

1955

# Hance A. Taylor, Erma G. Taylor and Parley P. Taylor v. Weber County et al : Brief of Appellants

Utah Supreme Court

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Case No. 8343

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

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HANCE A. TAYLOR, and ERMA G.  
TAYLOR, his wife, and PARLEY P.  
TAYLOR,

*Plaintiffs and Appellants,*

— vs. —

WEBER COUNTY, a municipal cor-  
poration, LYMAN HESS, ARTHUR  
BROWN, ELMER CARVER, J.  
PIERCE GRAHAM, ELLIS GRIF-  
FIN and GOLDEN NIELSEN,

*Defendants and Respondents.*

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**BRIEF OF APPELLANTS**

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LYMAN HESS, ARTHUR BROWN,  
ELMER CARVER, J. PIERCE GRAHAM,  
ELLIS GRIF-FIN and GOLDEN NIELSEN,

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Case No. 8343

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## BRIEF OF APPELLANTS

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### STATEMENT OF FACTS

This action was brought in the District Court for Weber County by Hance A. Taylor and Erma G. Taylor, his wife, and Parley P. Taylor, the owners of two adjoining tracts of land, over which the defendant, Weber

County, sought to acquire, over a period of years a right to drain a large quantity of water and to clean and enlarge a drainage ditch. The County, through its Commissioners, had negotiated for some time with plaintiffs for permission to conduct the water from a ponded area or swamp north of Center Street in Plain City, Utah, which water had backed up against and over a newly constructed highway, through the drainage ditch constructed by the predecessors of plaintiffs.

The plaintiffs during these negotiations had resisted the claim of the County that the drain through plaintiffs' property was a natural one, and had further resisted the claim of the County that it had acquired rights to use and do work on the drain by moving in a dragline or other machinery and enlarging and deepening the drain to handle an increased flow of water.

On the 20th day of November, 1953, after negotiations had failed, the defendants, Graham, Griffin, and Nielsen, under the direction of the defendants, County Commissioners Hess, Brown and Carver, cut the fence of Hance A. Taylor, and with a large dragline moved onto his property and cleaned and deepened the drain, although express permission to enter said property had been repeatedly denied the County and its agents by Mr. Taylor.

Because of the refusal of the Taylors to give permission to the County, the Sheriff of Weber County was

directed by the Commissioners to go to the Taylor farm and stand guard while the dredge line was passed over the fence and taken down through the drainage ditch area, over a second fence into Parley P. Taylor's farm, then back again through the ditch across the property of plaintiffs, through the fence again and out.

This action was grounded in trespass for damages and for a permanent injunction against further trespass and the use of the Taylor properties by the County or its agents.

The answer of the defendants to this action in its essence was a general denial, but at the pre-trial conference the defendants were required to set out a statement of facts which they expected to prove at the trial. This statement indicates that defendants relied upon their having acquired a right of way over the plaintiffs' land by prescription, or natural right of drainage, which right of way included the right to go onto the Taylor farms and clean the drain. Plaintiffs' complaint was amended to include an allegation of punitive damages based on the deliberate and intentional forceable entry of the Taylor farms by the defendants in open defiance of the plaintiffs' rights.

At the trial plaintiffs introduced evidence of their ownership of the land in question, established the forceful entry of their properties by the defendants, and further introduced evidence of the resultant damage to their farms.

The plaintiffs introduced as Exhibit C the photograph set out herein, showing the condition of the drain as left by the dragline, and the plaintiff, Hance A. Taylor, measuring the depth of the drain after the County had finished its dredging operation and had thrown along the sides of the ditch bank the materials accumulated in the bottom of the drain.



The ownership of the property by plaintiffs was established without contradictory testimony, and the estimate of the damage done by the trespass with its attendant results of cutting and washing away plaintiffs' ground was not controverted by the defendants.

