

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 : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

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

Recommended Citation

Brief of Appellant, *Merrill v. Bailey & Sons Company et al*, No. 6219 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/605

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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.

APPELLANTS' BRIEF

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,
JUDD, RAY, QUINNEY & NEBEKER,
Attorneys for Appellants.

J. D. SKEEN and

E. J. SKEEN,

Attorneys for Respondent.

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	4
STATEMENT OF ERRORS, QUESTIONS FOR DETERMINA- TION AND BRIEF OF THE ARGUMENT	15
POINT A	16-21
POINT B	16-23
POINT C	17-30
POINT D	17-44
POINT E	17-46
POINT F	18-49
CONCLUSION	49

AUTHORITIES CITED

Atkins v. Bordman, (Mass.) 2 Met. 457, 37 Am. Dec. 100	35
Brown v. Stone, (Mass.) 10 Gray 61, 69 Am. Dec. 303	35
Bina v. Bina, (Ia.) 239 N. W. 68, 78 A. L. R. 1216	35
Burns v. Williams, (Minn.) 172 N. W. 772	36
Combined Metals v. Bastian, 71 Utah 535	22
Clemmons v. McGeer, (Wash.) 115 Pac. 1081	22
Central Christian Church v. Lennon, (Wash.) 109 Pac. 1027	35-36
Doan v. Allgood, (Ill. 1923) 141 N. E. 779	34-35
Ernst v. Allen; Allen, et al., v. Langford, 55 Utah 272	27
Eastman v. Gurrey, 15 Utah 410	50
Fields v. Cobbey, 22 Utah 415	22
Freeman v. Sayre, 48 N. J. L. 37, 2 Atl. 650	36
Guillet v. Livernois, (Mass.) 8 N. E. (2d) 921	35-37
Giauque v. Salt Lake City, 42 Utah 89	50
Heuer v. Webster, 187 Ill. App. 273	35
Herman v. Roberts, (N. Y.) 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 801	35
Hathaway v. United Tintic Mines Co., 42 Utah 520	50
Idaho Wholesale Grocery Co. v. Robinson, 54 Utah 481	22
Jensen v. Birch Creek Ranch Co., 76 Utah 356	27
Jordan v. Duke, (Ariz.) 53 Pac. 197	47
Kaatz v. Curtis, (Mass.) 102 N. E. 424	35
Leland v. Bourne, 41 Utah 125	27
Missionary Soc. v. Evrotas, (N. Y.) 175 N. E. 523	35
Newcomen v. Coulson, (Eng.) L. R. 5 Ch. Div. 133 C. A.	35
Openshaw v. Openshaw, 86 Utah 229	45

AUTHORITIES CITED—Continued

	Page
Parker v. Weber County Irr. Dist., 68 Utah 472	50
Petty v. St. George Garage Co., 60 Utah 126	45
Rollo v. Nelson, 34 Utah 116	28-29
Rick v. Wells Fargo Co., 39 Utah 130	50
Straw v. Temple, 48 Utah 258	22
Stevens v. Bird-Jex Co., 81 Utah 355	26
Smith v. Rome, 19 Ga. 89, 63 Am. Dec. 298	36
Spring Creek Irr. Co. v. Zollinger, 58 Utah 90	50
Trustees of School v. Wilson, (III.) 166 N. E. 55, 78 A. L. R. 22 and note 78 A. L. R. 44	23
Wilcox v. Cloward, et al., 88 Utah 503	50
Weber v. Wannamaker, (Colo.) 89 Pac. 780	22
Young Mines Co. Ltd. v. Blackburn, (Ariz.) 196 Pac. 167	47
 Texts:	
American Jurisprudence, Vol. 17, page 1005, Sec. 111	33
American Jurisprudence, Vol. 17, page 1006, Sec. 112	34

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

APPELLANTS' BRIEF

STATEMENT OF THE CASE.

This is an appeal from a judgment or decree of the District Court of Salt Lake County, Utah, Hon. P. C. Evans, Judge thereof, in an action brought by plaintiff

to quiet his title to certain real property in Salt Lake City, and situate on the east side of 3rd West Street, Between 4th and 5th South Streets, in said City, and known and described as the South $\frac{1}{2}$ of Lot 3, Block 43, Plat "A", Salt Lake City Survey.

Plaintiff's complaint is in the usual form for an action to quiet title, and prays that title to the real estate be quieted in plaintiff against "all claims of title to, interest in or easement over or upon said land asserted by defendants or any of them," and also prays that defendants, and each of them, be restrained and enjoined from driving trucks or other vehicles over or upon, or from otherwise taking possession of or using "all or any portion of plaintiff's real estate for any purpose whatsoever," and that defendants be required to remove from plaintiff's land a certain concrete loading platform and ramp located thereon. (Ab. 1-4). Defendants separately answered, denying plaintiff's claim of title to said property unencumbered by any easement or right of way in favor of defendants, and setting up their separate and several ownership of certain parcels of land in Lot 2 of said Block and Plat aforesaid immediately adjoining plaintiff's said lands on the south, and alleging in detail the creation and their ownership by grant, reservation and use by the common grantors of the parties and their successors in interest, of certain easements, rights of way and other rights and privileges, over, upon and in and concerning plaintiff's said land, for the use and benefit of defendants' said lands in Lot 2 aforesaid (Ab. 5-56).

Plaintiff replied to defendants' several answers, admitting defendants to be the owners of the several parcels of land adjoining plaintiff's property alleged in their answers, and further admitting that defendants own, and as alleged by them, are entitled to certain easements, rights of way and rights and privileges over, in and upon plaintiff's land, for the use and benefit of their said lands in Lot 2, but denying that said easements, rights of way and privileges are as extensive as alleged by defendants; and plaintiff further admitted that when he became the owner of his said land, there was constructed and open, visible, obvious and apparent, and in use by defendants thereon, a railroad spur track and certain lumber loading platforms; and he alleged that thereafter defendants removed a portion of such lumber loading platforms and replaced the same with a concrete platform and ramp covering a larger area than that covered by the lumber platform, and that the burden upon plaintiff's land was thereby increased and the servitude thereon attempted to be enlarged, and prayed that plaintiff have judgment as prayed in his complaint. (Ab. 56-75). Based upon these replies, defendants moved the Court for a judgment on the pleadings upon the grounds, among others, that the said replies are complete departures from plaintiff's complaint and constitute admissions of defendants' defenses, claims and demands in their answers contained, (Ab. 75-76), which motion was by the Court denied, and the case was tried to the Court without a jury, and resulted in a judgment or decree which, by its terms, and in entire disregard of the grants and reservations con-

tained in the deeds of defendants and their predecessors in interest, excludes defendants from all of plaintiff's property north of said railroad spur track, as well as some south thereof, and restricts defendants' easements and rights of way, and other rights and privileges over, in and concerning plaintiff's land, to use of said railroad spur track situate thereon, and a small portion of plaintiff's ground to the south of such spur track (Ab. 169-176). The decree further requires the removal of the entire concrete loading platform and ramp constructed thereon pursuant to the right given and reserved in the deeds of defendants and their predecessors in interest, and it is to review this judgment or decree that this appeal has been perfected.

STATEMENT OF FACTS.

As shown by the abstract of title No. 77394 prepared by the Utah Savings & Trust Abstract Company, which was received in evidence and will be herein referred to as Exhibit "X", and as is also admitted by the pleadings in the case, the grants and reservations, by which the common grantors of plaintiff and defendants granted and reserved the easements and rights which defendants claim over and concerning plaintiff's land, are contained in a certain deed dated August 9, 1923, from Bert N. Bailey and wife, and defendants, Seymour N. Bailey and Emma Z. Bailey, his wife (Bert N. Bailey and Seymour N. Bailey being the common grantors of plaintiff and defendants of all of the property here involved), to de-

fendant Bailey & Sons Company, and covering certain of defendants' property in said Lot 2, and reading, so far as the grant of the easements and rights in plaintiff's land are concerned, as follows:

“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.

