

1948

# James C. Knight and Beatrice M. Knight v. Utah Power & Light Company and Ogden River Water Users Association : Brief of Appellants

Utah Supreme Court

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Charles L. Ovard; Howell, Stine and Olmstead; Attorneys for Defendant Utah Power & Light Company; David K. Holther; Attorney for Defendant Ogden River Water Users Association;

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IN THE  
**SUPREME COURT**  
OF THE STATE OF UTAH

JAMES C. KNIGHT and BEATRICE M.  
KNIGHT,

*Plaintiffs and Appellees,*

VS.

UTAH POWER & LIGHT COMPANY, a  
corporation and OGDEN RIVER WATER  
USERS ASSOCIATION, a corporation,

*Defendants and Appellants.*

**Brief of Appellants**

CHARLES L. OVARD,  
HOWELL, STINE AND OLMSTEAD, ..  
*Attorneys for Defendant*  
*Utah Power & Light Company*

DAVID K. HOLTHERR,  
*Attorney for Defendant*  
*Ogden River Water Users*  
*Association.*

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ERK, SUPREME COURT, UTAH

# I N D E X

STATEMENT OF THE CASE .....	1
THE PLEADINGS .....	3
THE FACTS .....	11
STATEMENT OF ERRORS UPON WHICH APPELLANTS RELY .....	13
THE ARGUMENT	
1. The lower Court Erred in Overruling Defendants' Demurrers, In Denying De- fendants' Motion For Non-suit Following Plaintiffs' Opening Statement, and In Denying Defendants' Motion for Non- suit Following Completion of Plaintiffs' Case in Chief .....	18
2. The Lower Court Erred in Denying De- fendants' Motion for Directed Verdict and in Refusing to Give Defendants' Re- quested Instruction No. 1, which would Have Instructed the Jury to Find for the Defendants' and Against the Plaintiffs .....	27
3. The Lower Court Erred in Refusing to Give to The Jury Defendants' Requested Instructions 9 and 14 .....	37
4. The Lower Court Erred in Its Instruc- tions 1, 5, 9, 10, and 12 .....	41

## CASES

Logan, Hyde Park and Smithfield Canal Com- pany v. Utah Power & Light Company, 45 Utah 491, 146 P. 560 .....	20, 21
LeDeau v. Northern Pacific Railroad Company (Idaho) 115 P. 503 .....	25, 26
Fleming v. Pittsburg Railway Company (Penn.) 27 Atl. 858 .....	31, 32
Ward v. Salt Lake City, 46 Utah 616, 161 P. 905 .....	33
Watters v. City of Omaha (Neb.) 110 NW 981 .....	34
Brantz v. Fargo, 19 N.D. 538, 125 N.W. 1042, 27 L. R. A. (N.S.) 1169 .....	34
Town of Spencer v. Mayfield, 43 Ind. App. 134, 85 N. E. 23 .....	34
Gallagher v. City of Tipton, 133 Mo. 557, 113 S. W. 674 .....	34
Hays v. City of Columbia, 159 Mo. 431, 141 S. W. 3 .....	34
Rome v. Cheney, 114 Ga. 194, 39 S. E. 933, 55 L. R. A. 221 .....	34
Lansing v. Toolan, 37 Mich. 153 .....	34
Rollow v. Ogden City, 66 Utah 475, 243 P. 791 .....	39, 40

## TEXTS

45 C. J. 746 .....	24
38 Am. Jr. 845 .....	35
45 C. J. 698 .....	36, 37
CONCLUSION .....	47

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*Defendants and Appellants.*

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**Brief of Appellants**  
**STATEMENT OF THE CASE**

The parties to this appeal will hereafter be designated as they were in the Court below, where respondents were the plaintiffs and appellants were defendants.

Plaintiffs, who are husband and wife, brought this action against the defendants to recover One Thousand Eight Hundred Twenty Five (\$1,825.00) Dollars damages claimed to have been sustained by them by reason of the flooding of their premises, which flooding allegedly resulted from defendants' negligence. The case was tried before the Court and jury on November 20th, 21st, 25th and 26th, 1947, in the District Court for Weber

County, the Honorable Charles G. Cowley presiding. At the opening of the trial, counsel for plaintiffs made an opening statement of plaintiffs' case (Tr. 3-4), following which defendants separately moved for judgment of non-suit (Tr. 5), which motions the court denied (Tr. 5). Upon the conclusion of plaintiffs' case in chief, defendants separately moved for judgement of non-suit (Tr. 132-134), which motions the court denied (Tr. 134). After both sides had rested the defendants separately moved for a directed verdict "No cause for action", (Tr. 257-259), which motions the court denied (Tr. 260). Thereupon the cause was submitted to the court under instructions by the court, and the jury in due course returned its verdict in favor of the plaintiffs and against the defendants for the amount of One Thousand Two Hundred Fifty Eight and 75/100 (\$1,258.75) Dollars (Tr. 289). The verdict was by six of the eight jurors, two jurors dissenting therefrom (Tr. 289). Thereafter, and within the time allowed by law, the defendants each moved the court for a new trial, which motion was on December 8, 1947, denied. The defendants thereupon filed on February 19, 1948, their notice of appeal from the judgement entered on the verdict, and from the order denying their motions for new trial. The statutory undertaking on appeal was waived by plaintiffs.

Hereafter, where it becomes necessary to refer to a defendant separately, defendant Utah Power and Light Company will, for convenience, be referred to as the Power Company, and defendant Ogden River Water Users Association, as the Water Users.

## THE PLEADINGS

Plaintiffs' action was based on the following complaint, as amended (omitting title, signatures and verification);

“Come now the plaintiffs and complain of the defendants and for cause of action allege:

“1. The defendant Utah Power & Light Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Maine and duly licensed to do business within the State of Utah. The defendant Ogden River Water Users Association is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Utah.

“2. At all times herein mentioned the plaintiffs were the owners of the following described real property situated in Weber County, State of Utah:

‘All of Lots 1, 2, 3, 4, & 5, Block 12, The Hermitage of Ogden Canyon, situate in the Northeast quarter of the Southeast quarter of Section 18, Township 6 North, Range 1 East Salt Lake Base and Meridian, U.S. Survey.’

The said real property was at all times herein mentioned improved with a frame dwelling with six rooms and a bath having hardwood floors and knotty pine finish, together with a cesspool sewer system constructed in said lands for the use of the said house. The said dwelling house was completely furnished, at all times herein mentioned with customary household furnishings, furniture and fixtures including a console radio and at the time of the flooding of the said premises as here-

inafter alleged the plaintiffs owned and had stored therein large quantities of clothing, luggage and other personal property.

“3. At the time of the flooding of the said premises the said household furniture, furnishings and equipment aforesaid, which were all property of the plaintiffs, were of the reasonable value of One Thousand (\$1,000.00) Dollars and upwards. The said dwelling house was of the reasonable value of Five Thousand (\$5,000.00) Dollars and upwards, and the clothing, luggage and household supplies aforesaid were of the value of One Thousand (\$1,000.00 Dollars and upwards.

“4. At all times herein mentioned a large wooden water pipe or flume was laid on the North side of Ogden Canyon in said Weber County on a point near the head of said Ogden Canyon past the premises of the plaintiffs aforesaid through the mouth of Ogden Canyon. The said pipe or flume was then and there owned, controlled and maintained by the defendants jointly and the said defendants were at all times herein mentioned under contractual obligations with each other and with the United States of America to be jointly responsible for the care and maintenance of said pipe. The said pipe was originally constructed and laid by the defendants and the United States Government as a joint enterprise for the use and benefit of the defendants.

