

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 Respondent

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;

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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. SUMMER-
HAYS & SONS COMPANY, a corporation;
COLORADO ANIMAL BY-PRODUCTS
COMPANY, a corporation; LEONA B.
WHITEHILL, administratrix of the Es-
tate of Bert N. Bailey, Deceased; ROBERT
BAILEY WHITEHILL, C. E. SUM-
MERHAYS and J. J. SUMMERHAYS,

No. 6219

Defendants and Appellants,

JOHN SCOWCROFT & SONS COMPANY,
a corporation,

Defendant Not Appealing.

RESPONDENT'S 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.

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

HURD & HURD,
BOYLE, RICHARDS & MCKAY
HADD, RAY QUINNEY & NEBECKER,
Attorneys for Appellants.

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No. 6219

RESPONDENT'S 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.

STATEMENT OF THE CASE

The appellants' statement of the case, particularly the summary of the pleadings, omits several matters which should be briefly discussed before proceeding with the argument. The complaint is said to be in the "usual form for an action to quiet title." Part of the prayer is mentioned and nothing more is said about it. There are several other allegations which should be noticed. It is alleged that the defendants, and each of them, assert and claim a right to use a portion of the plaintiff's land for roadways and for the purpose of loading and unloading merchandise from and upon railroad cars and trucks and that during or about 1934, certain defendants, without the consent of the plaintiff, constructed a concrete ramp upon the southwestern portion of the real estate and that all of the defendants assert and claim the right to drive trucks and other vehicles over it and are making constant use of it wrongfully and in violation of the rights of the plaintiff. It is also alleged that unless the defendants are restrained by the court, and unless they are required to remove the concrete ramp and loading platform the trespasses will be frequent and repeated to the irreparable injury of the plaintiff. (Abs. 1-4.)

The separate answers set up the ownership of land adjacent to the plaintiff's land and assert ownership of certain easements over and upon the plaintiff's land consisting of right of ways, the spur track, loading platforms, wagon roads, team tracks, and other facilities by virtue of grants and reservations in certain deeds dated in 1923, and by implication. The defendants specifically

deny that they are trespassing upon or wrongfully using the plaintiff's land and that they have the right to use the loading platform, ramps and roadways. (Abs. 4-56.)

The replies to the separate answers admit the execution and delivery of the various deeds from the common grantors and admit that when the said conveyances were made in 1923, there was situated upon the south part of plaintiff's property a spur track and a lumber platform approximately 10 feet wide and 75 feet long which was used for the purpose of loading and unloading merchandise upon railroad cars, and that it remained the same until 1932 when certain of the defendants removed it and substituted a concrete ramp covering a much larger area. It is denied that the defendants have a right to use any of plaintiff's premises except a lumber platform 10 feet wide and 75 feet long attached to the building located in the northwest corner of Lot 2 and the railroad spur. (Abs. 56-75.)

For the convenience of the court a diagram of the premises is attached to this brief. It is the same as Exhibit A except that it shows the size and location of the platform which the trial court found that the appealing defendants are entitled to maintain upon the plaintiff's land and also the location of the west door in the rear of the Colorado Animal By-Products Company warehouse. This diagram shows the property ownership as of the date suit was commenced, the railroad spur and the concrete ramp.

The evidence discloses that on August 9, 1923, Seymour N. Bailey and his wife were owners of an undivided

one-half interest in the premises now owned by plaintiff, and Bert N. Bailey and wife were the owners of the other one-half interest. Seymour N. Bailey and his wife conveyed their interest to Bert N. Bailey by a deed dated August 9, 1923, and recorded on September 10, 1923, in Book 11-Q of deeds, page 586. (Exhibit J, Entry 37.) The original deed is not in evidence. The deed contains the following reservations:

“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 ten 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 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.”

It will be noted that the words “and to the premises” do not appear after the word “premises” in the second paragraph, or anywhere in the deed. This is important because much of the appellants’ brief is predicated upon the meaning and significance of those words, and in numerous places in the brief it is argued that the find-

ings and decree are "false to the record" because the words "and to the Premises" are omitted.

On August 9, 1923, a deed from Bert N. Bailey and wife, and Seymour N. Bailey and wife conveyed to Bailey & Sons Company, certain land as follows:

CONVEY AND WARRANT:—

Commencing at a point $83\frac{1}{2}$ feet West of the Southeast corner of Lot 2, Block 43, Plat "A," Salt Lake City Survey, 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 said Lot and Block, thence North $99\frac{1}{2}$ feet; thence East $58\frac{1}{4}$ feet; thence South $99\frac{1}{2}$ feet; thence West $58\frac{1}{4}$ feet, to the place of beginning.

Also a perpetual right to the use of the railroad 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 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, and 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.