“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 said Lot 2, running thence South 76 feet; thence West $40\frac{3}{4}$ feet; thence North $10\frac{1}{2}$ feet; thence East $30\frac{3}{4}$ feet; thence North $65\frac{1}{2}$ feet; thence East 10 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, 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.” (Exhibit “X”, No. 25);

and a certain other deed of the same date from defendants, Seymour N. Bailey and wife to Bert N. Bailey, covering said defendants' undivided one-half interest in

what is now plaintiff's property, and reserving said easements and rights of way to and for the use of said Lot 2, in this language:

“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, re-construct 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.” (Exhibit “X”, No. 23);

and the deed by which plaintiff acquired title to his said land from the Bailey brothers' successor in interest thereto, one Walter H. Dayton, dated August 28, 1928, contained a reference to defendants' said easements and other rights, in this language:

“Subject to loading and trackage easements, etc.” (Exhibit “X”, No. 51).

The material facts in the case are not in dispute and may be summarized as follows:

1. In 1905 and 1906, the defendant, Seymour N. Bailey, and his brother, Bert N. Bailey (now deceased) acquired, as tenants in common, the South $\frac{1}{2}$ of Lot 3, Block 43, being the property now owned by plaintiff (Exhibit "X", Nos. 5-8), and about the same time the two brothers also acquired some property in Lot 2 of the same block, and immediately adjoining said property on the south, and from time to time thereafter, the two brothers also acquired other property in said Lot 2, until eventually and by the year 1915, they had acquired and owned all of the property here involved, both plaintiff's and all of defendants, except the easterly piece of what is now the John Scowcroft & Sons Company property, which was previously owned by and known as the Fratello property (Ex. "X", Nos. 8-20), and which is not involved upon this appeal.

2. In 1907, and while so owning plaintiff's property and the property which they had acquired in said Lot 2, adjoining plaintiff's property on the South, the two Bailey brothers constructed, or caused to be constructed, a railroad spur track upon and across what is now plaintiff's property, and at or about the same time, or shortly thereafter erected a warehouse building on their property in the northwest corner of said Lot 2 (Cudahy-Northwestern Hide Company building), and certain loading platforms on the southern portion of plaintiff's land adjacent to the north side of this building, and along the south side of the spur track, to serve their warehouse building so constructed. From time to time thereafter,

the Bailey brothers erected other warehouse buildings on the property they acquired in said Lot 2, and constructed other and additional loading platforms and other facilities on what is now plaintiff's property, to serve such warehouse buildings, including a concrete team, truck and auto drive to the north of the spur track to facilitate the movement of wagons, and later trucks, in loading on the *north* side of the spur to and from box cars thereon, and also to and from the loading platforms adjoining the spur on the south side thereof; and a hay barn, stable and other buildings were also constructed on what is now plaintiff's land, to the north of this concrete team, truck and auto drive, and at the east end thereof a warehouse building, now known as the Globe Mills building, was constructed.

In connection with the construction of the buildings facing on 5th South Street (Summerhays and Seymour N. Bailey buildings), which were constructed some time after the Northwestern Hide-Cudahy building, there was constructed, at the east end of the Northwestern Hide building, a passage or runway about 10 feet wide running from the loading platforms and spur track in a southerly direction into and to serve these buildings, which had no direct access to the loading platforms, the spur track and other facilities so constructed on what is now plaintiff's property, and these buildings ever since have been and still are served by these loading platforms, spur track, team, track and auto drive and other facilities on plaintiff's property through the said runway. The loca-

tion of the various properties involved and the buildings and facilities erected and constructed thereon may be readily understood by referring to Exhibit 7 and the photographs, Exhibits 1 to 6, inclusive.

3. From the time of the construction of these various buildings and facilities, the entire South $\frac{1}{2}$ of Lot 3 (plaintiff's property) was used *for the benefit of and to serve* the Bailey brothers' property in Lot 2, and the warehouse buildings constructed thereon—the facilities on said South $\frac{1}{2}$ of Lot 3 (plaintiff's property) having been constructed and designed to serve the then owners' property in Lot 2. Throughout the years down to the present time, merchandise has been loaded to and from railroad cars on the spur track to and from the loading platform to the south thereof and over said platform to and from the warehouses abutting the same on the south, and likewise merchandise has been and still is being loaded to and from wagons and trucks to the north of the spur track to and from said loading platform, and over the same to and from said warehouses, and a like use has been and still is being made of the loading platforms at the west edge thereof where the concrete platform and ramp is now located, and virtually the whole of said South $\frac{1}{2}$ of Lot 3 (plaintiff's property) to the west of the Globe Mills building has throughout the years and down to and including the present time been used and is being used to drive wagons and trucks over and upon, to serve the warehouses on Lot 2, through and over said loading platform as it was acquired and de-

signed by the Bailey brothers to do (Ab. 90, 94, 96, 109-110).

4. In the year 1923, and while their properties were being so used, the Bailey brothers commenced severing their ownership of the several properties, and at that time Bert N. Bailey sold and conveyed to his brother, defendant, Seymour N. Bailey, his one-half interest in what is now the Summerhays building or property (subject to certain indebtedness) in exchange for defendant, Seymour Bailey's one-half interest in the South $\frac{1}{2}$ of Lot 3 (plaintiff's property)—the Summerhays property (with other property) at the direction of Seymour Bailey, being conveyed by himself and his wife, and his said brother, Bert N. Bailey and his wife, to the Bailey Company, defendant, Bailey & Sons Company, and which said deed is the one dated August 9, 1923, mentioned and referred to at the beginning of this Statement of Facts, and grants and conveys the easements, rights of way and the right to maintain and use, rebuild and repair the facilities on the South $\frac{1}{2}$ of Lot 3 (plaintiff's property) in the language hereinbefore set out; and in the deed to Bert N. Bailey of defendant, Seymour N. Bailey's, one-half interest in the South $\frac{1}{2}$ of Lot 3 (plaintiff's property), so given in exchange for the above mentioned deed to Bailey & Sons Company, and which is the second deed at the commencement of this Statement of Facts mentioned and referred to, these easements, rights and privileges were reserved to and for the use of Lot 2, in the language secondly hereinbefore set out.

5. Later, Seymour N. Bailey's one-half interest in the Northwestern Hide Company property (old Cudahy building) was conveyed to the present owner, Colorado Animal By-Products Company, with Bert N. Bailey, or his estate, retaining and continuing to own his one-half interest therein (now owned by Bert Bailey's son, defendant Robert Bailey Whitehill), and the old Scowcroft building property was sold to the present owner, Scowcroft Company, with the deeds of conveyance in each instance granting and conveying the same easements, rights of way and privileges that had been granted and reserved in the above mentioned deeds between Bert and Seymour Bailey (Exhibit "X", No. 88). At the time of all of these conveyances and down to the time of his death, Bert N. Bailey (one of plaintiff's predecessors in interest) himself owned property in Lot 2, which was served by the south $\frac{1}{2}$ of Lot 3 (plaintiff's property), and the facilities thereon—the property so owned by Bert Bailey in 1923, when and after he became the sole owner of said South $\frac{1}{2}$ of Lot 3 (plaintiff's property) under the deeds of conveyance between the Bailey brothers above referred to, consisting of an undivided one-half interest in the old Scowcroft building property and a like interest in the Seymour N. Bailey building and the Northwestern Hide & Fur Company building, which two last mentioned properties he continued to own to the time of his death, and the same is now, as above noted, owned by his heir and son, the defendant, Robert Bailey Whitehill.