“5. The defendants at all times herein mentioned used the said water pipe to conduct water under great pressure and at great velocity for the purposes of the defendants from the head of Ogden Canyon to the mouth thereof. In the construction and in the maintenance of the said water



pipe and in the use thereof in violation of the duty which the defendants and each of them owed to all property owners in said Ogden Canyon and particularly to the plaintiffs, the defendants carelessly and negligently constructed and maintained the said pipe by carelessly and negligently failing to protect the same from large stones and boulders which during the spring of each year roll down the steep mountainsides of said Ogden Canyon and across the place where the said pipe was and is constructed and maintained, but on the contrary the said defendants carelessly and negligently left the said pipe lying unprotected upon the surface of the ground in the places where the said boulders roll down said mountainsides, and carelessly and negligently caused large quantities of water under pressure into and through said pipe so left unprotected. The defendants and each of them well knew, or by the exercise of reasonable care could have known that in the spring of every year rocks being loosened on the melting of the frost roll down the sides of said mountains and across the place where the parties laid and maintained said pipe without protecting the same from said rocks and boulders.

“6. On or about the 28th day of February, 1946, during a spring thaw large rocks and boulders became loosened from the mountainside of said Ogden Canyon and rolled down said mountainside with great force and violence and rolled into and upon the said waterpipe so left negligently exposed by the defendants and crushed and broke the said waterpipe so that very large quantities of water were released therefrom under great force and at high velocity and flowed from said pipe across the ground and upon and across the premises of the plaintiffs through the house with

which said premises were and are improved completely soaking and saturating the said frame building and all of its contents and leaving heavy deposits of mud and silt therein and filling up the cesspool of the parties, completely destroying luggage of the parties of the value of One Hundred (\$100.00) Dollars, completely destroying a French bouvai rug of the value of One Hundred (\$100.00) Dollars, completely destroying clothing of the parties of the value of Three Hundred Seventy Five (\$375.00) Dollars and household linens of the parties of the value of Fifty (\$50.00) Dollars, and groceries of the value of Ten (\$10.00) Dollars. Plaintiffs were further compelled to expend and they did expend the sum of Three Hundred (\$300.00) Dollars for removing the said mud and silt from their said dwelling house and cleaning the same and cleaning and polishing the said furniture and cleaning drift and debris from the yard deposited therein by said waters and cleaning the garage of the parties situated on said premises and redigging and repairing the said cesspool and repairing doors and furniture damaged by water and cleaning and repairing the said fireplace in the said dwelling. The parties were further compelled to expend and did expend the sum of Two Hundred Twenty Five (\$225.00) Dollars in and about the repair and replacement of hardwood flooring ruined and damaged by said waters and mud and silt and the further sum of Fifty (\$50.00) Dollars in and about the cleaning and repair of clothing of the parties which they were able to salvage from the flood caused by the negligence of the defendants as aforesaid. The said premises and the dwelling house thereon have further been damaged beyond repair in the sum of Five Hundred (\$500.00)

Dollars, and the furniture of the plaintiffs has been damaged beyond repair in the sum of One Hundred Twenty Five (\$125.00) Dollars all to the damage of the plaintiffs in the sum of One Thousand Eight Hundred and Twenty Five (\$1,825.00) Dollars.

“WHEREFORE, plaintiffs pray judgment against the defendants and each of them in the sum of One Thousand Eight Hundred Twenty Five (\$1,825.00) Dollars, for cost of suit and for such other and further relief as to the court may seem meet.”

Defendant Power Company demurred generally and specially to such complaint as follows (omitting title and signatures):

“Comes now the defendant, Utah Power & Light Company, and demurs to the complaint of the plaintiffs on file herein and for cause thereof alleges:

“(1) That said complaint does not state facts sufficient to constitute the cause of action attempted to be pleaded in said complaint, or any cause of action against this demurring defendant.

“(2) (a) That said complaint and particularly paragraph 2 thereof is uncertain in this, that it cannot be ascertained therefrom whether the improvements upon the said real property claimed to be owned by the plaintiffs were constructed to or subsequent to the construction of the water pipe referred to in paragraph 4 of said complaint.

“(b) That said paragraph of said complaint is ambiguous for the foregoing reasons.

“(c) That said paragraph of said complaint is unintelligible for the foregoing reasons.

“(3) That said complaint and particularly paragraph 4 thereof is

“(a) uncertain in this, that it cannot be ascertained therefrom whether the said pipe referred to therein was constructed prior or subsequent to the improvements upon the land claimed to be owned by the plaintiffs, as set out in paragraph 2 of said complaint, nor can it be ascertained therefrom by whom said pipe was constructed, whether by this demurring defendant or by the United States of America or by whom, nor can it be ascertained therefrom what contractual obligations it is claimed there were between the parties mentioned in said paragraph of said complaint, nor can it be ascertained therefrom when it is claimed that the said pipe was owned, controlled or maintained by the said defendants jointly, nor can it be ascertained therefrom why it is claimed that this demurring defendant was jointly responsible with the other persons named in said paragraph or any of them, for the care and maintenance of said pipe.

“(b) That said paragraph of said complaint is ambiguous for the foregoing reasons.

“(c) That said paragraph of said complaint is unintelligible for the foregoing reasons.

“(4) That paragraph 5 of said complaint is uncertain in this

“(a) That it cannot be ascertained therefrom whether the plaintiffs claim that this demurring defendant was negligent in the construction of said pipe or whether it is claimed

by said complaint that this demurring defendant was negligent in the maintenance thereof, nor can it be ascertained therefrom why such construction or maintenance was in violation of any duty to the plaintiffs, nor can it be ascertained therefrom why this demurring defendant was negligent in failing to protect said pipe from stones or boulders rolling down the mountain side, as set out in said complaint, nor can it be ascertained therefrom how or why it is claimed that this demurring defendant was guilty of any carelessness or negligence in leaving said pipe unprotected upon the surface of the ground, nor can it be ascertained therefrom why it is claimed this demurring defendant could have known that in the spring of every year, or at any time, rocks would be loosened by the melting of frost or otherwise and roll down the side of the mountain and across the place where said pipe line was maintained, nor why or for what reason this demurring defendant was under any duty to protect the said pipeline from any rocks or boulders.

“(b) That said paragraph of said complaint is ambiguous for the foregoing reasons.

“(c) That said paragraph of said complaint is unintelligible for the foregoing reasons.

“(5) That said complaint and particularly paragraph 6 thereof is uncertain in this:

“(a) That it cannot be ascertained therefrom how or why it is claimed that there was any negligence upon the part of this demurring defendant in leaving said pipeline exposed, as therein set out, nor can it be ascertained therefrom whether it is claimed by the plaintiffs that said pipeline was constructed prior or subsequent to the said



improvements upon said property claimed to be owned by the plaintiffs, or whether said personal property therein described was placed therein prior or subsequent to the construction of said pipeline, nor can it be ascertained therefrom when it is claimed that said pipeline was constructed.”

A similar demurrer was filed by defendant Water Users.

The demurrers were overruled, whereupon defendants separately answered, putting in issue the question of its negligence and plaintiffs’ damage, and further affirmatively pleaded that the pipeline which became broken, allowing water to flow on to plaintiffs’ premises, was constructed by the United States in the years 1935 and 1936 under contract with Barnard Curtis Company, and under plans and specifications prepared by the United States and in accordance with best approved engineering practices, and along the only practical and feasible route therefor, and that the pipe line at all times remained and was maintained in the same condition as originally constructed and installed; further that plaintiffs’ acquired the premises that were damaged subsequent to the building of the pipeline and subsequent to April 5, 1944, well knowing of the existence and location of the pipeline and the manner in which it was installed; further, that the proximate cause of plaintiffs’ damage, if any, was not any act of omission or commission of the defendants, but was the act of the State Highway Commission in banking snow on either side of the highway and thus channelling water flowing from the break down the highway onto plaintiffs’ premises, instead of

flowing into the river as it otherwise naturally would have done; further, that plaintiffs' action was barred by the provisions of section 104-2-30, Utah Code Annotated, 1943.