This deed is given subject to a mortgage of \$10,000.00 and interest from September 1, 1923. Also subject to the taxes for the year 1923, all of which grantees herein assume and agree to pay.

Signed: Bert N. Bailey
Leone Bailey
Seymour N. Bailey
Emma Z. Bailey
(Exhibit J, Entry 50.)

The foregoing is a full description of the land conveyed. The descriptions of the several parcels of land are omitted in the appellants' statement of facts. (App. Br. 5.) It will be noted that there is a separate reservation for each parcel conveyed. Thus, for the lot $23\frac{3}{4}$ feet wide, described in the diagram attached to this brief, as Bailey & Sons property, a vacant lot, the only easement reserved is the trackage privilege as follows:

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

For the lot described as the Summerhays property the reservation is as follows:

“Also a perpetual right to the use of the railroad 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 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, and 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 J, Entry 50.)

The latter part of the reservation refers to a tunnel or passageway wholly on Lot 2.

At the time of the conveyances, Seymour and Bert Bailey owned the property now occupied by the defendant, Colorado Animal By-Products Company; the property owned by J. J. and C. E. Summerhays and occupied by J. W. Summerhays & Sons Company, the vacant lot $25\frac{3}{4}$ feet wide, the property occupied by the Valvoline Products Company, and the old Bailey building which is located upon the West 57.75 feet of the Scowcroft property. The relative positions of these buildings may be readily ascertained for the purpose of this argument by an examination of the attached diagram, and the maps, Exhibits A and R prepared by E. H. Merrill, a practicing

engineer, showing the property in Lots 2 and 3 as of January 15, 1939 and as of August 9, 1923.

The appellants, by their act in constructing, maintaining and using the concrete ramp described in the pleadings, and as sketched in the attached diagram, have sought to extend their perpetual right to the use of the platform to such an extent that the concrete ramp which has replaced the lumber platform is in its widest place approximately 56 feet and in its narrowest place is more than three times the width of the platform described in the deed. There is a retaining wall along the northern edge of the ramp one foot in thickness and extending a few inches above the concrete ramp itself. The evidence in this case shows an utter and wanton disregard for the plaintiff's property rights. He was not even consulted before the ramp was constructed.

There is a sharp conflict in the evidence as to the size and location of the lumber platform referred to in the deeds. The appellants contended that the old lumber platform was 32 feet wide on its westerly edge and the plaintiff's witnesses testified that the platform, as stated in the deed, was 10 feet wide on its westerly edge and that the 10 foot platform extended along the north edge of the Colorado Animal By-Products Company Building to the east side of the west door where it widened out approximately to the spur track. The trial court believed the respondent's witnesses, made findings of fact and conclusions of law accordingly, and entered a decree limiting the defendants' use of the plaintiff's property for purposes of a platform to the area covered by the original lumber structure. The trial court did not believe that the reservations and grants in the deeds gave the

appellants the right to use all of the plaintiff's property as a right of way and limited them to the use of the area south of the spur track for roadway purposes. The findings and decree as to these two points are assailed by the appellants. There are no issues in the case as to the right of the appellants to use the spur track nor the right to maintain the roof over the platform.

ARGUMENT

The points relied upon by the appellants will be discussed in order:

Point A.

It is contended that the court erred in denying the defendants' motion for judgment on the pleadings. The appellants urge that the reply introduced a new and different cause of action; that the issues were framed by the several answers and replies; and that the complaint went entirely out of the law suit. A few cases are cited to sustain the proposition that the character of a law suit may not be changed and a new cause of action introduced. Neither the proposition urged or the cases cited are in point. As observed in the statement of the case, the complaint was not one merely to quiet title but included a specific allegation that the defendants had wrongfully constructed a concrete ramp upon the plaintiff's land without his consent; they were asserting and claiming the right to use it, and that unless required to remove it the plaintiff would suffer irreparable injury. The prayer is for a decree quieting title as against the claims asserted by the defendants, *and for a decree requiring removal of the concrete ramp and restraining the de-*

fendants from using the plaintiff's property. (Abs. 2-4.) When the defendants denied the allegations as to the ownership of the plaintiff's property and the wrongfulness of the use and maintenance of the ramp, issues of fact were framed. This will become apparent upon an examination of the complaint, and the allegations contained in paragraphs numbers two, three, four, five and six of the answer of Seymour N. Bailey and wife. (Abs. 5-8.) Similar allegations appear in the answers of the other appealing defendants. As a further defense the defendants refer to the reservations in the two deeds dated in 1923, and allege that the loading platforms and roadways were open, visible and apparent when the property comprising lots 2 and 3 was divided. It is alleged in paragraph eight of the Seymour Bailey answer (and similar allegations appear in all of the other answers) that the plaintiff enlarged and extended a platform attached to his warehouse which unlawfully interferes with the defendants' free use of their easements. (Abs. 14-15.) The prayer is that the defendants' title be quieted as to their easements and right of ways and that the plaintiff be required to remove the platform so enlarged. This is obviously a counterclaim, although not designated as such. The replies to the several answers are substantially the same. The affirmative allegations in the answers to the effect that the defendants had the right to use the plaintiff's land for roadway purposes and to use the ramp as at present constituted are denied. It is admitted that the deeds containing the reservations were executed but all of the allegations as to the meaning and construction of the deeds are denied.