6. In August 1928 when plaintiff acquired title to the South $\frac{1}{2}$ of Lot 3, as a mesne successor in interest of Bert N. Bailey and his brother, the defendant, Seymour N. Bailey, the easements, rights of way, loading platforms and other facilities above mentioned were open, visible and apparent thereon, and in open and continuous use by the defendants or their predecessors in interest just as they had been for more than twenty years, and the deeds above mentioned, wherein the easements, rights and privileges were granted and reserved, were properly of record in the office of the County Recorder of Salt Lake County, Utah, and the deed of the property to plaintiff expressly referred to these easements and rights of way, and made the conveyance subject thereto in the language thirdly set out at the beginning of this Statement of Facts.

7. About May or June of 1932, the defendants, or some of them, replaced a portion of the old lumber loading platform on the south line of plaintiff's property and adjoining the Northwestern Hide & Fur Company building, with a concrete loading platform or ramp, and paved with concrete the area from the foot of this ramp to the west line of plaintiff's property, and also an area of some 6 or 7 feet in width between such west line and the city sidewalk.

8. Prior to the construction of this concrete ramp, the area south of the spur track was not surfaced in any way, and in wet weather the ground became muddy and soggy, resulting in a virtual mud hole, making it ex-

tremely difficult to drive trucks and wagons over it in approaching and backing up to the loading platforms, and necessitating frequent dumping of cinders in the area to fill up the mud holes and make it passable (Ab. 99, 121). Some idea of the condition of this area prior to the laying of the concrete may be gained from an inspection of the photograph, Exhibit 1, showing an area in the region of the city sidewalk and west thereof where the unsurfaced ground has been cut up by trucks and wagons, and even in dry weather still has a small pool of water standing on the ground.

As previously noted, all of the foregoing facts are either admitted by the pleadings or stand uncontroverted in the record, and the only dispute in the testimony relates to the width at its western extremity of the portion of the old wooden platform that was replaced by the present concrete platform and ramp, and as to whether, in laying such concrete, the defendants covered more area than was covered by the portion of the old wooden platform so replaced by such concrete, but as the trial court's findings and decree, in excluding defendants from all of plaintiff's property north of the spur track, as well as some south thereof, is against law under and does violence to the admitted facts in the case, from which it appears that by the reservations and grants above set out, as well as the use made of plaintiff's property for more than thirty years, and the interpretation thereby placed upon such grants and reservations, defendants have, and are, as a matter of law, entitled to easements and rights of way over portions of plain-

tiff's land from which they are excluded by the decree; and as they had, as a matter of law, the right to surface the area over which they had such rights of way, including that south of the railroad spur, and to rebuild their loading platforms thereon, the above mentioned dispute in the testimony is of little, if any, importance upon this appeal, and will be considered only in relation to plaintiff's claim that the burden upon his property has been unreasonably increased by the surfacing of the portion now covered by the concrete.

Upon the facts above detailed, the trial court ordered "that plaintiff have judgment against the defendants in accordance with the prayer of the complaint" (Ab. 139), which, as previously noted, prayed that plaintiff's title be quieted against all claims of defendants, and that defendants be restrained from using plaintiff's land, or any part thereof, for any purpose whatsoever (Ab. 4); but not even counsel for plaintiff had the temerity to propose such a decree in view of the evidence in the case, and a decree of counsel's making was, therefore, entered, which is contrary to the record and the evidence, and in violation and disregard of the express terms of the grants and reservations above set out, excludes defendants from the use of the team track or auto drive and property to the north of the spur track, and limits defendants' rights in plaintiff's property to the maintenance of a platform over a small portion of the property to the south of the spur track, to review which judgment or decree, and the actions of the trial court

leading up to the entry thereof, this appeal has been perfected.

STATEMENT OF ERRORS, QUESTIONS FOR
DETERMINATION AND BRIEF OF
THE ARGUMENT.

As previously pointed out, plaintiff brought his action to quiet title to his land, alleging that defendants had no interest in or easements over or upon the same, or any part thereof. In reply to defendants' answers, setting up their easements and rights of way and other rights and privileges over and in and concerning his property, plaintiff admitted the terms of the grants and reservations creating such easements and rights, and that defendants had the easements and rights alleged by them, but charged that defendants had exceeded their rights in paving some of the area in question and covering with a concrete platform and ramp more area than had been covered by the portion of the wooden platform which the same replaced; and the case was thereby attempted to be converted from a suit to quiet title into one to determine the extent of easements and rights admittedly possessed by defendants, contrary to the allegations of the complaint; and the case was thus tried and required to be tried upon issues framed by defendants' answers and plaintiff's replies, and the allegations thereof, and not in anywise by plaintiff's complaint.

Because of this exceedingly unusual procedure and because the trial court, in undertaking to decide upon the issues so framed, in his findings of Fact, Conclu-

sions and Decree entirely departed from and found contrary to the admitted facts in the case, even to the extent of striking certain language from the reservations contained in one of the deeds in question (Ex. "X", No. 23) when incorporating such language in his Findings of Fact (F. of F. 2, Ab. 14—omits the words "and to the premises" after the word "premises" in line 3 thereof), and incorporating in his Findings and Decree metes and bounds figures and dimensions of which there is absolutely no evidence in the record, as well as in other respects, the defendants have necessarily assigned quite a large number of errors, many of which while addressed to separate findings of fact or conclusions of law or to the decree itself, relate to and cover the same general proposition or propositions, and therefore can well and will be grouped together for consideration herein under the following heads or propositions comprising our Statement of Errors relied upon, Questions for Determination and Brief of the Argument:

POINT A. The Court erred in denying defendant's motion for a judgment on plaintiff's complaint.

POINT B. The Court erred in its findings, conclusions and decree in excluding defendants from use of the team track or auto drive and property *north* of the spur track, and in limiting defendants' use of and easements over plaintiff's property to a portion only of the property south of the spur track, and the maintenance of a small platform thereon; and the findings of fact, conclusions of law and decree, in so excluding defendants

and limiting their use of plaintiff's property, are each contrary to and not supported by the evidence and are each against law. (Ass. of Error Nos. 2 to 10, both incl.).

POINT C. The Court erred in its findings, conclusions and decree in ordering and requiring removal of the present concrete loading platform and ramp, and in limiting the platform which may be maintained by defendants to a platform of the dimensions set forth in the findings and decree herein; and the findings of fact, conclusions of law and decree, in so requiring and limiting defendants, and in so specifying the size of such platform, are contrary to and not supported by the evidence and are against law. (Ass. of Error, Nos. 4, 5, 6, 7, Abs. 185, 186, 187).

POINT D. The Court erred in disregarding and failing to rule upon and in signing the findings of fact and conclusions of law without ruling upon, and without affording defendants an opportunity to be heard upon their objections and proposed amendments to the findings of fact, conclusions of law and decree as proposed by plaintiff, and thereafter signed by the court. (Ab. 161-69; Ass. of Error 31).

POINT E. The Court erred in admitting in evidence, over defendants' objection, and in overruling defendants' objections to each of plaintiff's Exhibits "L", "M", "N", "O", "P", "Q", and "R", and in using and considering said exhibits as evidence in the case and basing the findings and decree herein in part upon the same; and the Court also erred in finding and embody-

ing in the findings, conclusions and decree herein descriptions (by metes and bounds) of portions of plaintiff's property of which there is no evidence in the case, and which were apparently supplied de hors the record. (Ass. of Error Nos. 20 to 30, both incl.).

POINT F. The Court's decree is erroneous, contrary to law and not supported by the evidence or the findings of fact, and should be reversed (Ass. of Error Nos. 11 to 17, both incl.).

Before proceeding to a discussion of our several propositions, it may be helpful to the Court to briefly point out and state our complaints of the Court's several findings and conclusions concerning which error is assigned, and such complaints may be summarized as follows:

1. Finding of Fact No. 3 is not supported by the evidence, but is contrary thereto.

2. Finding of Fact No. 11 is contrary to the evidence and false to the record in that there has been omitted from the recital of the reservation in the deed therein referred to, the words "and to the premises" which follow the word "premises" in the third line of the second paragraph of such reservation, and by such omission, the Court has attempted to relieve plaintiff's property of a portion of the burden imposed thereon by such reservation, in violation and disregard of the express terms thereof (see Entry 23 of Abst., Ex. X).