Defendants' evidence at the trial was directed to a showing that the drain had not been appreciably enlarged by the recent dredging operation. Evidence was also introduced by the defendants, apparently in an effort to establish the claimed right of way to maintain the drain across plaintiffs' farms. Defendants' evidence was intended to show that the drain was viewed by the County as a necessary channel through which to divert water which had accumulated in a pond north of Center Street and which had, during the spring of the year, overflowed onto the highway (T. 106, 130). No evidence was introduced to the effect that the drain across plaintiffs' farms was the natural drain for the pond area.

Lester England, a witness for defendants, testified to the effect that in his youth he had heard his father, now deceased, say that the Englands had purchased the right to go onto the Taylor farm and clean the drain, and had at one time paid a predecessor of Hance A. and Parley P. Taylor, the sum of \$20.00 for the right to use the drain (T. 187).

Defendants further attempted to show that on various occasions through the years County employees had cleaned the drain. Lester England testified that around 1918 the Taylor drain had been cleaned by one Louis Shummers, a County employee (T. 191, 192). Mr. England admitted on cross-examination that he remembered when the "drain" was just a "swale" through the plaintiffs' farms (T. 216). Witness Delwin Sharp



for the defendants, testified that in 1918 as Road Supervisor of Weber County, he had directed the deepening of the Taylor drain and the putting in of a culvert under a canal north of the Taylor farms (T. 227). His testimony was that he had hired John H. Taylor, the father of the plaintiff, Hance A. Taylor, to assist in this work (T. 229). A County employee, Ernest Jensen, testified that he operated a dragline on the Taylor properties in 1928 (T. 235). Witness Jesse Singleton testified that he personally cleaned the drain in 1933 as Road Supervisor (T. 244) at which time he saw no one and spoke to no one on the Taylor farms (T. 255), and further testified that in 1935 he knew of work being done on the drain by the P.W.A. as part of a mosquito abatement project (T. 245). Again in 1938 Singleton hired plaintiff Parley P. Taylor and his son to dig out the cattails from the drain (T. 247), and, finally, in 1943 he again cleaned the drain with a drag line (T. 251), but on cross-examination he stated that on this occasion he did not enter the Parley P. Taylor farm (T. 257). None of defendants' witnesses testified that they had gone onto the Taylor farms without seeking permission of the Taylors to do so.

Plaintiffs' rebuttal was to the effect that the drain was constructed by the Taylors in 1913 or 1914 (T. 283) by means of a slip scraper and plow, and that the drain at that time was not more than a foot deep (T. 284). The drain had originally been constructed to relieve the land of excess water, when the snow would melt and the Plain City canal broke (T. 283, 312), and at that time

carried no water from the pond north of Center Street. Plaintiffs' rebuttal further showed that in 1928, County Commissioner Randal had promised the Taylors that if they would let the County clean the drain, the County would tile it at a later time (T. 286). Permission was given the P.W.A. to enter the Taylor farms because of the mosquito project and the obvious resultant benefit to the properties to be rid of the mosquito nuisance (T. 288). Again in 1943 Commissioner McEntire promised the Taylors that if permission were given the County to enter the farms, the County would tile the drain (T. 290). This was not denied by defendants. Permission was accordingly given, but conditioned on the tiling, which never did occur. A meeting of the County Commissioners and interested farmers occurred at the County Building in 1948, and at that time the County Commissioners again expressed the desire to acquire a right of way through the Taylor farms in exchange for tiling (T. 292). The cost of tiling was considered, and proved to be in excess of what the Commissioners felt they could expend, and no further progress was made in that regard.

Mrs. Urie, mother of Hance A. Taylor, testified that in 1943, at which time she owned the Hance A. Taylor farm, she gave the County permission to clean the drain if they would tile it (T. 301). She further testified that she had previously given the P.W.A. permission to enter the farm and clean the drain as part of the mosquito abatement project (T. 301).

Commissioner Carver, called by defendants, testified on cross-examination to the effect that Weber County cleaned the Taylor drain in November, 1953, and that the Commissioners were not at that time acting under the direction of farmers in the vicinity.

