no proper foundation laid for the admission of said Exhibit. (Tr. 285-286; Ab. 114).

24. The Court erred in admitting in evidence, over appellants' objection, respondents' Exhibit "P", for the reason that said exhibit was irrelevant, incompetent and immaterial, and no proper foundation was laid therefor, and said exhibit was not authenticated or identified, and was not proper cross-examination. (Tr. 289; Ab. 117).

25. The Court erred in permitting the witness Richards, over appellants' objection, to testi-

fy as to a map which had not been admitted in evidence. (Tr. 293-294; Ab. 117).

26. The Court erred in permitting the witness Jensen, over appellants' objection, to testify concerning the map, Exhibit "Q". (Tr. 320; Ab. 122).

27. The Court erred in admitting in evidence, over appellants' objection, Exhibit "P", on the ground and for the reason that said exhibit was incompetent, irrelevant and immaterial, and no proper foundation had been laid for its admission. (Tr. 333-334; Ab. 126-127).

28. The Court erred in admitting in evidence, over appellants' objection, Exhibit "R", for the reason that said exhibit was incompetent, irrelevant and immaterial, and no proper foundation had been laid for admission thereof, and said exhibit was not authenticated as to its accuracy. (Tr. 334; Ab. 127).

29. The Court erred in permitting the witness Snow, over appellants' objection, to testify that Exhibit "P" was a fair representation of a platform exclusive of the ramp, installed by the Kelly-Springfield Tire Company. (Tr. 359; Ab. 132).

30. The Court erred in admitting, over appellants' objection, in evidence Exhibit "Q", upon

the ground and for the reason that said exhibit was incompetent, irrelevant and immaterial, and no proper foundation was laid for its admission and no evidence of its authenticity. (Tr. 379-380; Ab. 136-138).

31. The Court erred in failing to rule or pass upon and to allow and grant, and in effect overruling and denying appellants' objections and proposed amendments to the Findings of Fact and Conclusions of Law and Decree as proposed by the respondent, and as thereafter made and adopted by the Court. (Tr. 105-109; Ab. 161-168).

32. The Court erred in overruling and denying appellants' Motion for a New Trial filed herein. (Tr. 135; Ab. 181).

33. That Finding of Fact No. 12 is contrary to and not supported by the evidence, and is false to the record herein for the reason that the following provision is omitted from the right of way for ingress, egress and regress last mentioned and described in the deed in said finding referred to, to-wit:

“to be kept open for loading and unloading goods, merchandise and other commodities from the platform along the South line of Lot 3, Block and Plat aforesaid, above referred to, together with the right of maintaining a cover or roof over said platform at the North end of said Right of Way,”

and which said provision is in fact embodied in and appears as a part of the deed referred to in said finding. (Tr. 121; Ab. 148).

WHEREFORE, defendants and appellants pray that for the manifest errors assigned the judgment appealed from be reversed and the cause remanded for a new trial; and for such other and further order as may be meet and proper in the premises.

Duly signed by counsel for all appellants and duly served upon counsel for plaintiff, all appellants and non-appealing defendant, John Scowcroft & Sons Company, and filed herewith.

HURD & HURD,
MOYLE, RICHARDS & MCKAY,
BAGLEY, JUDD, RAY & NEBEKER,
Attorneys for Appellant.