3. Finding of Fact No. 12 is contrary to the evidence in that it omits from the grant in the deed therein

referred to certain terms thereof specifying the purpose of the grant. (See Ass. of Error No. 33; Ex. X, No. 26).

4. Finding of Fact No. 13 is contrary to and not supported by the evidence in that there is no evidence that at the time found, or at any other time, there was a platform of the dimensions therein recited, or that the roof therein referred to was of the dimensions therein found and recited, and the said dimensions and metes and bounds description in said Finding contained were apparently supplied de hors the record.

5. Finding of Fact No. 14 is not supported by the evidence in that there is no evidence whatsoever that defendants claim the right to exclude plaintiff from the use of that portion of his property covered by said concrete ramp, or that the construction, maintenance or use of said ramp has increased the burden upon plaintiff's property, or that the same is wrongful or damaging to plaintiff or his property beyond what follows and is contemplated by the rights granted and reserved in and concerning said property for the benefit of defendants' property.

6. Findings of Fact Nos. 15 and 16 are each contrary to and not supported by the evidence in that there is no evidence that defendants' right to maintain a loading platform or a roof over the same upon plaintiff's property is limited to a platform or a roof of the dimensions in said findings set forth, and the dimensions therein set forth were apparently supplied de hors the record.

7. Finding of Fact No. 18 is contrary to and not supported by the evidence, false to the record and at variance and in conflict with Finding of Fact No. 12 and the grants and reservations of defendants' easements over and rights in plaintiff's property therein and in the deeds, and in Findings of Fact Nos. 11 and 12, contained, in that by said grants and reservations there was granted and reserved for the benefit of defendants' property a perpetual right to "the use of the railroad spur, together with the team, truck and auto drive along the *north* line thereof," (Ab. 148, last paragraph of reservation), and there was also reserved a perpetual right to the use of the trackage and "to the premises" (referring to plaintiff's land), notwithstanding which, and contrary thereto, the Court finds and adjudges, in and by said finding, that defendants have no easements over or rights in any of plaintiff's property *north* of the spur track, or except to maintain a platform over a small portion of the ground south of the spur track.

8. The conclusions of law and decree are false to the record, and neither find support in the evidence or in the findings, in that they likewise exclude defendants from use of the team track or auto drive and property *north* of the spur track, and limit defendants' rights in plaintiff's property to a small area south of the spur track, and the maintenance of a small loading platform over the same, contrary to and in disregard of the express terms of the grants and reservations which are in part set out and in part falsely omitted from the Findings of Fact; and the Decree, in ordering and requiring

the removal of the concrete loading platform and ramp presently upon plaintiff's property, is against law and finds no support either in the evidence or the findings of fact.

Coming now to a consideration of our several propositions above enumerated.

POINT A. As previously pointed out, plaintiff in his complaint alleged that he and his predecessors in interest have been in open, notorious, continuous and adverse possession of the real estate therein described for more than seven years with hostility toward the claims of all other persons, and that plaintiff's possession has been exclusive except for wrongful trespasses and encroachments by defendants, and he further alleged that defendants claim the right to use a portion of his real estate for roadway purposes and loading and unloading of merchandise from and upon railroad cars and trucks which pass over and upon plaintiff's land, and to maintain and use a ramp and loading platform thereon, and that they are making constant use of the same, and that such use is wrongful and in violation of the rights of the plaintiff, and he prayed that his title be quieted against all such claims of defendants, and that they be restrained and enjoined from using his property, or any portion thereof, for any purpose whatsoever. In his reply, however, plaintiff said that the allegations of his complaint above referred to were false and untrue in that he admitted that defendants had and were entitled to certain easements and rights of way over and other rights in and concerning

his property, and he specifically admitted that in and by the deeds alleged in defendants' answers, by and between the common grantors of the parties, grants or reservations of easements and rights in his property were contained, as alleged by defendants.

Ignoring the bad faith evident in this type of pleading, the effect thereof was to convert the action from one to quiet plaintiff's title against allegedly unfounded claims of defendants, into an action to construe the grants and reservations contained in the Bailey brothers deeds, and to determine the extent of defendants' admitted easements over and rights in plaintiff's property, which plaintiff claimed and asserted were not as great or extensive as asserted by defendants. Plaintiff's complaint thus went entirely out of the lawsuit, and the case was presented for trial upon the allegations of defendants' answers and the plaintiff's replies thereto.

This Court has several times held, as have the courts generally, that the character of a lawsuit may not be thus changed or a new and different cause of action and prayer or claim for relief thus introduced into the case. *Combined Metals v. Bastian*, 71 Utah 535; *Idaho Wholesale Grocery Co. v. Robinson*, 54 Utah 481; *Straw v. Temple*, 48 Utah 258; *Fields v. Cobbey*, 22 Utah 415; *Weber v. Wannamaker*, (Colo.) 89 Pac. 780; *Clemmons v. McGreer*, (Wash.) 115 Pac. 1081.

Ordinarily, a suit to quiet title or to remove a cloud on title may not be employed to obtain the Court's construction of a deed or other instrument under which the

parties claim. *Trustees of School v. Wilson*, (Ill.) 166 N. E. 55, 78 A. L. R. 22, and note 78 A. L. R. 44.

In his complaint, plaintiff asserted that defendants had no interest in or easement over his land, and prayed that the court so adjudge, and by its decree enjoin defendants from "taking possession of or using all or any portion of plaintiff's real estate for any purpose whatsoever." By his replies, plaintiff admitted and alleged that defendants did have some rights in and easements over his land, and that he, therefore, was not entitled to the relief prayed in his complaint. There was not even any prayer, either in the complaint or in plaintiff's replies, which authorized the proceedings had or the judgment or decree entered in the case, but the Court, nevertheless, and notwithstanding defendants' motion, proceeded to hear and determine, not the case made by plaintiff's complaint, but a case purporting to be made by defendants' answers and plaintiff's replies thereto which was and is an entirely different case from that attempted to be made by the complaint. It is submitted that defendants' motion was well taken and that the Court erred in denying the same and refusing to dismiss plaintiff's complaint, and in proceeding to hear the case so purporting to have been made upon defendants' answers and plaintiff's replies thereto.

POINT B. As previously pointed out, all parties to this action, so far as the property involved on this appeal is concerned, claim through the same or common owners and grantors, namely, defendants Seymour N.

Bailey and his deceased brother, Bert N. Bailey, who were the owners as tenants in common of plaintiff's land as well as that of all of the appealing defendants. Such joint ownership of plaintiff's land, as well as the major part of the lands in Lot 2 here involved, was severed in 1923, by the conveyance to Bert of defendants, Seymour Bailey's, one-half interest in what is now plaintiff's property, and the conveyance to the defendant, Bailey & Sons Company, by Bert and Seymour Bailey and their wives of said defendants' lands in Lot 2, by the deeds of conveyance dated August 9, 1923, which are found and described in Findings of Fact Nos. 11 and 12, and the rights in and easements over what is now plaintiff's land were therein granted and reserved; and as all of the parties claim under and through these deeds it is obvious that they are bound and their rights are determined by the deeds, and the grants and reservations therein contained, and they can neither detract from nor add to the rights therein granted and reserved.

Aside from the rights granted and reserved to maintain loading platforms and a roof over the same, and to rebuild and reconstruct such platforms, which we will consider under Point C, the deeds above referred to (Finding No. 11) reserve "the perpetual right to the use of the trackage along the south line of said premises *and to the premises*, and to the team, truck 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" (Entry No. 23, Ex. X). It will be observed that the words "and to the premises"

are omitted from the Finding as copied in the abstract of the record for the reason that said words were stricken from the reservation as set forth in said Finding. If the Court will look at Finding No. 11 of the original Findings, however, (Tr. 120) it will be observed that said words were properly inserted and then stricken with pen and ink.