At the close of all the evidence plaintiffs moved for a directed verdict as to liability (T. 333) on the ground that it was undisputed that the County had forcefully entered the plaintiffs' farms and cleaned the drains without plaintiffs' permission, and further upon the ground that defendants had introduced no clear and satisfactory evidence to support the right of way claimed. Plaintiffs' motion was denied and the matter was submitted to the jury on special interrogatories and a general verdict.

The jury answered in the affirmative Interrogatory No. 1, which read as follows:

"Do you find from the evidence that Weber County on November 20, 1953, had a right of way across the plaintiffs Hance A. Taylor, Erma G. Taylor and Parley P. Taylors' land for the purpose of draining water, through the drain then existing on plaintiffs' land and for cleaning and maintaining that water drain? Answer yes or no."

The verdict of the jury was for defendants and against plaintiffs, no cause of action.

On March 30, 1955, this appeal was taken from the judgment of the trial court based upon the general verdict and the jury's answers to the special interrogatories.

## STATEMENT OF POINTS

I. THE TRIAL COURT ERRED IN HIS REFUSAL TO GRANT PLAINTIFFS' MOTION FOR A DIRECTED VERDICT AS TO LIABILITY AT THE CLOSE OF ALL THE EVIDENCE.

II. THE TRIAL COURT ERRED IN HIS INSTRUCTION NO. 3 WHICH QUOTES VERBATIM FROM THE DEFENDANTS' PRE-TRIAL STATEMENT AS TO THEORIES OF DEFENSE WHICH ARE NOT SUBSTANTIATED BY ANY EVIDENCE IN THE CASE.

III. THE TRIAL COURT ERRED IN HIS INSTRUCTION NO. 6, SETTING FORTH "BASIC PRINCIPLES OF DRAINAGE LAW."

IV. THE TRIAL COURT ERRED IN HIS INSTRUCTIONS NO. 13, THERE BEING NO EVIDENCE AT ALL IN THE RECORD TO SUPPORT THE INSTRUCTION.

V. THE TRIAL COURT ERRED IN HIS REFUSAL TO SUSTAIN PLAINTIFFS' OBJECTIONS TO THE TESTIMONY OF WITNESS LESTER ENGLAND, AND FURTHER ERRED IN REFUSING PLAINTIFFS' MOTION TO STRIKE THE TESTIMONY OF WITNESS LESTER ENGLAND AS TO CERTAIN MATTERS.

## ARGUMENT

I. THE TRIAL COURT ERRED IN HIS REFUSAL TO GRANT PLAINTIFFS' MOTION FOR A DIRECTED VERDICT AS TO LIABILITY AT THE CLOSE OF ALL THE EVIDENCE.

The evidence of the defendants failed to sustain any one of the theories advanced at pre-trial by which the County claimed to have acquired a right of way over

plaintiffs' farms. The record discloses no testimony whatsoever concerning the Taylor drain being the "natural drain" for the area north of Center Street. On the contrary all the evidence concerning the origin of the Taylor drain is to the effect that it was originally constructed by the predecessors of the Taylors by slipscaper and plow in approximately the year 1913 to relieve the immediate area of surplus water. Defendants' witnesses testified that the pond north of Center Street was located in a "saucer-like" area into which water from the surrounding land flowed, but there was no direct testimony that the natural course of drainage from that "saucer-like" area was through the Taylor farms. Rather, defendants' evidence was that the natural drainage was to the North (T. 195). Defendants' evidence did not controvert that the County was attempting to appropriate a private drain owned by the Taylors for public use, due to an alleged emergency situation resulting from the accumulation of water north of the Center Street highway.