Apparently the defendants take the position that

when the plaintiff admitted that in 1923 a lumber platform approximately 10 feet wide and 75 feet long stood on his property and alleged that a concrete ramp covering a much larger area was constructed in 1932, there was a departure from the cause of action stated in the complaint. This contention is without merit for the reason that the charge is made in the complaint that the defendants wrongfully and without the consent of the plaintiff constructed and are using the *very concrete ramp*, and assert and claim the right to use it. Issues of fact are also raised by the pleadings as to the right to use all of the plaintiff's property as a right of way, and as to the right of plaintiff to enlarge his own lumber loading platform.

It is elementary that if the pleadings present material issues of fact, the motion for judgment on the pleadings must be denied.

49 C. J. 670, Sec. 948;

Miller v. White, 258 P. 565;

Oleson v. Pincock, 68 Utah 507, 251 P. 23;

Mapleton v. Kelley, 39 Utah 252, 117 P. 52.

If the motion is made by the defendants it may be treated as a general demurrer and be governed by the rules applicable thereto.

Coburn v. Bartholomew, 50 Utah 566, 167 P. 1156.

It is not even argued that the complaint does not state a cause of action. The only argument is that the replies

state a new cause of action and as shown above this is without merit.

Neve v. Allen, 55 Kan. 638, 41 P. 966.

Furthermore, if they did, this point could not be raised by a motion for judgment on the pleadings.

Mills v. Hart, 24 Colo. 505, 52 P. 680;

Wilson v. Jones, 67 Okla. 6, 168 P. 194.

The replies are not inconsistent with the complaint. The complaint says that the defendants have without the consent of the plaintiff constructed and maintained upon his property a large concrete ramp and the replies merely deny affirmative allegations that the defendants have certain easements over the plaintiff's property including the right to maintain and use the ramp and narrow the issues somewhat by admitting that the defendants have the right to maintain a smaller lumber platform. There is nothing unusual about the pleadings. If counsel's position is sound the pleader in drafting his complaint would have to anticipate just what easements or interests in the property the defendant will claim and negative them in the complaint. The trial court very properly denied the motion.

Point B.

It is next contended that the trial court erred in making findings of fact which confine the defendants' easements to the use of the property south of the spur track and to the use and maintenance of a platform covering

the same area as it covered in 1923 at the time of the severance of Lots 2 and 3. At the outset, on page 24 of their brief it should be noted that the appellants admit that "their rights are determined by the deeds and the grants or reservations therein contained and they can neither detract from nor add to the rights therein granted and reserved." It should also be noted that the appellants do not refer to the specific property conveyed by the deeds, but attempt to give the impression that all of the property ever owned by Seymour or Bert Bailey or by Bailey & Sons is benefited by every grant or reservation. Let us analyze the deeds:

The deed from Seymour to Bert Bailey dated August 9, 1923, described only the property now owned by the plaintiff. It will be noted that it expressly states that the reservations of the right to the use of the trackage and to the team truck or auto drive along the track are for the benefit of Lot 2 for the loading and unloading of merchandise. There is nothing said about which side of the track the team truck or auto drive was on. The evidence indicates that at one time a team, truck and auto drive along the north side of the track was used for the benefit, not of Lot 2, but Lot 3, as a means of ingress and egress to and from the warehouse now owned by the plaintiff and, an old hay barn. The hay barn burned down in 1918 and the road fell into disuse. As observed by appellants, the old concrete road is now covered with gravel. The roadway along the track used for loading and unloading in 1923 was the one along the south side of the tracks by means of which trucks and wagons loaded and

unloaded merchandise upon and from the lumber loading platform. As shown by the attached diagram, the loading platform in the rear of the properties involved in this appeal, which the court found was only 10 feet wide and was quite a distance from the old roadway north of the tracks which led at one time to the hay barn and to the warehouse, but the roadway to the south of the tracks was located adjacent to the lumber platform and was used for loading and unloading merchandise. The deed refers to only one roadway and the parties obviously had reference to the road south of the tracks. The deeds themselves, and the evidence as to the relative location of the platform and the spur track are sufficient to support the findings of the trial court.