The above quoted reservation plainly and in unmistakable terms reserves, in addition to the trackage, the right *to the use of the premises*, which plainly means the premises being granted, namely, the South half of Lot 3 (plaintiff's property); and it also specifically reserves the right to the use of the team, truck or auto drive along the spur track, and all this "to be used in connection and for the convenience of Lot 2 etc."

The deed from the Bailey brothers and their wives to Bailey & Sons Company (F. of F. No. 12) also contains an express grant of "the perpetual right to the use of the railroad spur, together with the team, truck and auto drive along the *north* line thereof etc.," and hence, there is by these deeds unmistakably and plainly reserved and granted a perpetual right to the use of plaintiff's premises *north* as well as south of the railroad spur track, including and specially referred to and granted, the team, truck or auto drive along the *north* line of the spur track. In this connection, it might be noted that this team or auto drive was constructed on the *north* side of the spur track and *paved with concrete* prior to 1914, and it has existed and been used ever

since down to and including the present, for the loading and unloading of merchandise on the north side of the spur track to and from box cars thereon, and also to and from the loading platforms on the south side of the spur (Ab. 90, 95). The pavement is now pretty well worn and covered with gravel, but may still plainly be seen on the ground, and it plainly appears in the photograph, Exhibit 4.

Notwithstanding these express and plain grants and reservations, the trial court, by its Findings and Decree appealed from, excludes defendants from and finds and adjudges that defendants have no easements or rights of way over any part of plaintiff's property *north* of the spur track.

The language in these grants and reservations is plain and unambiguous, and neither requires nor is subject to any construction, but if they are to be in anywise construed, it devolves upon the Court to look to the situation of the parties, the object to be attained and the circumstances generally surrounding and attending the transaction when the instruments granting and reserving the easements and rights of way were made.

As said by this Court in *Stevens v. Bird-Jex Co.*, 81 Utah 355, quoting with approval from other cases (page 360):

“in construing instruments creating easements in land, the court will look to the circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the

object to be attained, to ascertain and give effect to the intention of the parties.”

It should also be remembered that the easements here in question are “easements appurtenant”—they are attached to and for the benefit of the lands in Lot 2, in which both grantors in such deeds had, and continued to have, property to which such easements and rights were necessary and convenient; *Ernst v. Allen, et al.*; *Allen et al. v. Langford*, 55 Utah 272; and this being an equitable action, it is not only the right but the duty of this Court to review, weigh and consider the evidence and determine questions of fact as well as of law. *Jensen v. Birch Creek Ranch Co.*, 76 Utah 356—362; *Leland v. Bourne*, 41 Utah 125, 137.

When the grants and reservations in the deeds, and the admitted facts and uncontroverted evidence in the case, are looked to with the above stated cardinal rule of construction in mind, it is too plain to admit of dispute that such grants and reservations created, granted and reserved easements and rights of way over plaintiff's land to the *north* as well as to the south of the railroad spur track—it was plainly contemplated by the Bailey brothers when they made these deeds, and the grants and reservations therein, that plaintiff's property even to the whole thereof west of the Globe Mills Building, if required, should be used as a driveway and turn-around “for the convenience of Lot 2 of said Block, for the loading and unloading of merchandise,” as specifically stated in the deeds.

As previously noted, plaintiff's property had been so used for more than thirty years by the owners of the several properties in Lot 2. To facilitate this use, a paved driveway (team, truck or auto drive) was constructed on the *north* side of the spur track, and all of the area in front of the Globe Mills Building was paved as a turn-around for wagons and trucks, and it has been through the years, and still is, so used. (See map, Ex. 7, and testimony of Ryser, Richards and Jensen, Ab. 90, 95, 105, 109, 110, 120-122). Plaintiff's own witnesses, Evans and Snow, employees of Kelly-Springfield Tire Co., which occupied the Northwestern Hide & Fur Co. Building from about 1926 to 1931, testified to a similar use of the property by that company and others dealing with it (Ab. 128-130, 134).

This use of the property, and the easements and rights of way, were open, visible and apparent, and in constant use at the time plaintiff bought his property. He so admits in his reply (Ab. 56-75), and he further admitted on the witness stand that he had inspected the property before he bought it. (Ab. 86). In view thereof, plaintiff was charged with notice and knowledge of these easements and the extent thereof, and the extent of defendants' claims thereunder and the full use of the property which was being made at the time he purchased the same. *Rollo v. Nelson*, 34 Utah 116.

It is also significant that for more than ten years after he acquired the property, plaintiff stood by and observed the use made of the same under these ease-

ments, and the extent of defendants' claims thereunder, without protest or complaint of any kind, and he and his property are, therefore, not only bound by the easements and right of way as expressed in the language in which the same are granted and reserved in the deeds in question, but also with the construction which had been placed upon the same by the use made and being made of the property both before and after he acquired it. *Rollo v. Nelson*, supra.

Contrary to the admitted facts and the express terms of the grants and reservations in the deeds, as well as the construction which had been placed upon the same by many years of use of the property, the trial court found that defendants had no easements or rights of way over or other rights in the team, truck or auto drive, and property north of the spur track, and by the decree appealed from excluded defendants from all of such property. Thus, and contrary to the uncontroverted facts and evidence in the case, the Court found in Finding No. 3 that plaintiff and his predecessors in interest have been in exclusive and adverse possession of his real estate for more than seven years, except for wrongful encroachments by defendants, and the Court also, in Finding No. 18 found that defendants have no easement or right of way except as found in certain of the other findings which relate to the property south of the spur track, and found that defendants have merely a right to maintain a small loading platform on a portion of said property. Such Findings and Decree, we sub-

mit, are plainly contrary to the evidence and against law and ought not to be permitted to stand.

POINT C. With respect to that portion of plaintiff's property south of the spur track, which is now paved with concrete and contains the concrete platform and ramp complained of, the evidence is likewise undisputed that under the grants and reservations in the deeds, as well as by continued use, and the construction thereby placed upon such grants and reservations, defendants have and are entitled to easements and rights of way over the whole of such property so south of the spur track. The trial court in its Findings and Decree recognized and decreed such right over a portion of such land in connection with his decree of the right of defendants to maintain a platform over a portion of said ground (Ab. 149-53). The evidence shows that for more than thirty years, teams, and later trucks, have been driven over this area and backed up from the west to and against the westerly edge of the loading platform which existed at the rear of the Northwestern Hide & Fur Company building before the present ramp and platform was constructed, as well as from the north to and against the northerly edge thereof, using and traversing every inch of the ground now covered by such concrete platform and ramp, of which plaintiff complains; and this ground is being used today in just the same manner as it has been used throughout the years, except that instead of backing up over a piece of flat unsurfaced terrain which was a virtual mud hole in wet weather, to a perpendicular edge of a loading platform,

the trucks now back over concrete and up a slight incline or grade to the loading platform itself, which is now somewhat lower than the portion thereof which was removed when the concrete was laid, and this concrete ramp and platform cover the identical land which was so used and traversed by teams, wagons and trucks in backing up to the old wooden platform which it replaced. The witnesses, Ryser, Richards and Jensen, each testified to this use for twenty-five years or more (Ab. 94-110-120-22), and the plaintiff's own witnesses, Evans and Snow, confirmed this use of the property from about 1926 to 1931 (Ab. 130-34), and there is no testimony whatever to the contrary, and as previously noted, the trial court in its Findings and Decree has so found and recognized such easements and rights of way in part.

By the terms of the grants and reservations, the owners of the lands in Lot 2, admittedly have the right to maintain a loading platform or platforms on the southern portion of plaintiff's property, with the "full right to repair, *reconstruct or rebuild* the same within its present location." (Ex. X, 23 and 25, F. of F. Nos. 11 and 12).