A second theory found in defendants' pre-trial statement is that the County had acquired a right of way through some general use over the period of years. This "general use" was sought to be substantiated by testimony that some farmers in the immediate vicinity had used the Taylor drain and, in fact, had purchased the right to use it from Hance A. Taylor's father. Such evidence is clearly immaterial since any right acquired by farmers in the area or by the "general community" could

not give the County a right in the absence of an express grant, and no such grant to the County was ever claimed or suggested by the evidence. Further, the County, through its Commissioner Carver, admitted that it was not the agent of someone else in cleaning the drain. At page 324 of the transcript occurs the following on recross-examination of the witness Carver :

### RECROSS EXAMINATION

BY MR. CHRISTENSEN :

Q. Are you saying now, Mr. Carver, the reason you sent that dragline through there is because the people north of Center Street told you to?

A. Oh, no. I don't do that.

Q. It had nothing to do with it at all? And if the drain needed cleaning, you would have cleaned it whether anyone told you to or not?

A. I think so, yes.

Q. The fact that the people returned there telling you to clean the drain, that doesn't make any difference?

A. Yes, I think it does. When a lot of people are complaining.

Q. It's sort of a public relation job?

A. No. We like to do the things that should be done at the time it's needed.

\* \* \* \*

Q. Well, did you rely on what these people told you as to whether or not this drain needs cleaning?

A. Oh, no. We go look at it after they come in.

Q. You were not cleaning it for them?

A. No.

Q. You were relying on them to determine whether or not it needed to be cleaned?

A. We were cleaning it for Weber County.

Q. You use your own judgment in those matters, don't you?

A. Yes.

Defendants' theory that the right of way had been acquired by prescriptive use over a twenty year period prompted the introduction of testimony through many witnesses of instances where Weber County through its employees had gone onto the Taylor farms and cleaned the drains. This evidence when read in conjunction with cross-examination and rebuttal testimony conclusively shows that on each and every occasion when defendants entered the Taylor farm for the purpose of cleaning the drain, permission was sought and obtained or the entry was made without the plaintiffs' knowledge. This Court has frequently observed that the testimony of a witness is no stronger than it remains after cross-examination. Further, the cleaning in recent years was the result of a conditional permission given by the Taylors to the County if it would tile the drain and thus prevent its further enlargement. It was never adverse or under claim of right.

An element necessary for acquiring a right of way by prescriptive use is adverse user, or a continued use under claim of right with the acquiescence of the owner of the servient estate. *Bertolina v. Frates*, 89 Ut. 238, 57 P. (2d) 346; *Jensen v. Gerrard*, 85 Ut. 481, 39 P. (2d) 1070. This element is entirely lacking in the evidence. There can be no acquiescence by the landowners in the absence of knowledge that someone is attempting to acquire a right of way over their property. There was no claim of right on the County's part as witness the permission consistently sought. Further, there can be no adverse user when the evidence shows that permission has been unconditionally or conditionally given for each separate entry upon the servient estate by that party who seeks to create the easement.

Since defendants introduced no testimony to controvert the ownership of the Taylor farms or the forceable entry by Weber County, it became their burden to show that the entry was under some claim of right. This they sought to do by introducing evidence to the effect that a right of way had been acquired by prescription. Their burden in this regard is that they must establish their claim by "clear and convincing evidence," *Buckley v. Cox*, 274 P. (2d) 277 (Utah, 1952), or "clear and satisfactory evidence," *Jensen v. Gerrard*, *Supra*. See also 2 Tiffany on Real Property, 2nd Ed., Sec. 519, page 2046. We submit that the evidence of defendants was not of that quality required by the Utah cases.



II. THE TRIAL COURT ERRED IN HIS INSTRUCTION NO. 3, WHICH QUOTES VERBATIM FROM THE DEFENDANTS' PRE-TRIAL STATEMENT AS TO THEORIES OF DEFENSE WHICH ARE NOT SUBSTANTIATED BY ANY EVIDENCE IN THE CASE.