The reference to the "north line thereof" found in the deed to Bailey & Sons Company is relied upon to indicate that the team, truck and auto drive was on the north side of the track. *Counsel does not point out that this grant of a right of way is for the benefit only of the lot in the Southwest corner of Lot 2 now owned by Summerhays.* The argument is deceptive in that it attempts to impress the reader that the deed to Bailey & Sons Company described, in connection with this grant, *all of the property in Lot 2.* It is significant that the property to be benefited is in the southwest corner of Lot 2. The old road to the hay barn and the warehouse would be of no benefit to the lot so situated, but the roadway south of the track between the track and the old lumber platform would be the one vital to the needs of the occupant of the Summerhays property and the only one used. Further-

more a reading of the entire deed from the abstract, Exhibit J. Entry 50, (not from the excerpts quoted by appellant) will indicate clearly that the reference to the "north line thereof" means the north line of "said Lot" meaning Lot 2. It described the railroad spur and auto drive as both being along the north line of the lot through and over a part of the south $\frac{1}{2}$ of Lot 3. If the deed had conveyed, the Scowcroft property located some distance east, there may have been some merit to counsels' contention, but there is none, with reference to the Summerhays property or any other property. *Again we reiterate that the grant in the Bailey & Sons Company deed is the only one that mentions any north line, and it specifically described the Summerhays property and that only as the dominant estate.*

The grant is not as counsel contends for the benefit of all of Lot 2.

Under Point B counsel repeatedly refers to the words "and to the premises" which it is claimed should be included in the description of the easements reserved in the Seymour Bailey—Bert Bailey deed. It is claimed that those words intended to reserve a right of way over *all of plaintiff's property*. As pointed out the words do not appear in the abstract of the deed, Entry 37, Exhibit J. The trial court has as much right to base its finding upon the description in Exhibit J as it would have had to base it upon the abstract, Exhibit X, or upon any other abstract. Under the circumstances the finding of the trial court should not be disturbed.

Flinders v. Hunter, 60 Utah 314, 208 P. 526;

James v. Jensen, 50 Utah 485, 167 P. 827.

Point C.

The appellants contend that the findings of fact, conclusions of law and decree as to the location and dimensions of the loading platform described in the deeds are not supported by the evidence. Before discussing the testimony of the various witnesses, let us reexamine the reservation in the deeds with respect to the loading platform. In the deed from Seymour to Bert Bailey (Exhibit J, Entry 37) it will be noted that the platform is described as follows:

“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.” (Italics ours.)

It is admitted by appellants as observed above that:

“The parties are bound and their rights are determined by the deeds and grants and the reservations therein contained and they can neither detract from nor add to the rights therein contained.” (App. Br. 24.)

Yet they immediately forsake this proposition and contend that the trial court erred in finding and decreeing that the rights of appellants *were* determined by the deeds. They would have this court believe that the express limitations to the effect that a platform “about 10 feet wide” could be maintained and used “as at present constructed” and could be rebuilt “within its present location,” are meaningless and that the defendants could properly construct a concrete ramp upon the plaintiff’s

property which is, in its widest place, more than five times the width of the original lumber platform. It is claimed that since the appellants had a right of way over the area south of the tracks to drive to and from the loading platform, they had a right to grade it and surface it and that was all they were doing when they constructed the ramp over the entire southwest corner of the plaintiff's property covering fifty-six feet of his frontage, without his knowledge and consent. Such an argument clearly does violence to the express limitations in the deeds of the right to maintain the platform "as at present constructed" and in "its present location."

Testimony was offered by both plaintiff and defendant as to the size and location of the platform. The defendants' witnesses testified that the west edge of the platform was 32 feet wide and that it covered nearly the same area as is covered by the concrete ramp. A sharp conflict arose as to whether the west edge of the lumber platform was 32 feet wide or 10 feet wide. The court found that at the time of the severance of the property now owned by the plaintiff, from the appellants' property, the lumber loading platform covered the following described 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 be-

ginning. Also steps to said platform extending 7 feet west and 5 feet North from the Southwest corner of said platform." (Finding of Fact No. 13, Abs. 149.)

This finding is assailed as unsupported by the evidence and it is even contended that the description was supplied *de hors* the record by someone after the case was tried and submitted. This contention is entirely groundless. The following evidence supports the finding as to the size and location of the lumber platform as it existed August 9, 1923.

Testimony of Joseph F. Merrill is that the location and size of the platform was, as shown by the map, Exhibit L, and by the insurance company maps, Exhibits M and N. It will be noted that the very dimensions specified in finding No. 13 appear on the map, Exhibit L. (Abs. 84, 85—Tr. 166, 167.)