There is some dispute in the testimony concerning the size of the portion of the old platform which was replaced by the concrete, but irrespective of such dispute in the testimony, and irrespective and regardless of the size of such platform, which we will hereinafter consider, the defendants under said grants and reservations unquestionably have the right to maintain, and they

had the right to build or construct a platform on this portion of plaintiff's property of *some dimensions*; and further and more important upon this appeal, the defendants have and are entitled to easements and rights of way over plaintiff's ground, and the whole thereof south of the spur track, to reach and drive wagons and other conveyances over and upon in reaching and backing up to any such loading platform. What defendants did in tearing down a portion of the old platform and replacing the same with concrete had to do more with their easements and rights of way over the ground, than it did with the rebuilding or reconstructing of the portion of the platform so removed. What defendants actually did was to remove a portion of the old wooden platform and surface with concrete the area over which they so had their easements and rights of way, including the area previously covered by such old platform, slightly changing the grade of a portion of their rights of way so that the right of way, in addition to being surfaced with concrete now slopes up ramplike to the remaining portion of the old platform, but as previously noted, the cement and ramp covers the identical area over which defendants have such easements, and over which teams and trucks would have to back to reach any loading platform upon this portion of plaintiff's property, whether constructed as such platform was originally or as the same is now. In other words, defendants, in laying such concrete, merely surfaced their right of way and slightly changed the grade thereof so as to

make their easements and rights of way serviceable and more convenient for their use in the manner intended.

Having the easements and rights of way over and upon the ground now covered by the concrete and ramp, defendants had, as a matter of law, the right to surface their easements and rights of way to make the same passable and more convenient for their use, including the right to change the grade of such easements or rights of way so long as in doing so they did not unreasonably interfere with some use plaintiff was entitled to make of this portion of his property, i. e., so long as they did not increase the burden or servitude upon plaintiff's land.

The rule respecting the right of the owner of an easement or right of way to maintain, repair, surface and otherwise change and improve the same is well stated in *American Jurisprudence*, Vol. 17, page 1005, Sec. 111, in this language:

“Generally, the grantor of an easement consisting of a way in the absence of any express stipulation is under no obligation to maintain the way in a condition suitable for use; maintenance of the way is left to the grantee. The latter may make the way as useable as possible for the purpose of the right owned so long as he does not increase the burden on the servient tenement or unreasonably interfere with the rights of the owner thereof. The right of the owner of an easement of way to make repairs exists without question where the way is impassable and useless without repairs. It has been held that the grantee of an easement may prepare the way for proper

use and, hence, may *grade, gravel, plough or pave such way*. He may depress the grade of the way so as to make it accessible to a public highway with which it connects. There is authority for the proposition that the owner of an easement of way may improve it by constructing a sidewalk, but he can do nothing in any respect which tends to place an additional burden upon the servient premises or interferes with the rights of other persons having a right to use the way. The reasonableness of the improvements or repairs made by the owner of an easement of way is largely a question of fact."

Section 112, page 1006:

"The test to determine the right to make a particular alteration is whether the alteration is so substantial as to result in the creation and substitution of a different servitude from that which previously existed."

In *Doan v. Allgood*, (Ill. 1923) 141 N. E. 779, the Court laid down the rule in this language:

"Whoever has an easement in or over the land of another has the right to do everything necessary to preserve the easement, and the right to repair a way is fully established. * * * The question of what acts of repair are reasonable in the use and enjoyment of an easement is one of fact in each particular case, and depends on the extent and character of the lawful use of the easement. The owner of the easement may make such *grades* or fills and lay such tiles or construct such ditches as may be necessary to enable him to make use of the way in accordance with the grant, provided in so doing he does not injure the servient estate. He may not construct a grade or fill or ditch in such a manner as to affect

injuriously the adjoining land of the servient estate.”

And in *Missionary Soc. v. Evrotas*, (N. Y.) 175 N. E. 523, the rights of the owner of an easement or rights of way are thus stated:

“Even if defendant’s easement were to be constructed as no broader than a right of passage, he would be entitled to break up the soil, level irregularities, fill up depressions, blast rocks, and not only remove impediments but supply deficiencies in order to construct a suitable road.
* * * In so far as such operations would not interfere with the rights of the other abutting owners, his actions would not proceed beyond the intent of the grant. His right to use the land for the passage of vehicles cannot be regarded as free and unobstructed, if he be obliged to refrain from putting it in a reasonably convenient condition for such a use.”

To like effect, and establishing the right of an owner of an easement or right of way to change the grade of the way, pave or otherwise surface it, and make and maintain the same in a condition for his convenient use, see *Guillet v. Livernois*, (Mass.) 8 N. E. (2d) 921; *Brown v. Stone*, (Mass.) 10 Gray 61, 69 Am. Dec. 303; *Atkins v. Bordman*, (Mass.) 2 Met. 457, 37 Am. Dec. 100; *Kaatz v. Curtis*, (Mass.) 102 N. E. 424; *Doan v. Allgood*, *supra*; *Heuer v. Webster*, 187 Ill. App. 273; *Herman v. Roberts*, (N. Y.) 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 801; *Bina v. Bina*, (Ia.) 239 N. W. 68, 78 A. L. R. 1216; *Newcomen v. Coulson*, (Eng.) L. R. 5 Ch. Div. 133 C. A.; *Central Christian Church v.*

Lennon, (Wash.) 109 Pac. 1027; *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 298; and *Freeman v. Sayre*, 48 N. J. L. 37, 2 Atl. 650.

Under the authorities above cited, defendants had the right to do exactly what they did respecting their easements and rights of way, unless in so doing they unreasonably interfered with some right of plaintiff, i. e., unless they increased the burden or servitude upon his property, and the only question in this connection then is as to whether in so cementing the ground over which they had their easements and rights of way, defendants did increase the burden or servitude upon plaintiff's land.

By way of conclusion merely, the trial court finds that the burden upon plaintiff's property was increased (F. of F. 14), but no fact or facts whatever are found supporting this conclusion, and when the evidence is looked to there is not a scintilla of evidence which could be claimed to even remotely support any such conclusion. The onus was on plaintiff to prove his allegation of increased burden (*Burns v. Williams*, (Minn.) 172 N. W. 772), but he neither produced nor attempted to produce any evidence whatsoever upon this point, and the evidence produced generally went to show conclusively that there was no increase of the burden on plaintiff's property by such paving of this area, and the construction of the ramp complained of. It was uncontroverted that in wet weather the water drained into this area making it a virtual mud hole, requiring frequent dumping of cinders

therein in an attempt to fill up the holes (Ab. 121-22), which of itself furnished good ground for paving the area and building the ramp to drain off the water and keep the area dry and passable, thereby benefiting rather than burdening the property. *Guillet v. Livernois*, *supra*.

Plaintiff himself could of course do nothing on this property that would interfere with defendants' use thereof. In view of defendants' easements and rights of way, he could not erect any building or obstruction of any kind, not even so much as a peanut stand on any portion of this ground, because to do so would interfere with free access to the ground and the loading platforms thereon, irrespective of whether such platforms were of the size claimed by plaintiff, or of the size claimed by defendants, or as now constructed in the form of platforms, ramp and paving. Plaintiff can now make every use of his property, and every portion thereof, which he could make before the area in question was paved and the present ramp constructed. He has not shown, and he cannot show that he has in anywise been deprived of any use of or any right in his property which he is entitled to, by the paving and construction of the ramp complained of, and there is, therefore, no support whatsoever for the claim or the trial court's conclusion that the burden upon plaintiff's property has been increased by the paving thereof.

If, as we contend, defendants had the right to surface the ground covered by their easements and rights of

way, and in doing so they did not increase the burden upon plaintiff's land, then the size of the old original platform, or the portion thereof that was replaced by the concrete, and whether the concrete covers more area than was covered by such platform, is immaterial to and of no consequence in this lawsuit, and the evidence and testimony concerning the size of such platform need not be considered, but as the trial court made findings upon this question contrary to the evidence and admitted facts, we shall briefly refer to this matter and the evidence concerning it.