## THE FACTS

On May 28, 1935, the United States entered into a contract with Barnard-Curtiss Company under which the latter was to construct a conduit, or wood stave pipeline from Pineview Dam in upper Ogden Canyon down the canyon to the mouth thereof. The pipeline was 75 inches in diameter and was for the purpose of conveying water from the dam for electric power developments and for irrigation of extensive acreages in Weber and Box Elder counties. It runs in a generally easterly and westerly direction. The line was constructed during the years 1935 and 1936, in accordance with plans and specifications prepared by the United States, and along the route selected by it. (Exhibit 6 and 7, Tr. 140, 141.) Subsequent to the building of the pipeline, plaintiffs acquired a home in the canyon some distance below the Dam, and fronting on the canyon highway. (Tr. 119). On the evening of February 28, 1946, a break occurred in the pipeline about three-fourths mile easterly (towards the dam) of plaintiffs' home; the water flowed from the break onto the highway, and then down the highway until it reached plaintiffs' premises, where it flowed upon the premises and into the home. Prior to this snow fall in the canyon had been quite heavy, and in plowing the snow therefrom the State Highway Commission had banked it along each side of the highway and had it not been for the snow so banked along either side of the highway the

water would not have flown down the highway to plaintiffs' premises, but would have left the highway and flown into Ogden River long before it reached plaintiffs' premises. (Tr. 193-198; 205; 232. At the point where the break in the pipeline occurred, the pipeline is located about 50 feet north of the highway, and at an elevation above the highway. In installing the pipeline at this point a cut was made in the side of the canyon and the pipe laid at the base of the cut (Tr. 212). The cut is about 25 feet deep, and the face of the cut rises directly above the north side of the pipe about 25 feet (Tr. 212). Above the cut to the north the canyon opens out into a gradual slope until it reaches precipitous cliffs some half mile farther north (Tr. 186-188). On the evening of February 28, 1946, a large mass of rock became dislodged from these cliffs some half mile to the north of the canyon, and a large boulder came down the slope in great leaps and bounds toward the pipeline. As it approached the pipeline it struck the ground about 68 paces to the north of the cut, at the base of which lay the pipeline, and then apparently leaped high in the air and descended at a point where it just cleared the brow of the cut and struck the pipeline, tearing a hole in it, from which flowed the water which reached plaintiffs' premises. (Tr. 180). Immediately following the accident a large rock, weighing some 91½ tons, was found lying in the highway directly below the break in the pipeline. (Tr. 230, 241).

Following the construction of the pipeline by the United States, the responsibility for its maintenance had been turned over to the defendants.



Plaintiffs' cause of action, as we understand it, is predicated upon the theory that defendants were negligent in the construction of the pipeline, and in its maintenance, in that they should have foreseen this danger to the line and have taken precautions in addition to what they did, to guard against it. The court by its Instruction No. 7, (Tr. 276) itself determined that there was no evidence in the case of negligence in the matter of maintenance, and purported to submit the case to the jury solely upon the theory of negligence in its construction.

The evidence in further detail will be considered in connection with Points I and II of the Argument.

## STATEMENT OF ERRORS UPON WHICH APPELLANTS RELY

1. The lower court erred in overruling defendants' demurrers.

2. The lower court erred in denying defendants' motions for non-suit following plaintiffs' opening statement.

3. The lower court erred in denying defendants' motions for non-suit following completion of plaintiffs' case in chief.

4. The lower court erred in denying defendants' motions for directed verdict.

5. The lower court erred in refusing to give defendants' Requested Instruction No. 1 (Tr. 265).

6. The lower court erred in refusing to give defendants' Requested Instruction No. 9. (Tr. 268).

7. The lower court erred in refusing to give defendants' Requested Instruction No. 14 (Tr. 269).

8. The lower court erred in giving Instruction No. 1 (Tr. 273-274).

9. The lower court erred in giving that portion of Instruction No. 1 reading as follows:

“The defendants and each of them well knew, or by the exercise of reasonable care should have known that in the spring of every year rocks being loosened on the melting of the frost roll down the sides of said mountains and across the place where the defendants laid and maintained said pipe without protecting the same from said rocks and boulders,” (Tr. 284-285).

10. The lower court erred in giving that portion of Instruction No. 1 reading as follows:

“The defendants by their answers deny that they were negligent in the construction and maintenance of said pipeline, and deny that there was any negligence on their part directly or proximately causing any damages which the plaintiffs may have suffered, and defendants pray that said complaint be dismissed,” (Tr. 285).

11. The lower court erred in giving Instruction No. 5. (Tr. 275).

12. The lower court erred in giving that portion of Instruction No. 5 reading as follows:

“It is the efficient cause,—the one that necessarily sets in operation the factors that accomplish the injury,” (Tr. 285).

13. The lower court erred in giving Instruction No. 9. (Tr. 276-277).

14. The lower court erred in giving that portion of Instruction 9 reading as follows

“Water collected by gravitation manifests a power familiar to all, capable of accomplishing useful and beneficial purposes, or destructive and disastrous consequences and results,” (Tr. 285).

15. The lower court erred in giving that portion of Instruction 9 reading as follows:

“If the defendants in this action interfered with or undertook to control the force of the water flowing down Ogden Canyon, for their own purposes, by the diversion of that water into a wooden pipe constructed along the side of the canyon and above the land, home and other property of the plaintiffs, Mr. and Mrs. Knight, the law requires the defendants so doing to use ordinary judgment, skill, care and caution in the construction and maintenance of that pipeline and in the use of the pipeline for the coursing of water in order that the property of the plaintiffs may not be injured.” (Tr. 286).

16. The lower court erred in giving Instruction No. 10. (Tr. 277-278).

17. The lower court erred in giving that portion of Instruction 10 reading as follows:

“If the defendants constructed the wooden pipeline referred to in the evidence in this case or conveyed waters through the same for their own purposes, the defendants were under a duty to use the same care which an ordinary prudent man would use in the construction and operation of the pipeline to prevent the escape of water from the pipe to the damage of those in the vicinity.” (Tr. 287).

18. The lower court erred in giving that portion of Instruction 10 reading as follows:

“The degree of care required to prevent the escape of water is commensurate with the damage or injury that will probably result if the water does escape,” (Tr. 287.)

19. The lower court erred in giving that portion of Instruction 10 reading as follows:

“In this case if a reasonable prudent man would anticipate that the damage which would probably result if the water should escape from the pipeline here involved would be high, then the degree of care required to prevent the escape of water from this pipeline would be high.” (Tr. 287).

20. The lower court erred in giving that portion of Instruction 10 reading as follows:

“If you find from a preponderance of all of the evidence in this case that the defendants, in the construction of the pipeline in this case, failed to exercise that degree of care to prevent the escape of water from the pipeline which an ordinary prudent man in the same or similar circumstances would exercise in the protection of said

pipeline from rocks rolling down the canyon hillside that could reasonably be anticipated to roll down the canyon hillside, and that as the natural and proximate result of their neglect to exercise that care water escaped from the pipeline and caused damage and injury to the property of the plaintiffs, then you should find for the plaintiffs." (Tr. 287).

21. The lower court erred in giving Instruction No. 12. (Tr. 278-279).

22. The lower court erred in giving that portion of Instruction 12 reading as follows:

"Such sum as will reasonably compensate said plaintiffs for damage to their clothing, but not to exceed the sum of \$375, the amount claimed by plaintiffs." (Tr. 279).