The trial court in his Instruction No. 3 charged the jury as follows:

“To this complaint, the defendants answered admitting they entered the land in question, but alleging that they did so lawfully as and for Weber County \* \* \*”

The instruction goes on to recite four theories which the defendants had proposed, any one of which they felt would justify a finding of the acquisition of a right of way. Paragraphs one, two and three of this instruction are verbatim quotes from the defendants' pre-trial statement of facts and none of the instruction finds any support in competent evidence. Paragraph 2, containing the statement that the *people of the community* had maintained the drain for 35 to 40 years or more, alleges facts which, if true, would be immaterial. The balance of paragraph 2 relating to the maintenance of the drain by Weber County, while gaining some support from the evidence, yet, if true, would not in and of itself support a finding that a right of way had been created, absent adverse use or acquiescence for twenty years to a claimed right. *Savage v. Nielsen*, 114 Ut. 22, 197 P. (2d) 117. Paragraph 3 of the instruction, as previously discussed, is supported, if at all, by evidence in the form of hearsay

testimony by one Lester England. Further, such evidence, if admissible, could not create a right of way in Weber County, absent a grant from O. G. Swenson and Lester England's father or their successors in interest to the County.

In *Bruner v. McCarthy, et al.*, 105 Utah 399, 142 P. (2d) 649, Justice Wolfe discusses at length the matter of a trial court's reading to the jury the pleadings in a case. At page 413, of the Utah Report, he states:

“There is nothing inherently erroneous in reading the pleadings in order to present the issues. If they are concise, well drawn, and present the issues sharply *where there is evidence material to each issue*, it may be that the court could not improve upon them as a method of stating the position of each side.” (Italics ours.)

Justice Wolfe goes on to cite earlier Utah cases in which it had been held prejudicial error for a verbatim statement of the complaint, answer or reply to be given the jury as part of their instructions, such statements being too often misleading and prejudicial. Among other cases Justice Wolfe quotes from *Farmers and Merchant's Savings Bank v. Jensen*, 64 Utah 609, 232 P. 1084 wherein the Supreme Court held that:

“The court in the written charge should itself clearly define the particular issue or issues submitted to the jury and should specifically state to them the material facts alleged, denied and admitted in respect to such issues. (Citing cases.)

But upon appeal prejudice will not be presumed simply from a showing that the trial court failed to construe the pleadings and to charge the jury upon the issues. The burden rests upon the complaining party to go further and point out to this court wherein and in what respect he has been prejudiced by such error on the part of the trial court. *Davis v. Hiener*, 54 Utah 428, 181 P. 587."

Justice Wolfe then continues:

"While most jurisdictions frown on the practice of using the language of the various pleadings to summarize the issues for the jury, the rule that reading the pleadings may or may not be error seems to meet with general approval.

"It has been held prejudicial error to read parts of pleadings relating to issues upon which no evidence has been introduced, *Hines v. Gale*, 25 Arizona 65, 213 P. 395. \* \* \*"

It is submitted that the trial court in quoting at length in Instruction No. 3 from the defendants' pre-trial statement of facts (R. 26) committed the very error Justice Wolfe discusses, i.e., *the reading of parts of pleadings relating to issues upon which no evidence has been introduced*. This is clearly true of paragraphs one and four, and part of paragraph two of this instruction. Certainly any jury of laymen, whose responsibility it was to determine whether a right of way existed, would become confused at the court's suggestion that four possible theories existed and were supported by the evidence upon which they could find the acquisition of a right of way by

Weber County over the farm lands of the Taylors. That which holds true for the reading of pleadings as part of a court's instructions would likewise hold true for the reading of a party's pre-trial statement as part of the instructions. Thus, as stated in *Shields v. Utah Light and Traction Co.*, 99 Utah 307, 315; 105 P. (2d) 347,

“We conclude that the reading of the long and involved complaint to the jury as part of the charge was error, not altogether corrected by the mere admonition that the foregoing is not to be construed as evidence but merely sets forth the claims of plaintiff.”

For further references on the question whether an instruction in the absence of evidence to support it is error, see plaintiffs' Assignment of Error No. IV.

### III. THE TRIAL COURT ERRED IN HIS INSTRUCTION NO. 6, SETTING FORTH “BASIC PRINCIPLES OF DRAINAGE LAW.”

The trial court's instruction No. 6 intended to “be helpful” in stating “a few of the basic principles of law governing drainage problems” erroneously states the law with respect to the acquisition of a prescriptive right.