Testimony of Arnold Evans that in 1926 he was employed at the warehouse now occupied by the Colorado Animal By-Products Company, but then occupied by the Kelly-Springfield Tire Company. He describes the platform as follows:

"Q. Will you describe the platform at the rear of the building when you went there?

A. Well, there was a platform extending out from the building, I would say about 10 feet with steps leading from the third west side up to the platform to the first door, if I remember correctly. After that it extended out almost to the spur track.

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

A. I think on the east side." (Tr. 328.)

Mr. Evans indicated the locations of the two doors in the north of the warehouse with a red pencil. (See Exhibit R.)

Eugene H. Merrill measured the distance from the west side of the west door which is the first door referred to by Mr. Evans and found it to be 36 feet. (Abs. 135, 136, Tr. 233.) He found the width of the west door to be 6 feet and the distance from the north side of the building to the widest point of the wooden platform which is located on the property at present and which the testimony shows was not changed when the concrete ramp was constructed to be 23 feet. The distance from the west side of the building to the sidewalk at the northwest corner was found to be 6.7 feet. There is no contention made by appellants that the location of the building now occupied by Colorado Animal By-Products Company or the location of the west door has been changed during the last 20 years.

Mr. Evans testified also that Exhibits P, Q and R, the first two being railroad maps of the Oregon Short Line and the Denver & Rio Grande Western Railroads and the latter being a drawing made by E. H. Merrill from other maps fairly represent the platform as it was in 1926. (Abs. 123-128.) The Oregon Short Line map shows the dimensions of the platform to be the same as described in the findings and decree. The witness also testified that the area indicated in red pencil immediately north of the Colorado Animal By-Products Company warehouse shows the additions made by the Kelly-Springfield Tire Company in 1926. (Abs. 125.)

Willard Snow who also worked at the Kelly-Springfield warehouse in 1926 described the platform as follows:

“Q. Will you describe the platform as it was when you went there?

A. You mean the one just directly north of the building. That was about—there was some steps leading up to this platform, almost at the corner of the building, up to this platform. This platform was about, I imagine around ten, maybe eleven feet wide, and then from this main platform there was another little ramp, probably oh, maybe, five feet, maybe, leading up to the west door.

Q. And on the east what was the platform?

A. The east?

Q. Yes.

A. 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 employ. It was new construction.

Q. That is, by the Kelly-Springfield Tire Company?

A. Yes, by the Kelly-Springfield Tire Company.

Q. Now, describe that platform or ramp?

A. The platform ran at right angles from the west door directly out to the spur track, and it was probably, maybe six feet wide.

Q. And about how long?

A. You mean from the building?

Q. From the building out to the track?

A. About twenty-five or thirty feet.

Q. Then what was immediately east of the new ramp?

A. Well, the old ramp that connected with this ramp that the Kelly-Springfield Tire Company built, it went off east and followed the spur track around over to the end of Bailey's building.

Q. It followed the curve of the track?

A. It followed the curve of the track, yes.

Q. About how far did that extend north from the building at the widest point?

A. Well, about the same as that Kelly-Springfield platform. That hit pretty close to the center, I believe, or right at the east edge of the Kelly-Springfield ramp that went out, which was about twenty-five or thirty feet." (Tr. 355, 356—Abs. 131.)

When Mr. Snow was shown the map, Exhibit P, which shows the same dimensions of the platform as appear in the findings and decree and he was asked whether it was a fair representation of the platform in 1926, he said, "that looks just like it to me." (Tr. 359, Abs. 132.)

The testimony of the two disinterested witnesses, Evans and Snow, as to the size and location of the platform was definite and clear, and it is submitted that this testimony together with the actual measurements made by E. H. Merrill amply support the findings as to the size and location of the old platform. The right of the appellants to maintain and use a platform on the plaintiff's property is limited by the deed to the location of the old platform and the finding as to the location of the old lumber platform is supported by substantial and conclusive evidence. The testimony of Evans and Snow is not adequately ab-

stracted. It may be found in the transcript, pages 327 to 376.

The map attached to Exhibit O, a public document of the Public Service Commission of Utah, shows the platform as described by plaintiff's witnesses.

The evidence supports the specific findings as to the dimensions of the original lumber platform without reference to any of the maps introduced for illustrative purposes. It may be briefly summarized:

“7.3 feet East of the Southwest corner of Lot 3 Block 43, Plat ‘A,’ Salt Lake City Survey.”