23. The lower court erred in giving that portion of Instruction 12 reading as follows:

"Such sum as will reasonably compensate said plaintiffs for the reasonable repair actually needed of clothing of the parties which they were able to salvage, but not to exceed the sum of \$50, the amount claimed by plaintiffs." (Tr. 279)

24. The lower court erred in giving that portion of Instruction 12 reading as follows:

"Such sum as will reasonably compensate said plaintiffs for the reasonable expenditure made by them and which was actually necessary for removing the said mud and silt from their dwelling house and cleaning the same, and cleaning and polishing of said furniture, and cleaning drift and debris from the yard, and cleaning the

garage, and re-digging and repairing the cesspool, and repairing doors and furniture damaged by water, and cleaning and repairing the fire place in the said dwelling, but not to exceed the sum of \$300, the amount claimed by the plaintiffs.” (Tr. 279).

25. The lower court erred in giving that portion of Instruction 12 reading as follows:

“Such sum as will reasonably compensate said plaintiffs for the reasonable damage beyond repair of the furniture, but not to exceed the sum of \$125, the amount claimed by plaintiffs.” (Tr. 279).

## THE ARGUMENT

For the purposes of argument, and in the interests of brevity, certain of the assigned errors will be grouped, and considered collectively.

### I.

THE LOWER COURT ERRED IN OVERRULING DEFENDANTS’ DEMURRERS, IN DENYING DEFENDANTS’ MOTION FOR NON-SUIT FOLLOWING PLAINTIFFS’ OPENING STATEMENT, AND IN DENYING DEFENDANTS’ MOTION FOR NON-SUIT FOLLOWING COMPLETION OF PLAINTIFFS’ CASE IN CHIEF. (ASSIGNED ERRORS 1, 2 and 3).

Plaintiffs’ complaint as amended, and defendants’ demurrer thereto is set forth herein at pages 3 to 10. Plaintiffs’ opening statement to the jury is at pages 3 and 4 of the transcript. The allegations of defendants’



negligence, so far as the complaint is concerned, are as embodied in paragraph 5 of the complaint. The expected proof of such negligence, as evidenced by plaintiffs' opening statement, is shown at page 4 of the transcript.

In substance such asserted negligence is that the defendant's constructed the pipeline in such a manner as to leave it above ground and exposed at the point where the break actually occurred, without protective covering from rolling rocks, knowing that in the spring of the year rocks become dislodged above the pipeline from melting frosts, and roll toward and across it. Plaintiffs' evidence was limited to a showing that the pipeline was above ground at points near where it was broken on the evening of February 28, 1946, that in the past small and large rocks have been dislodged from the canyon walls and rolled upon the highway, but not in this particular area, (Tr. 16-17), that no evidence of rolling rocks at the place where this break occurred was observed over a period of thirty-five years prior to February 28, 1946, (Tr. 19), that near the place where this break occurred a break occurred in another pipeline about twenty-five years previous, (Tr. 26-31) *but the witness couldn't say what caused that earlier break* (Tr. 29), that a small 24 inch pipeline owned by Ogden City, that was rotten and deteriorating, was damaged by rolling rocks in the past (Tr. 32-36), that only one previous break had occurred in the existing pipeline, which is evidenced in this action, which break occurred some years before, and in a different area (Tr. 40-41), that this pipeline at the point of the break on February 28, 1946, was covered with earth to a depth of six inches (Tr. 42).

It is defendants' contention that neither the allegations of the complaint, plaintiffs' opening statement, or plaintiffs' evidence showed any actionable negligence on the part of the defendants. The most it shows is that the pipe line was located so as to be in a position to be struck by rolling rocks if uncovered, that it had been struck and broken by a rock at least once before, but in a different area, it had never been struck or broken in this particular area before, and it was covered in this particular area to a depth of at least six inches, which obviously was sufficient to protect it from a rolling rock.

Defendants' position is that this case is governed by the decision of this Court in the case of *Logan, Hyde Park & Smithfield Canal Co. v. Utah Power & Light Co.*, 45 Utah 491, 146 P. 560. The facts in that case are similar to those in the instant case. There plaintiff was the owner of an irrigation canal which, at the point of the alleged injury, was constructed along the side of a steep mountain. Defendant constructed a wooden flume along the same mountain side about fifty feet above plaintiff's canal. Above the canal and flume, along the mountainside were many boulders of various sizes, some very large. There were also many loose rocks of various sizes, some of which would, from time to time, become loosened and roll down the mountainside. On May 22, 1913, a large rock rolled down the mountainside, struck and broke defendant's wooden flume, and water flowing from the break therein damaged plaintiff's canal. The rock started about 500 feet above defendant's flume. Defendant's flume was six feet high, the upper four feet being completely exposed. The flume was constructed as such flumes usually are in this state, along



the incline or contour of the mountain, and it was sufficient for the purpose for which it was constructed. While rocks of various sizes from time to time rolled down the mountain, there was no evidence of previous damage to the flume during the twelve years it had been in existence. There was no evidence that defendant did anything to cause the rock to be placed where it was, or to start it rolling down the mountain.

Upon such evidence defendant moved for a non-suit, which was denied. Defendant then produced evidence showing it was in no way connected with the loosening of the rock in question, and also produced evidence (the nature of which is not apparent from the opinion) from which it was made to appear that some person who was stranger to the defendant, caused the rock to roll. In its decision this court said:

“The denial of the motion for a nonsuit is assigned as error, and it is also insisted that the verdict is not supported by any evidence of negligence on the part of the defendant.

“It seems to us this contention is sound. True, plaintiff’s counsel contend that, in view that there were many large boulders and loose rocks along the steep incline on the mountain side above the flume, it was the defendant’s duty to guard against injury to its flume from any of the rocks that might become dislodged and roll down the mountain side. According to plaintiff’s own evidence, however, such a danger or contingency was quite remote. The evidence is conclusive that the wooden flume was in operation for at least twelve years before the rock in question struck and injured it. Is it negligence not to foresee and guard

against the consequences of an occurrence of the character in question here, which happens only once in twelve years, and may not occur again or is it any evidence of negligence? If such be the law, then the only method by which the defendant can make itself immune against suits for damages caused by rocks that may roll down the mountain side and which cause injury to its flume, and may thus result in causing the water flowing therein to cause damages, is to remove all the rocks that are along the mountain side above the flume, or build the flume into the mountain side and cover it over so that no rocks could possibly injure it. The latter is what plaintiffs counsel suggest defendant should have done. To require that seems quite unreasonable.

“Counsel for plaintiff have, however, cited one case, namely *Howe v. West Seattle L. & I. Co.*, 21 Wash. 594; 59 Pac. 495, which they claim supports their contention. In that case the defendant placed a large log on the brink of a precipitous incline, and after it had lain there for some time a landslide occurred, which caused the log to roll down the mountain side, and in its course it struck and killed plaintiff’s infant child. That case is not point here, for the reason that the defendant in that case placed and left the log in an unsafe and dangerous place or position. That case falls within the principle laid down by us in the case of *Furkovich v. Bingham, Etc., Co.*, 45 Utah 89; 143 Pac. 121. In that case it was the defendant that set in motion the instrumentality which, in rolling down the mountain side, caused the injury to the plaintiff there, while in the *Howe* case, *supra*, the defendant left the instrumentality, the log, in such an unsafe place or position that it was forced down the mountain side by natural forces, which, under the evidence and circumstances there shown,

the Washington court held the defendant should have foreseen. No such conditions are involved in the case at bar.