Upon the trial, it was contended, and no doubt will be in this Court, that the language in the reservation in the deed referred to in Finding of Fact No. 11, reserving the right to maintain a platform on the southern portion of plaintiff's property "about 10 feet wide", and the reservation of the right to repair or rebuild such platform "within its present location," fixed and determined the size of the platform which defendants could maintain at about 10 feet in width, but while there is some slight dispute in the evidence concerning the exact size of the old platform at its westerly edge, the undisputed evidence and the physical facts and circumstances do establish beyond the peradventure of a doubt that the platform referred to in the deeds, and as it originally existed, never was of a width of only 10 feet, and that no matter what its width at its westerly edge (which is the point about which the testimony differed), the northerly edge of the platform did follow the curve of the spur, and did

have a width of some thirty to thirty-five feet, and these facts were established by plaintiff's own witnesses, Snow and Evans (Ab. 128, 131, 133-4).

In addition to referring to the platform as "about 10 feet wide," the reservation also includes the right to maintain an overlapping roof for said platform, and further describes the platform as "including also the curve thereof along the railroad spur." Although this language follows the reference to the roof over the platform, it obviously refers to the platform itself because the roof never did follow the curve of the track, and is at present in the same condition as when originally constructed, that is, straight-edged and not curved (see photos, Ex. 2, 3 and 5), and in some of the conveyances the roof is referred to as being at the north end of the platform, which is in accordance with the facts (Ab. 33). From the photographs received in evidence, and the plat, Exhibit 7, the Court will note that the spur runs in a general east and westerly direction, curving to the *north* as it approaches and enters the street, which furnishes the curve referred to in the reservation, and it is, therefore, apparent from the language of the reservation and the physical facts, that the words "about 10 feet wide," refer to the *easterly* end of the platform and not the westerly end thereof, as plaintiff apparently seeks to interpret it, as otherwise the language following such dimensions, "including also the curve thereof etc.," would be meaningless. In other words, the language in the reservation obviously specifies a platform proceeding from a width

of "about 10 feet" at its *easterly* extremity, and running west with a curve to the *north* along the spur track, which very effectively describes a platform occupying the area between the north wall of the warehouse buildings on Lot 2, and the spur track, following with its northerly edge the line of the spur as it curves to the north towards and into the street, and this is in accordance with the evidence (Ab. 90, 91, 102-3, 106, 119, 123). It is obvious that to be of any use as a loading platform to and from box cars on the spur, the platform would have to follow the curve of the spur and be constructed within a few feet of the track and this would be particularly true of the portion of the platform at and near the westerly end adjacent to the Northwestern Hide & Fur Company building, where the undisputed evidence shows that meat and other commodities were loaded to and from box cars on the spur, and where a pair of scales were set into the platform at the time this building was occupied by Cudahy, and large meat trucks were operated on the platform to load and unload meat and other commodities from the box cars over the platform and into the warehouse building (Ab. 120, 123). Men who had worked over this platform for more than twenty-five years testified that it was 32 feet wide at its westerly extremity, with a jog to the east of about 10 feet, and then a jog to the north to within a few feet of the spur track (Ab. 90-91, 102-3, 106, 119, 123). The man who removed the platform when it was replaced by the concrete, and who was a thoroughly disinterested witness not employed by any of the defendants, testified that he measured the stringers

which supported the flooring of the platform at its westerly extremity when he removed them, and that they measured 32 feet in length. He testified that there were two stringers butted end to end and set into the wall of the warehouse building at right angles to and running north from the building wall, and that one of such stringers so butted end to end was 18 feet and the other 14 feet in length, making the platform at this westerly edge 32 feet in width (Ab. 103). The platform would have had to have been of approximately this size in order to have permitted the use which was admittedly made of it, and which use, in addition to the pushing of meat trucks and the like over it, weighing operations and the like, included the backing up to the platform at its westerly edge of as many as six wagons for loading and unloading purposes (Ab. 94), and the above recited physical facts and the language in the reservation itself show the platform to have been of approximately this size. Even plaintiff's own witnesses, Snow and Evans, admitted that at a point a short distance east of the westerly edge of the platform, it was at least 25 to 30 feet in width, and that it followed the curve of the track (Ab. 128, 131, 133-4).

From this evidence, coupled with the physical facts and the language of the reservation itself, we submit that the only reasonable conclusion deducible is that the old platform in its westerly course followed the curve of the spur to the north and was of the width testified by defendants' witnesses, namely, about 32 feet at its westerly extremity, and "about 10 feet wide" at its easterly ex-

tremity as recited in the reservation itself. It may be noted that the platform at its easterly extremity is not now as much as 10 feet in width, nor is it as wide throughout what remains of it as when originally constructed, for the reason, as shown by the uncontradicted evidence, that it was cut off all along its length on the spur track side to afford better clearance for the cars on the spur and the men handling the same (Ab. 113, 123).

In his findings, however, the trial court departed entirely from and completely disregarded the evidence in the case, and by metes and bounds has described a platform set back at its westerly edge 7.3 feet from the property line, and which it is recited to be or to have been 10.7 feet wide at its westerly extremity and for 34 feet east thereof, and then jogging out to the north 14.6 feet to a total width at that point of 25.3 feet, and then following along the track to the east to a width of 5 feet at its easterly end (F. of F. No. 13 and C. of L. No. 2). The Court may search the record from end to end and it will not find any testimony of any such dimensions, or that the platform was of the size so described in the Findings, Conclusions and Decree. Obviously, these dimensions were obtained and made de hors the record by someone after the case was tried and the court had announced his decision. That this was the case was virtually admitted by counsel for plaintiff upon the hearing of the motion for a new trial (Ab. 177-180). At this time counsel admitted that a survey of the property had been made after the court had announced his decision and measurements

made to obtain the dimensions used in the Findings and Decree. Counsel also claimed that the so-called railroad and insurance maps (Ex. "L", "M", "N", "O", "P", "Q" and "R") were also used to obtain such dimensions. As we shall hereinafter point out, these maps were not properly identified or authenticated to be received as *substantive* evidence. There was no evidence that they were or pretended to be accurate. The makers of the maps were not produced and no one competent to speak authenticated them, and they were received in evidence by the court over defendants' objections as *illustrative* merely of the testimony of plaintiff and his witnesses (Ab. 84-5-6). Notwithstanding they were not and could not be received as *substantive* evidence, the Court, under counsel's own admission, in making his Findings and Decree, has so used the maps and has also used other dimensions obtained by someone after the trial of the case, and which *someone* defendants had no opportunity to cross-examine as to such claimed dimensions and measurements or the making thereof. If such procedure is to be permitted in the trial of cases in a court of justice, we might as well flatly abandon all rules of evidence and trial procedure and any pretext of a fair and impartial determination of the rights of litigants. It is submitted that the Findings and Conclusions so made and the Decree thereon cannot be permitted to stand.

The Findings, Conclusions and Decree herein, attempting to limit the size of the platform defendants are entitled to maintain on plaintiff's property, are a plain

attempt to rewrite the grants and reservations in the deeds under which the parties claim and to relieve the plaintiff's property of the major portion of the burden thereby imposed upon the same, and ought not, we submit, to be permitted to stand.

POINT D. Within due time and the order of the Court (Tr. 103-4) after service of the Findings and Decree proposed by plaintiff, and under date of August 7, 1939, defendants made objections and proposed proper amendments to the Findings, Conclusions and Decree as so proposed (Ab. 161-68) to make the same conform to law and the facts and evidence in the case, but disregarding and without ruling and passing upon or giving defendants any opportunity to be heard upon such objections and proposed amendments, the trial court under date of August 14, 1939, signed and filed Findings and Decree as proposed by plaintiff (Ab. 169).