William I. Richards, a witness called by the defendants testified that the distance was 7 feet 8 inches. (Abs. 106.) The discrepancy between this testimony and the starting point in the decree is four inches and it is in favor of the defendants so they cannot complain. Witnesses Ryser and Richards, both called by the defendants, testified that the marks on the building shown on the photographs, Exhibits 1, 3, and 6, particularly Exhibit 6 show where the western edge of the old lumber platform was located and also show where the steps were. The building is on the property line and it will be noticed that by counting the bricks between the corner of the building marked Colorado Animal By-Products Company, to the mark which the defendants' witnesses testified was even with the western edge of the platform that there are $10\frac{1}{2}$ bricks. Each brick, as is commonly known, is 8 inches long and the combined width of the mortar would be approximately 4 inches or a little less than $\frac{1}{2}$ inch between

two bricks. The total distance then from the corner of the building to the edge of the platform would be 88 inches or 7-1/3 feet.

Thence North 10.7 Feet

The width of the original lumber platform at its western most edge was said to be between 10 and 11 feet by the following witnesses:

Joseph F. Merrill. (Abs. 84.)

Taylor Merrill. (Abs. 87.)

Arnold Evans. (Abs. 124.)

Willard Snow. (Abs. 131, 132.)

Any discrepancy amounts only to a fraction of a foot and the finding should not be disturbed. These are the witnesses the trial court chose to believe.

Thence East 34 Feet.

Eugene H. Merrill made measurements of the distance between the Northwest corner of the Colorado **Animal By-Products** Building and the west side of the West door and found the distance to be 36 feet and the width of the door to be six feet. (Abs. 135, 136.) Both Arnold Evans and Willard Snow testified that the 10 foot lumber platform extended east along the building to the *east side* of the west door and that it then jogged to the north extending out to within 18 or 20 inches of the railroad track. (Abs. 124-131, 132-135.) The platform starts 7.3 feet east of the northwest corner of the building. By mathematical computation, it will be found that the platform extended east 34.7 feet before it jogged to the north. The discrepancy of .7 of a foot is also in favor of appellants and they cannot complain.

Thence North 14.6 Feet.

The evidence shows that the location of the spur track has not been changed since 1923 and that the Colorado Animal By-Products Company warehouse is in the same location as it was before 1923. (Abs. 89, 90.) The map, Exhibit A, prepared by E. H. Merrill, an engineer and duly authenticated accurately shows the location of the spur track and the building to which the lumber platform was attached. (Abs. 78-80.) By the use of a measure, it will be found that the distance from the building at a point 42 feet east of the Northwest corner of the building to a point 20 inches south of the railroad track is 25.3 feet. The platform was 10 feet 7 inches wide so the distance of the jog to the north would be 14.6 feet. Furthermore, Willard Snow testified that it was about 25 or 30 feet from the west door of the warehouse to the track. (Abs. 132, 135.) Arnold Evans testified to the same effect.

Thence South Approximately 70 Degrees East 61.2 Following the Curve of the Oregon Short Line Tracks and on the South Side Thereof.

The testimony of the defendants' witnesses, Ryser and Richards, is to the effect that the rear part of the platform follows the curve of the track as it did before the concrete was installed. (Abs. 93, 94, 106, 108, 109, 111, Exhibits 4, 5.) The tracks have not been moved so therefore the angles, directions and distances could be and were taken from the map prepared by E. H. Merrill, Exhibit A. The angle and distance south and east following the curve of the Oregon Short Line Track was computed

from Exhibit A which shows the easterly part of the platform as it was in 1923 and as it is at present. (Exhibit 5, Abs. 93.) Witnesses called by the defendants, William I. Richards and M. A. Jensen testified that except for enlarging the clearance between the platform where it curves along the track and the spur track, the outside boundaries of the platform were never changed between 1910 and 1933. (Abs. 113, 123.)

Thence South 5 feet to the South Side of Lot 3.

This dimension is the same now as it was in 1923 and the measurement is taken from the map, Exhibit A. (Exhibit 5, Abs. 93.)

Thence West 91.7 Feet More or Less to Point of Beginning.

This is the closing line of the description and is taken from the map, Exhibit A, which shows the building and the eastern end of the platform as it is now and as it has been since 1923 and before.

It is respectfully submitted that in view of the foregoing counsel's argument on page 42 of appellants' brief that:

“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,”

is clearly without merit. It is also charged that these courses and distances could only be taken from the various maps which were introduced for illustrative purposes. It is highly significant that whether the maps have any value, in connection with the oral testimony, as substan-

tive evidence or not, they are obtained from many separate sources; they show the platform as described in the findings, as it was before the concrete structure was put in and they are all the same. Not one shows the western extremity of the platform to be 32 feet wide. It is also significant that the appellants have been unable to produce a single map or photograph which sustains their position.

It is argued in the appellants' brief over several pages that the reference in the deed to a platform 10 feet wide described the easterly end of the platform with a curve to the north along the spur track. This argument is absurd for the reason that if the platform was ever 10 feet wide at the easterly end, it would have extended well past the middle of the railroad tracks. See Exhibit A. No one contends that the railroad tracks have ever been moved.