“The case of *Fleming v. Railway*, 158 Pa. 130; 27 Atl. 22 L. R. A. 351; 38 Am. St. Rep. 835, is, however, squarely in point in favor of the defendant. In that case, the same as here, a rock, from some unknown cause, became dislodged and rolled down a steep cliff, and in its course struck a railroad train and killed a passenger while riding in a coach in said train. There, as here, the defendant was in no way connected with the instrumentality (the rock) which caused the injury, and the court held that therefore it could not be held liable, and reversed the judgment. That case, in the writer’s judgment, was much stronger in favor of the plaintiff there than this is the case at bar in favor of the plaintiff here. We cannot see how this judgment can be sustained upon any sound legal principle.”

That case, we submit, is conclusive as to this. Except for one factor, the facts are identical. That one factor makes defendants’ position in this case stronger than in the Logan, Hyde Park Case. In the Logan, Hyde Park case at least four feet of the flume was exposed to the danger of rolling rocks. In this case, as shown by plaintiffs’ testimony, the pipe line was completely covered at the place of damage. (Tr. 42). In that case it was the first break in twelve years; in ours, while there had been a previous break in another area some two years previous, the only damage in this area was twenty-five years previous, and there was no proof that it had been caused by a rolling rock.

In this case plaintiffs' claim, as evidenced by their complaint, that defendants were negligent in not protecting the line from rolling rocks. The answer to that is in the language of this court in the Logan case:

“If such be the law, then the only method by which the defendant can make itself immune against suits for damages caused by rocks that may roll down the mountain side and which cause injury to its flume, and may thus result in causing the water flowing therein to cause damages, is to remove all the rocks that are along the mountain side above the flume, or build the flume into the mountain side and cover it over so that no rocks could possibly injure it. The latter is what plaintiff's counsel suggest defendant should have done. To require that seems quite unreasonable.”

The lower court conceded that decision was controlling in this case, except for one factor which it felt differentiated the two. That point of distinction, the lower court held, was that defendant in the Logan case offered evidence that a stranger loosened the rock. We contend that is not an important factor, first, because that came in as part of defendant's case, and this court held that defendant's motion for non-suit should have been granted; second, this court does not mention that factor as being important to its decision; and, third, it can't have any bearing upon the matter. To hold that it is the determining factor, is to say that defendants' are obliged to anticipate damage from acts of God (our case), but not to anticipate damage from acts of humans. This, of course, is not the law, as it is elementary that an injury resulting directly and proximately from an act of God is not recoverable. 45 C. J. 746. Hence, if it be con-

ceded that it is not negligence to construct a pipe line or flume in this mountainous area along a mountain side, *even though it is exposed to rocks as in the Logan case*, and this court held in the Logan case that such was not negligence, then whether the rolling rocks are started downward by humans or by an act of God is immaterial. In other words, if these defendants would not be liable if strangers had loosened the rock that caused the damage, *a fortiori* they are not liable when the rock is loosened by an act of God.

The only claimed negligence, accordingly, being that defendants constructed the pipeline without adequate protection from rolling rocks, and this court having held in the Logan case that such is not negligence in an area where experience has shown that damage therefrom is infrequent, and plaintiffs' own evidence having shown that damage from rolling rocks in this area was extremely infrequent, the lower court erred in overruling defendants' demurrer, in denying defendants' motion for non-suit on plaintiffs' opening statement, and in denying defendants' motion for non-suit at the conclusion of plaintiffs' case in chief.

A situation very similar to that involved in the present case is found in the case of *LeDeau v. Northern Pacific Railroad Company* (Idaho), 115 Pac. 503. In that case a rock came leaping and bounding down the side of a mountain and through the window of one of the defendants' railway cars, striking and injuring a passenger. The Court there said:

“The only question for consideration is that of negligence. It is clear from this evidence that the rock did not fall from the side of the cut. It



was evidently not an overhanging or loose rock left on the face of the cut through which the track was laid. The respondent seems to think that the rock came from high up on the mountain side, and that theory is borne out by the testimony of the other witnesses, as well as by the surrounding circumstances, and the actual falling of the stone and its striking the car at the height and place where it did strike. It must have come from a considerable distance, in order to have gained sufficient momentum to drive it from the place where it last struck the ground above the face of the cut, and carry it through the car window in the direction in which it was passing when it struck respondent.

“It is clear, therefore, that the accident did not occur by reason of anything which the appellant or its agents or employes did, nor did it occur through any defect in the appliances which appellant was using, or the instrumentalities it was employing as a common carrier. The only theory on which appellant could be held for the results of this accident would be that it owed to respondent, and to all of its passengers, an active duty to employ such means as were necessary and sufficient to either clear the mountain side of loose and overhanging rock and stone, or else to construct along its right of way such retaining walls or barriers as would be likely to prevent rock and stone from rolling down the mountain side onto its track. To require such an active duty on the part of a railroad company operating in this intermountain region, where roads are necessarily built through canyons and around mountain sides, where the bluffs and hills rise precipitously for hundreds and sometimes thousands of feet above, would be imposing upon the

company a duty that would be burdensome, and might sometimes prove prohibitive to transportation companies. The mere suggestion of building retaining walls along railroad rights of way through some of the canyons and ravines in this mountainous country, demonstrates its futility. No company could support such an expense."

A case to the same effect is the case of *Fleming vs. Pittsburgh Railway Company* (Penn.) 27 Atl. 858.

## II.

THE LOWER COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT, AND IN REFUSING TO GIVE DEFENDANTS' REQUESTED INSTRUCTION NUMBER ONE, WHICH WOULD HAVE INSTRUCTED THE JURY TO FIND FOR THE DEFENDANTS AND AGAINST PLAINTIFFS.

At the conclusion of all the evidence defendants moved the lower court for a directed verdict (Tr. 257-260), and upon its denial submitted its proposed Instruction No. 1 directing the jury to find for the defendants and against plaintiffs. This was refused. (Tr. 265). Error is assigned.

Following completion of plaintiffs' evidence, the substance of which, insofar as it related to defendants' negligence, has heretofore been discussd, and following defendants' motion for non-suit (which was denied), defendants offered evidence affirmatively showing their freedom from negligence.

J. R. Iakisch, th engineer in charge of the construction of this pipeline by the United States Bureau of Reclamation (and whose qualifications are unquestioned) testified that the specifications for construction of the pipeline (Defendants' Exhibit 7) were prepared by engineers of the Bureau of Reclamation, that they were prepared in accordance with best approved engineering practices, that the line was constructed in accordance with the specifications (Tr. 141), and that due consideration was given to reasonably anticipated damage from falling rocks (Tr. 143). On cross examination he testified that economic factors enter into the question of completely burying a pipeline in a mountainside, and in determining whether it is to be of wooden or steel construction (Tr. 147-148). On redirect he testified that this particular damage occurred in an area in which, in his judgment, there was less reason to anticipate damages from falling or rolling rocks than any other area; that the slope above the pipeline is gradual until cliffs a long distance away are reached Tr. 148), and that the cost of a complete tunnelling of the mountain for the pipe line (Tr. 149) or complete elimination of all possible hazards (Tr. 156) would have been prohibitive.

The witness J. W. Farrell, who resided at Huntsville, at the top of Ogden Canyon, and who was a former employee of the defendants, testified that as he was on his way home between 6:30 and 7:00 o'clock P. M. on the evening of February 28, 1946, he met the water coming down the highway from the break in the line at a point about a thousand feet below the break (Tr. 158), and half a mile above plaintiffs' house (Tr. 168). He proceeded through the water to the home of the pipeline's caretaker



at Pineview Dam, a mile above the break (Tr. 167) and assisted the caretaker in closing the gates at the dam through which water was flowing into the pipeline. He then went on home, but returned the next morning to the point of the break in the pipeline. A large hole was torn in the south, or down hill side, of the pipe, and a large rock lay on the north shoulder of the highway (Tr. 163). He described the terrain to the north of the break as a rather gradual slope to some precipitious cliffs in the distance. (Tr. 165). He further testified that previous to the break the line at the point of the break was completely covered (Tr. 175).