While there is apparently no statute expressly providing for the making of objections and the proposal of amendments to Findings and Decree as proposed by the prevailing party, the losing party unquestionably has the inherent right to do so, and to be heard upon the objections and amendments which he makes and proposes and in respect to the settlement of the Findings and Decree in the case; and the Third District Court has recognized and provided for the exercise of such right by the adoption of a rule (13) providing in part that after service of a proposed draft of Findings and Decree by the prevailing party, "if adverse counsel deems the same in-

sufficient or not in accordance with the Judge's decision, he may, within twenty-four hours, or such further time as the Judge may on application allow, specify his objections thereto together with such amendments as he may deem proper to make the draft conform to the Judge's decision, serve a copy thereof upon opposing counsel, and likewise deliver the original, with proof of service to the Judge, or in his absence, to the Clerk for him. The Judge may thereupon designate a time when he will settle the same, and at the time so appointed, the draft so prepared together with objections and amendments so proposed, will be considered and settled by the Judge, etc."

This Court has held that it is error to fail or refuse to rule upon a motion to strike, and upon a motion to strike a cost bill, as well as to make proper Findings, Conclusions and Decree when requested so to do. *Petty v. St. George Garage Co.*, 60 Utah 126, 130-131; *Openshaw v. Openshaw*, 86 Utah 229, 232-3.

It should require no authority to sustain the proposition that a party is entitled to notice of and an opportunity to be heard on objections made to proposed and requested action by the Court in the case, including as here notice of and an opportunity to be heard concerning the settlement of Findings, Conclusions and Decree in the case, where, as here, those proposed by the prevailing party are objected to and amendments thereto are proposed. Instead of requiring notice of the settlement of such Findings and Decree, and affording

defendants an opportunity to be heard thereon, and upon their objections and proposed amendments, the trial court erroneously and without any hearing, and without ruling upon such objections and proposed amendments, signed and filed the Findings and Decree as proposed by plaintiff, which are, as previously pointed out, not at all in accord with the judgment or decree which was ordered by the Court upon his consideration of the case (Ab. 139). It is submitted that the Court erred in failing and refusing to rule upon defendants' objections and proposed amendments, and in signing the Findings and Decree without ruling thereon, as well as in failing to sustain the objections made and to allow the amendments proposed, which were proper and conformed to the law and the evidence in the case.

POINT E. As previously pointed out, the trial court, over defendants' repeated objections, received in evidence and permitted counsel for plaintiff to examine plaintiff and his witnesses, and to cross-examine defendants' witnesses upon Exhibits "L", "M", "N", "O", "P", "Q" and "R", which are claimed to be maps or drawings of the property and some of the buildings, the railroad spur and other improvements upon the property in question. These maps and drawings were not identified or authenticated by the makers thereof, or by anyone who knew or pretended to know anything whatsoever about them. No witness authorized to speak testified or vouched for their correctness or accuracy, and nothing was shown concerning the purpose for which

they were prepared or anything about their preparation. *It was not even shown that they were or purported to be maps or drawings of the property in question* except by the unfounded and unsupported statements of witnesses, who neither knew nor professed to know anything about the same or their preparation, or for that matter to have ever seen the same before they were produced in court, to the effect that the property and improvements in question looked like what the maps and drawings purported to show.

It is elemental that before a map or drawing may be received as *substantive and independent* evidence, its correctness and accuracy must be proved as a pre-requisite to its introduction. *Young Mines Co. Ltd. v. Blackburn*, (Ariz.) 196 Pac. 167; *Jordan v. Duke*, (Ariz.) 53 Pac. 197. While maps and drawings in some instances may be admitted for *illustrative* purposes—that is to illustrate a witnesses testimony—without proof of their accuracy or correctness, they should even in such instances at least be shown to be maps or drawings of the property or thing about which the witness is testifying, and should not be used or permitted to be used as evidence themselves or as the witnesses' testimony, or in substitution for the witnesses' testimony.

The trial court in overruling some of defendants' objections and admitting these exhibits in evidence, stated that he was receiving them as illustrative only of the witnesses' testimony (Ab. 85, 86), but notwithstanding that none of these maps or drawings were referred to in

the examination of defendants' witnesses, he permitted counsel for plaintiff to cross-examine such witnesses thereon (Ab. 113, 116, 117), and in considering the case, and in the Findings of Fact, Conclusions of Law and Decree, he treated and considered the same as *independent and substantive* evidence in the case, and predicated some of his chief Findings and portions of his Decree squarely upon the maps and drawings, and the dimensions and figures therein shown.

As previously noted, counsel for plaintiff, upon the presentation of the motion for a new trial, affirmatively admitted that these maps and drawings were used to provide certain of the metes and bounds description set forth in the Findings, Conclusions and Decree. Counsel admitted that such descriptions were taken from these maps and drawings, which he referred to as "the railroad maps and the insurance maps in evidence"—that the figures appearing on these maps were used to make up such descriptions, and "*in some instances a scale was used to determine them*" (Ab. 178-180), and thus it appears that no matter what the court's purpose was in receiving such maps and drawings in evidence, they were actually and in point of fact used as substantive and independent evidence in the case, and the Findings and Decree were actually predicated thereon.

It is our position that under the facts and showing in the case, these maps and drawings were not receivable for any purpose—they were not receivable as any witnesses' testimony, and it was improper and erroneous

for the court to permit cross-examination of defendants' witnesses thereon as was done—but even if such maps and drawings could have been properly received to illustrate the testimony of the witnesses who testified concerning them, they were not receivable as substantive or independent evidence. As above stated, there was no evidence or showing that such maps and drawings were correct and accurate, and it was, therefore, prejudicial error to receive the same in evidence as and to treat the same as substantive and independent evidence, and to base the Findings and Decree thereon, and such Findings and Decree so based thereon, therefore, ought not to be permitted to stand.

CONCLUSION.

POINT F. As hereinbefore pointed out, the trial court in his Findings and Decree herein has disregarded and found contrary to the express terms and provisions of the grants and reservations in the deeds in question, and has disregarded and found contrary to the admitted facts and undisputed testimony in the case, and has entered a Decree herein which is plainly erroneous and contrary to law and the admitted facts and evidence in the case.

This Court has repeatedly held that a trial court is not at liberty to disregard undisputed documentary and other evidence in the case, or to ignore admitted facts and creditable, uncontradicted, unimpeached or unimpaired testimony and evidence, and make a finding con-

trary thereto. As said by this Court in *Wilcox v. Cloward, et al.*, 88 Utah 503;

“The trial court is not at liberty to disregard creditable, uncontradicted, unimpeached, or unimpaired evidence and make a finding contrary thereto. Parker v. Weber County Irrigation District, 68 Utah 472, 251 P. 11.”

To like effect see *Giauque v. Salt Lake City*, 42 Utah 89; *Eastman v. Gurrey*, 15 Utah 410; *Hathaway v. United Tintic Mines Co.*, 42 Utah 520; *Spring Creek Irr. Co. v. Zollinger*, 58 Utah 90; *Rick v. Wells Fargo Co.*, 39 Utah 130; and *Parker v. Weber County Irr. Dist.*, 68 Utah 472.

This, we submit, is exactly what the trial court did in this case, in a plain and palpable intent to rewrite the terms of the grants and reservations of defendants' easements, rights of way and other rights and privileges over and in and concerning plaintiff's property, and to thereby relieve the same of the major portion of the burden imposed upon such property by such grants and reservations.

As said in *Hathaway v. United Tintic Mines Co.*, supra:

“The finding of facts and entering of judgments are solemn acts, and no court should permit itself to make a finding of fact where the record is conclusive, as in this case, that there is absolutely no evidence to support such finding.”

For the reasons and because of the manifest errors assigned and hereinbefore pointed out, we submit that

the judgment and decree appealed from is erroneous, contrary to law and the evidence in the case, and should be reversed.

Respectfully submitted,

HURD & HURD,

MOYLE, RICHARDS & MCKAY,

JUDD, RAY, QUINNEY & NEBEKER,

Attorneys for Appellants.