This court has declared many times that although in equity cases it may review conflicting evidence to determine whether findings of the trial court are supported it has repeatedly held that the findings will not be disturbed unless they are clearly against the weight of the evidence. This rule is well stated in the recent case of *Stanley vs. Stanley*, 94 P. (2d) 465, as follows:

“The scope of review on appeal in equity cases is clearly settled in this jurisdiction. ‘This court is authorized by the state constitution to review the findings of the trial courts in equity cases but the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that

the court has misapplied proven facts or made findings clearly against the weight of the evidence. Olivero v. Eleganti, 61 Utah 475, 214 P. 313, 315.”

See also:

Klopenstine v. Hays, 20 Utah 45, 57 P. 712;
Singleton v. Kelley, 61 Utah 277, 212 P. 63;
Holman v. Christenson, 73 Utah 389, 274 P. 457;
Zuniga v. Evans, 87 Utah 198, 48 P. (2d) 513;
Wilcox v. Cloward, 88 Utah 503, 56 P. (2d) 1;
Hoyt v. Upper Marion Ditch Company, 94 Utah 134, 76 P. (2d) 234.

It is also settled that it is the exclusive province of the trial judge to pass on the credibility of witnesses and the weight of the evidence. The rule is stated as follows in the case of Flinders v. Hunter, 60 Utah 314, 208 P. 526:

“Nor can the assignment be sustained that the court’s findings are contrary to or not supported by the evidence. On some of the material facts the statements of plaintiff and his witnesses are in direct conflict with the statements of the defendant and his witnesses. It was the exclusive province of the trial court to pass upon the credibility of the witnesses and the weight to be given to their statements. There is some substantial evidence in support of every essential finding made by the court, and in view of that we cannot interfere with the court’s findings.”

See also James v. Jensen, 50 Utah 485, 167 P. 827.

The law as to the right of the owner of the dominant estate to materially change or enlarge the servitude upon

the servient estate is well stated in the case of *Stephens Ranch Company v. Union Pac. R. Co.*, 48 Utah 528 at page 535, 161 P. 459, thus :

“The law is further well settled that when one acquires lands which are burdened with such an easement or prescriptive right he takes them subject to such right, but he is not also bound to submit to a material change or enlargement of the right by the dominant owner if thereby the servient estate is injured to a larger extent than it was under the right as it existed when the servient estate was acquired. It is not necessary to cite or review a large number of cases upon this point. See *Creeley Irr. Co. v. Van Trotha*, 48 Colo. 12, 108 P. 985; *Manier v. Myers and Johns*, 43 Ky. (4 B. Mon.) 514; *S. C.* 45 Ky. (6 B. Mon.) 132; *Schumacher v. Brand*, 72 Wash. 543, 130 P. 1145; . . . ”

See also :

17 Am. Jur. 98, and cases there cited.

The structures or roadways on the servient estate which are used in the enjoyment of the easement cannot be materially altered without the consent of the owner of the servient property. The following is a good statement of the rule :

“As a general rule when the character of an easement is once fixed, no material alterations can be made in physical conditions which are essential to the proper enjoyment of the easement except by agreement. This applies to both the owner of the easement and the owner of the fee. The test is to determine the right to make a particular alteration is whether the alteration is so substantial as to re-

sult in the creation and substitution of a different servitude from that which previously existed. It is no defense in an action involving such an alteration that the mode and manner of using the easement will be less burdensome to the servient estate, and more convenient to the owner of the dominant lands.” 17 Am. Jr. 1006.

The extent to which a court of equity will go to confine the servitude to that part of the servient estate which is reserved for a right of way by deed, is well illustrated in the leading California case, *Winslow v. Vallejo*, 148 Cal. 723, 84 P. 191, 5 L. R. A. (N. S.) 851. In that case the deed did not definitely describe the area subject to a right of way for the laying of water pipes. In granting an injunction against the city and restraining it from enlarging the servitude, the court said:

“In *Jennison v. Walker*, 11 Gray, 423, the court said: ‘Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised, cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and defined course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee.’

This case involved the location and course of an aqueduct. The same principle has been applied to the construction of a dam (*Evangelical Lutheran Orphan Home v. Buffalo Hydraulic Asso.*) (64 N. Y.) 561; and to the location of a right of way. *Wynkoop v.*

Burger, 12 Johns 222; Bannon v. Angier, 2 Allen 128; O'Brien v. Goodrich, 177 Mass. 32, 58 N. E. 151; Garraty v. Duffy, 7 R. I. 476. We think, therefore, that the construction given to the conveyance by the lower court was correct, and that the laying of the 10-inch pipe, with the acquiescence of both parties, measured and limited the location and the extent of the easement. 'It is elementary that the location of an easement of this character cannot be changed by either party without the other's consent after it has once been finally established, whether by the express terms of a grant, or by acts of the parties tantamount in their effect.' Vestal v. Young, 147 Cal. 715, 82 P. 381; Allen v. San Jose Land & Water Co., 92 Cal. 138, 15 L. R. A. 93, 28 P. 215. If the defendant had no right to lay the new pipe, injunction was the proper remedy. 'It is the settled law of this state that, irrespective of other damage, an injunction will be granted to prohibit the continuance of action that obstructs one in the free use and enjoyment of his land, where such action, if continued, will ripen into an easement.' Vestal v. Young, supra, and cases cited."