D. M. Grover, the caretaker at the dam, testified that after he had shut the water off he went to the point of the break, but it was too dark to see much. He returned the next morning. The south side of the pipeline was torn out, indicating the rock had hit it just over the top (Tr. 180). A big rock four or five feet high and six feet long lay in the road below the break. From the terrain it appeared that the rock had bounded down the hill, last striking the earth before reaching the line about sixty-eight steps north of the line. From that point it jumped to the top of the pipeline. (Tr. 180).

Mr. W. J. Blackburn testified that from an inspection of the cliffs above the break, and the terrain between the cliffs and the pipeline, one could see where a portion of the cliff had broken away, and how a large rock had come bounding down the slope toward the pipeline, striking the ground at points, and leaping clear of the brush at others. The distance from the break in the line to the cliffs which had broken away was upwards of a half mile. (Tr. 186-188)

The witness, Roney K. Inama, described the pipeline at the point of the break as having been laid at the base of a cut, with the face of the cut rising on the north side of the line about twenty-five to thirty feet. The hole in the line was on the top and south side (Tr. 212).

David A. Scott testified as to how the terrain above the break showed how the rock had come down in great leaps and bounds from the cliffs, which he put at three-fourths mile above the break, towards the pipe line. (Tr. 223)

Defendants' witnesses testified at length on other matters, but the above is sufficient for present purposes. Plaintiffs' contention was that defendants were negligent in not protecting the pipeline from rolling rocks; that a rock, loosened by the frost had come rolling down the mountainside, striking and breaking the pipe, and the waterflowing from the break had caused damage to plaintiffs. The defendants' evidence supplied the details. First, the pipeline was in fact covered at the point of the break. Second, not only was it covered, but at the point of the break it was laid at the base of a twenty-five foot cut. So the line was adequately protected from rolling rocks, in that it was actually covered, but more important it was at the base of the cut, so that rocks rolling toward it would, upon reaching the brow of the cut twentyfive feet above it, be carried by their own momentum beyond the pipeline at the base of the cut.

What then is the explanation of this accident? It lies in the description of the terrain between the cliffs a half to three-quarters of a mile to the north and the line itself, as given by the witnesses. A portion of these

cliffs broke away. A large rock came down the slope from the cliffs, traveling in enormous leaps and bounds. It struck the earth about sixty-eight steps north of the line, leaped high in the air, and in coming down barely cleared the brow of the cut at the base of which the pipe was laid, and in its descent struck the line on its southerly top side. It was not an ordinary rolling rock that broke the line. It was truly a phenomenon. With the pipeline laid as it was at the base of the cut, the timing of the rock had to be perfect. A little lesser or greater momentum, and the line would not have been hit—had the rock last struck the earth sixty-seven or sixty-nine paces, instead of sixty-eight, above the line, it would have cleared.

The eventuality is not one that could reasonably have been foreseen, and such is the test of negligence. The pipe line was amply protected from ordinary rolling rocks. If there was a duty on the part of defendants to guard against such dangers, that duty was fulfilled. Accordingly, we submit, that defendants' motion for directed verdict should have been granted. The evidence of defendants established, as a matter of law, that their duty to protect the line from foreseeable hazards was more than fulfilled, and it was error to submit the matter to the jury.

Another reason why under all the evidence a verdict should have been directed for defendants is to be found in the decision of this Court in the case of *Ward v. Salt Lake City*, 46 Utah 616, 161 Pac. 905. As above pointed out, plans and specifications for this pipeline were prepared by the Bureau of Reclamation of the United States, and strictly in accord with best approved

engineering practices. The pipeline was constructed in accordance with such plans and specifications. There is no conflict in the evidence as to these matters.

In the Ward case the question involved was whether the defendant was negligent in its construction of a certain gutter along a street in Salt Lake City. On the part of the city it was shown without conflict that the paving, the gutters, the covering thereon and the sidewalk thereon were all constructed in accordance with *a plan prepared and recommended by a competent civil engineer.*

In considering the question of the city's negligence under these circumstances this court said:

“It seems to us that under the undisputed evidence the verdict and judgment cannot prevail. It has frequently been held by the courts—indeed, so far as we are aware, there is little, if any, diversity of opinion upon the proposition—that a municipality may adopt and follow a plan prepared by a competent civil engineer in making public improvements, including the paving and guttering of streets and in constructing sidewalks and cross-walks, and that the question of whether such plans are sufficient or proper cannot be reviewed by the courts, except upon the grounds pointed out by us in the case of *Morris v. Salt Lake City*, 35 Utah, 485, 486, 101 Pac. 373, and cases there cited. A municipality, as a matter of course, is liable for a negligent execution of its plans, or for permitting the improvements which are constructed in accordance therewith to be out of repair or to become unsafe. It may, however, not be sued because some citizen, or many of them for that matter, may think that the public im-

provement, although constructed according to the plans adopted and followed as aforesaid, are unsafe or could be improved. Where public improvements are constructed in accordance with a plan prepared and adopted as aforesaid, the city is liable only in case the improvement, when constructed in accordance with such plan, is clearly insufficient or unsafe.”

In the case of *Watters v. City of Omaha* (Neb.) 110 N. W. 981, in considering this matter the Court said:

“In this case, as in ordinary cases grounded on negligence, the acts or omissions of the defendant upon which the charge of negligence is based are to be tested by the conduct of a man of ordinary care and prudence in like circumstances. The improvement of which the stairway in question is a part is of such a character that it could be planned and constructed only by men of peculiar skill and knowledge in that line. The city authorities, therefore, were compelled to employ experts to plan and construct it. In doing so, they did precisely what a man of ordinary care and prudence would have done in like circumstances. Where, then, is the point of departure from the course of conduct such a man would have pursued? Is it in the adoption of the plan? They had employed men skilled in their profession to prepare it. Had they not a right to rely on the superior judgment and skill of such men? Would not a man of ordinary care and prudence have done so in like circumstances, unless the plan was so obviously defective that there could be no difference of opinion among reasonable men with respect to it?”



To the same effect are the following cases:

Brantz v. Fargo, 19 N. D. 538, 125 N. W. 1042,  
27 L. R. A. (N. S.) 1169.

Town of Spencer v. Mayfield, 43 Ind. App. 134,  
85 N. E. 23;

Gallagher v. City of Tipton, 133 Mo. 557, 113 S.  
W. 674;

Hays v. City of Columbia, 159 Mo. 431, 141 S.  
W. 3;

Rome v. Cheney, 114 Ga. 194, 39 S. E. 933, 55 L.  
R. A. 221;

Lansing v. Toolan, 37 Mich. 153.

If it be said that that rule of law is applicable only as regards construction work done by the sovereign, and we can conceive of no rational reason for such limitations, as individuals must rely upon the judgment of expert engineers the same as governments must, nevertheless it is applicable here, *because this pipeline was constructed by the government*. Defendants came into the picture only after the project was completed. The only issue was negligence in construction—alleged negligence in maintenance and operation having been deleted. (Instruction No. 7, Tr. 276). Defendants can be liable only if the United States would have been liable if it had retained the pipeline, and under the Ward decision, *supra*, the United States could not have been liable as the line was constructed under specifications prepared and approved by competent engineers.

Still another reason why plaintiffs may not recover in this action is to be found in the doctrine of assumed risk. The evidence shows that the line was completed

in 1936. Plaintiffs' home was built thereafter in 1938 or 1939 (Tr. 234), and plaintiffs acquired it after its construction (Tr. 118). Plaintiffs knew of the existence of the pipeline. (Tr. 119) Thus the manner of construction and complete location of the line were in being at the time plaintiffs acquired their property.

The doctrine of assumed risk is succinctly stated in 38 Am. Jr. 845:

“The principle that one who voluntarily assumed the risk of injury from a known danger is debarred from a recovery is recognized in negligence cases. As stated, a plaintiff who, by his conduct, has brought himself within the operation of the maxim, ‘Volenti non fit injuria,’ cannot recover on the basis of the defendant’s negligence. In the words of the maxim as translated, ‘that to which a person assents is not esteemed in law an injury.’ Although there is authority for confining the doctrine of assumption of risk to cases arising out of the relation of master and servant, or at least to cases involving a contract relationship, it is now fairly well settled that the defense of assumed risk may exist independently of the relation of master and servant. The maxim ‘volenti non fit injuria’ applies in a proper case independently of any contract relation. It is said that one who knows, appreciates, and deliberately exposes himself to a danger ‘assumes the risk’ thereof.”

Thus we urge that plaintiffs, acquiring their property subsequent to the building of the line, with knowledge of its existence and location, cannot now recover for damages sustained by reason of said pipeline.

One other point perhaps merits comment. In plaintiffs' cross examination of Mr. Iakisch it was sought to be established that there was perhaps a safer way to construct the line than that followed, as for example, building it of steel or concrete, instead of wood. The evidence is undisputed that the line was constructed in accordance with best engineering practices. In fact, except for the suggestion on cross-examination of Mr. Iakisch that it might have been built of steel or concrete, or given a wooden snow shed covering (Tr. 155), plaintiffs' offer no suggestions as to how the line should have been constructed to have protected it against this rock. Their silence is understandable, for who can suggest what precaution might have sufficed. Certainly a rock the size of this one, dropping from above as this one did, would have crushed any ordinary steel or concrete line as easily as it did this wooden one. Burying it deeper, unless it was under many feet of earth and rock, would have been of no avail. The weight of the rock, as it dropped from above, would have had its effect for a considerable depth below the surface. And if defendants must insure against damage from this rock, must they also insure against damage by one twice or ten times as large? If so, they just can't lay their lines near the mountains, because it is within the realm of possibility that the entire side of a mountain might some day slip away. However, the fact that there may have been a safer method is beside the point.

“If one has acted with ordinary prudence he is not negligent, although danger might have been avoided if he had acted in a different manner, and hence, the doing of an act in a particular



manner is not necessarily negligent merely because there may have been a safer manner of doing it.” 45 C. J. 698.

### III.

THE LOWER COURT ERRED IN REFUSING TO GIVE TO THE JURY DEFENDANTS’ REQUESTED INSTRUCTIONS NOS. 9 and 14 (ASSIGNMENTS OF ERROR NOS. 6 and 7)

Defendants duly and timely requested the court to instruct the jury as follows:

“DEFENDANTS’ REQUESTED  
INSTRUCTION NO. 9.

The Court charges you if you find from the evidence in this case that the rock which caused the break in the pipeline in question herein, was a part of a precipice or cliff which existed prior to said break and was approximately from one-half of a mile to a mile distant from said pipeline, then the Court charges you that the defendants were not required to anticipate that such rock would be so broken from said precipice or cliff, and therefore the plaintiffs would not be entitled to recover in this action.” (Tr. 268)

“DEFENDANTS’ REQUESTED  
INSTRUCTION NO. 14.

The court charges you that if you find from the evidence in this case that the water that flowed down onto the road from the break in the pipeline in question, would have flowed into the river but for the fact that the State Road Commission

had prevented the water from so flowing into the river by placing an embankment of snow on either side of the roadway, which caused the water to flow down the roadway on to plaintiffs' premises, then you must find for the defendants no cause for action." (Tr. 269)

The lower court refused to give each of such requested instructions, and such refusal is assigned as error.

(a) As to defendants' requested instruction No. 9.

The evidence in the case, and as hereinbefore outlined, established that the rock which broke the pipeline broke from a cliff upwards of a half mile north of the line. The location of the cliffs from which this rock came, in relation to the line, is further evidenced by the photographs received in evidence as exhibits. It is defendants' contention that the care required of them was not such as a matter of law as would require them to foresee the likelihood of a rock falling from this cliff reaching and damaging the line. Hence, the defendants were entitled to such instruction, and the lower court erred in refusing it.

(b) As to defendants' requested instruction No. 14.

The pipeline at the point at which it was damaged lies a few feet north of the highway, and at a higher elevation. Plaintiffs' home was located down the winding canyon road about three-fourths mile from the point of the break. (Tr. 193) Ogden River parallels the highway down the canyon, and at the point of the break it is immediately south of the highway. There are several points along the highway between the point of the break

and plaintiffs' home at which water on the highway will flow therefrom and into the river if unimpeded. One of such points is about 75 to 100 feet down the highway from the point of the break. (Tr. 193-196) In other words, the water flowed from the break onto the highway, and then flowed down the highway. Under normal conditions it would have flowed from the highway and into the river long before it reached plaintiffs' property, probably within 75 to 100 feet from the point at which it reached the highway. Prior to the time of the break, however, the State Highway Commission, in its maintenance of this highway had plowed the snow therefrom and into banks on either side which were from two and a half to three feet high, and which banks of snow had become frozen. The effect thereof was to form a channel of the highway from which the water could not escape as it flowed down the highway toward plaintiffs' property. Tr. 193-198; 205; 232; Exhibit 17; 233).

Defendants' contention is that had it not been for the action of the highway maintenance crews banking the snow along the highway as they did and in such a way as to prevent the normal flow of water from the highway into the river, the water flowing from the break would not have reached plaintiffs' property three-fourths mile away, but would have flowed into the river long before it reached plaintiffs' property. That in view of this fact any negligence of defendants in the premises was not the proximate cause of plaintiffs' damage, and the Court should have so instructed the jury.

A terse and clear statement of what in law constitutes proximate cause was made by this Court in the case of *Rollow v. Ogden City*, 66 Utah 475, 243 P. 791.

“The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, but which, in the natural and probable sequence of events, *and without the intervention of any new or independent cause*, produces the injury.”

Apply that definition of proximate cause to this case. For the water flowing from the break in defendants pipeline to be the proximate cause of plaintiffs' damage the circumstances must be, first, that “in the natural and probable sequence of events” it would have produced the damage, and second, production of the damage must be “without the intervention of any new or independent cause.”

In this case the evidence is without conflict that “in the natural and probable sequence of events” any large amount of water flowing from the break would have passed into the river long before reaching plaintiffs' property and without damage to plaintiffs. The reason it didn't go into the river, in the natural sequence of events, is because highway maintenance crews prevented it from so doing, and actually channelled it down the highway a distance of some three quarters of a mile to a point where it flowed onto plaintiffs' property. There was thus the intervention of a “new or independent cause”, without which damages to plaintiff would not have resulted.

We submit that the defendants were entitled to their requested instruction No. 14, and the lower court erred in not giving it.

#### IV.

THE LOWER COURT ERRED IN ITS INSTRUCTIONS 1, 5, 9, 10 and 12. (ASSIGNMENTS OF ERROR 8 TO 25).

##### (a) AS TO INSTRUCTION NO. 1

By its instruction No. 1 the lower court sought to outline to the jury the claims of the parties as embodied in the pleadings. In its recitals as to plaintiffs' contentions the court stated that it was contended by plaintiffs that "defendants carelessly and negligently left the said pipe lying unprotected upon the surface of the ground." (Tr. 273) There is no evidence in the case that the pipeline was either unprotected or lying upon the surface of the ground, and on the contrary the evidence was not controverted that the pipeline was protected by the cut, at the base of which it was laid, and further was covered by at least six inches of earth.