There can be no doubt but that the effect of constructing the concrete ramp across the front of plaintiff's property not only violated the terms of the deed but very substantially and materially enlarged the servitude. Upon an examination of the photographs, Exhibits 1—6 and B—H inclusive, and of the map, Exhibit A, it will be apparent that the concrete ramp covers more than two-thirds of plaintiff's frontage. It is bound on the north by a concrete retaining wall one foot thick and it is so constructed as to make the ramp and the entire area covered usable only by the occupants of the appellants' premises.

The deed does not give the beneficiaries the *exclusive right* to use the roadway to and from the loading platform and when the loading platform was only about 10 feet wide to a distance of 42 feet from the west property line, the area now covered by the concrete ramp could be readily used by both the owner of the dominant and servient estates. Furthermore, prospective purchasers of plaintiff's property, as it is encumbered by the great concrete ramp readily observe that they can buy no frontage whatever. If the plaintiff had permitted the ramp to remain as it is without objection for the prescriptive period his property would have become burdened with an easement to maintain a concrete ramp for the *exclusive benefit* of the dominant estate, covering nearly all the frontage, which very substantially decreases its value. It is idle to argue that such wrongful appropriation of the plaintiff's property did not increase the burden and did not materially change the nature of the servitude. To sustain this unlawful act of the appellants would destroy in a measure the sacred right of a property owner to determine just how and by whom his land may be used. It is submitted that the findings of the trial court as to the location of the original lumber platform and as to the concrete ramp and parts of the decree requiring the removal of that portion of the ramp which extends beyond the area occupied by the original platform are all amply sustained by the evidence and by the law.

Point D.

Counsel admits that there is no statutory support for the argument that the trial court erred in failing to give

the defendants any opportunity to be heard upon objections and proposed amendments, and in not ruling upon the objections. The rule quoted by the appellants as one promulgated by the Third District Court provides that the judge *may* designate the time for argument and settle the same, etc. It will be noted that this is discretionary with the judge. The objections were submitted as suggestions to aid the court in making its finding and decree. The trial judge is not required to let counsel orally argue them, and when he signed the findings and decree he, of course, ruled adversely to the appellants' contentions. The cases cited by appellants to support their contention in this regard are not in point. They relate to situations where the court failed to make findings on material issues and failed to rule upon plaintiff's motion to strike parts of the pleadings. It is submitted that this contention is wholly without merit.

Point E.

In view of the full disclosure in the preceding pages of the source of the evidence which support the findings of fact and decree with reference to the dimensions of the platform as it was in 1923, the argument under Point E is entirely beside the point. As noted above the findings do not rest upon courses and distances in maps introduced only for illustrative purposes, but rest upon the testimony of witnesses and upon the map, Exhibit A prepared by a practicing engineer which shows the location of structures on the ground which have not been altered since prior to 1923. The appellants had full opportu-

ity to cross-examine E. H. Merrill, who prepared the map, Exhibit A, and as far as the record discloses no inaccuracies as to the location of the concrete ramp, the spur track, the building now occupied by the Colorado Animal By-Products Company, or the other buildings and property lines have been found. As pointed out above the findings are sustained in part by the testimony of the appellants' own witnesses, Ryser, Richards and Jensen.

The reference in the appellants' brief to the questions asked of one of the attorneys for the respondent at the time the motion for a new trial was presented (Abs. 179-182) is not accurate. Upon a reading of all of the questions and answers, it will be noted that Mr. E. J. Skeen said:

“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.” (Abs. 179.)

The question as to whether Eugene Merrill did or did not, in an abundance of precaution recheck courses and distances (no one knows what courses and what distances) has nothing whatever to do with this case. The question is whether the description of the old platform contained in the deed and decree is supported by the evidence, and as we have painstakingly pointed out every course and every distance is amply supported by evidence, properly authenticated and received, much of it offered by the appellants themselves. The various railroad and insur-

ance maps were properly received in connection with testimony that they show the platform as it was before the concrete was installed.

All of the assignments of error relied upon by the appellants are without merit, and the decree of the district court should be affirmed.

Respectfully submitted,

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