While it is true that the foregoing was stated only as a contention on the part of plaintiffs, we submit that it is improper to advise the jury as to claims made in the pleadings, in support of which no evidence is offered, unless the jury is further instructed that no proof thereof has been made, as it tends to mislead the jury into believing that there is evidence in the case in support of such contention. In other words, in advising the jury as to the claims of the parties, only such claims should be stated in support of which competent evidence has been received.

The court further, as a part of its instruction No. 1, stated:

“The defendants and each of them well knew, or by the exercise of reasonable care should have known that in the spring of every year rocks being loosened on the melting of the frost roll down the sides of said mountains and across the place where the defendants laid and maintained said pipe without protecting the same from said rocks and boulders.”

Defendants duly excepted to this portion of the instruction (Tr. 284).

The court doesn't preface its assertion by any positive statement that this too is but a claim of the plaintiffs, but throws it in as an established fact, which we submit was error, as it was a controverted issue in the cause.

Nor do we believe that the final paragraph of the instruction cures the error, as it relates only to “allegations and denials” of the parties, and, as indicated, this portion of the instructions was not given as being merely an allegation of the plaintiffs.

(b) AS TO INSTRUCTION NO. 5.

The court's instruction No. 5 reads as follows:

“The ‘proximate cause’ of an injury is that cause which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, —the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion.” (Tr. 275)



Defendants duly excepted to the whole of the instruction, and separately to the second sentence thereof. (Tr. 285) Such second sentence, we submit, is not a correct statement of the law, and as it tends to modify the first sentence, the instruction is bad and it was error for the court to give it.

The effect of the instruction as given is to define proximate cause as being merely

“the efficient cause,—the one that necessarily sets in operation the factors that accomplish the injury”.

Under the definition of proximate cause given by this court in *Rollow v. Ogden City, supra*, proximate cause is not simply the “efficient cause”, as given by the lower court, but the “efficient cause”, if one wants to use that phrase, which, *in the natural and probable sequence of events produces the injury, without the intervention of any new or independent cause*. Those limitations on “efficient cause”, which limitations are essential to proximate cause, were wholly lacking or nullified by the instruction as given.

(c) AS TO INSTRUCTION NO. 9.

The instruction as given reads as follows:

“Water collected by gravitation manifests a power familiar to all, capable of accomplishing useful and beneficial purposes, or destructive and disastrous consequences and results.

If the defendants in this action interfered with or undertook to control the force of the water flowing down Ogden Canyon, for their own purposes, by the diversion of that water into a

wooden pipe constructed along the side of the canyon and above the land, home and other property of the plaintiffs, Mr. and Mrs. Knight, the law requires the defendants so doing to use ordinary judgment, skill, care and caution in the construction of that pipe line and in the use of the pipe line for the coursing of water in order that the property of the plaintiffs may not be injured. In so constructing, and using the said wooden pipe line to conduct and control that water, they are required to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature, although they are not required to prepare to meet unlooked for and overwhelming displays of adverse power of such a nature as to surprise cautious and reasonable men in the same circumstances.” (Tr. 276)

Defendants duly excepted to the whole thereof, and separately as to each paragraph (Tr. 285, 286).

The first paragraph of the instruction is obviously a purely gratuitous theoretical observation of the court which, we submit, embodies no statement of law, and which has no place in instructions of law. We feel it was error for the court to make this purely gratuitous observation.

The second paragraph is devastating. By its instruction No. 7 the court instructed the jury that negligence in construction was the only issue in the case, and negligence in maintenance is out, and then immediately follows with its instruction No. 9 in which the jury is instructed as to defendants’ duty in their *use* of the line.

(d) AS TO INSTRUCTION NO. 10.

This instruction as given is as follows :

“If the defendants constructed the wooden pipeline referred to in the evidence in this case or conveyed waters through the same for their own purposes, the defendants were under a duty to use the same care which an ordinary prudent man would use in the construction and operation of the pipeline to prevent the escape of water from the pipe to the damage of those in the vicinity. The degree of care required to prevent the escape of water is commensurate with the damage or injury that will probably result if the water does not escape. In this case if a reasonable prudent man would anticipate that the damage which would probably result in the water should escape from the pipeline here involved would be high, then the degree of care required to prevent the escape of water from this pipeline would be high. If on the other hand a reasonable prudent man in the same or similar circumstances would anticipate that the damage which would probably result from the escape of the water in the pipeline would be only small or slight, then the degree of care required would be correspondingly low. If you find from a preponderance of all of the evidence in this case that the defendants, in the construction of the pipeline in this case, failed to exercise that degree of care to prevent the escape of water from the pipeline which an ordinary prudent man in the same or similar circumstances would exercise in the protection of said pipeline from rocks rolling down the canyon hillside, that could reasonably be anticipated to roll down the canyon hillside, and that as the natural and proximate

result of their neglect to exercise that care water escaped from the pipeline and caused damage and injury to the property of the plaintiffs, then you should find for the plaintiffs and assess their damages in such amount as you find to be reasonable under the evidence and the other instructions of the court. (Tr. 277)

Defendants duly excepted thereto, and separately as to each of the first three sentences thereof and the last sentence. (Tr. 287) We find the same error as in Instruction No. 9. The court, having taken negligence in maintenance from the jury by Instruction No. 9, has again given it back, for the court says:

“the defendants were under a duty to use the same care which an ordinary prudent man would use in the construction *and operation* of the pipeline to prevent the escape of water from the pipe to the damage of those in the vicinity.” (Tr. 277)

(e) AS TO INSTRUCTION NO. 12.

By subparagraphs (c) and (h) and subparagraph (f) and (j) the court instructed the jury that if they found for the plaintiffs they might award them:

“(c) Such sum as will reasonably compensate said plaintiffs for damage to their clothing, but not to exceed the sum of \$375, the amount claimed by plaintiffs.

(h) Such sum as will reasonably compensate said plaintiffs for the reasonable repair actually needed of clothing of the parties which they were able to salvage, but not to exceed the sum of \$50, the amount claimed by plaintiffs.

(f) Such sum as will reasonably compensate said plaintiffs for the reasonable expenditure made by them and which was actually necessary for removing the said mud and silt from their dwelling house and cleaning the same, and cleaning and polishing of said furniture, and cleaning drift and debris from the yard, and cleaning the garage, and re-digging and repairing the cess-pool, and repairing doors and furniture damaged by water, and cleaning and repairing the fire place in the said dwelling, but not to exceed the sum of \$300, the amount claimed by the plaintiffs.

(j) Such sum as will reasonably compensate said plaintiffs for the reasonable damage beyond repair of the furniture, but not to exceed the sum of \$125, the amount claimed by plaintiffs.” (Tr. 279)

Exceptions to these portions of such instruction were duly taken. (Tr. 279) It is apparent that by subparagraphs (c) and (h) the court instructed the jury that it might award twice for the same damages referred to in such instructions. The same is true as to subparagraphs (f) and (j). This clearly was error.

## C O N C L U S I O N

Defendants accordingly submit that the lower court erred

- (1) in over-ruling defendants’ demurrers;
- (2) in denying defendants’ motions for non-suits;
- (3) in denying defendants’ motions for a directed verdict;

(4) in refusing to give defendants' requested instructions in the particulars hereinbefore noted.

(5) in instructing the jury as it did in the particulars noted.

That such errors were substantial and prejudicial to defendants, and each of them, and the judgment of the lower court should be reversed.

Respectfully submitted,

CHARLES L. OVARD,

HOWELL, STINE AND OLMSTEAD,

*Attorneys for Defendant*

*Utah Power & Light Company*

DAVID K. HOLTHERR

*Attorney for Defendant*

*Ogden River Water Users  
Association.*