Paragraph four of this instruction sets forth in Hornbook fashion what the law books refer to as “the lost grant theory.” The writer at 17 American Jurisprudence, Easements, Section 55, discusses the origin of easements by prescription and in the following words states how the theory grew up in our law:

“Easements may be created by prescription or, more properly speaking, under the modern doctrine, by presumption. Theoretically, statutes of limitations apply only to actions for the recovery of land as distinguished from incorporeal hereditaments, such as easements. An easement claimed in the land of another cannot be the subject of a constant, exclusive, and adverse possession such as is requisite to assert the bar of limitations. Thus, originally in England, easements, as incorporeal hereditaments, were said to lie wholly in grant, and statutes of limitation were held to apply only to actions for the recovery of land. In time the fiction of a “lost grant” was adopted by the courts; that is, the courts presumed, from the long possession and exercise of right by the defendant with the acquiescence of the owner, that there must have been originally a grant by the owner to the claimant which must have been lost.”

In reading the instructions of the court as a whole, it would seem that this “lost grant” theory of Instruction No. 6 is something entirely different than the adverse use theory discussed in Instruction No. 9. Both, however, are concerned with the acquisition of a right of way by prescription. Again, the element obviously missing in paragraph four of this instruction, is that of adverse use, or in the alternative, acquiescence by the servient land owner in the acts of the party seeking to establish the right of way under claim of right. See *Smith v. North Canyon Water Company*, 16 Ut. 194, at page 202, 52 P. 283, where the court discusses the elements necessary to prove the acquisition of a water right by prescription.

Since those very elements were not proved by the defendants at the trial as shown heretofore, Instruction No. 6 was not only an erroneous statement of the law, but, even if correctly and completely stated, was not supported by the evidence.

IV. THE TRIAL COURT ERRED IN HIS INSTRUCTION NO. 13, THERE BEING NO EVIDENCE AT ALL IN THE RECORD TO SUPPORT THE INSTRUCTION.

Instruction No. 13 is an instruction wholly without support in the evidence. The Instruction reads as follows :

“If you find that O. G. Swenson and Lester England’s father purchased from John Taylor, the prior owner of plaintiffs’ lands, the right to allow the water from their places to be drained through the drain across plaintiffs’ land and the right to maintain such a drain, and if you find that Lester and Merl England are successors in interest to the land being continuously drained since that time through the drain in question, so as to have a prescriptive right as elsewhere defined, and if you find that Weber County was requested and instructed by said Englands shortly prior to November 20, 1953, to clean out said drain in their behalf and as their agent, then you are instructed that said Weber County was not a trespasser when it did so, but that the right to so act would not exceed the right of England would have had and if the act did so, they would be trespassers to the extent not justified by the right.”

It will be seen that the Instruction, in substance, is one on the theory of agency, and as heretofore stated, the

County expressly denied at the trial, through its Commissioner Carver, that it was acting for anyone but Weber County, in the cleaning of the Taylor drain November 20, 1953. A clear statement of the scope of instructions is found at 64 Corpus Juris 760, where it is stated:

“Instructions should be confined to the issues presented by the evidence. Where there is no evidence upon an issue, failure to instruct upon, or to present it, is not error. *On the contrary, instructions on issues not raised by the evidence or directly opposed to the evidence are erroneous, and properly refused although they are correct as abstract propositions of law and although the issues are raised through the pleadings;* and it is error to refuse to eliminate an issue made by the pleadings when there is no evidence to support it. If an instruction not warranted by the evidence is calculated to mislead the jury and prejudice the objecting party, it is ground for a reversal; \* \* \* (Italics ours).”

The reason for carefully guarding the giving of instructions upon which there is no evidence, is found at 14 Ruling Case Law 736, where the statement is made:

“If an instruction is not thus based on the evidence, it is erroneous in that it introduces for the jury facts not presented thereby, and it is well calculated to mislead *and induce them to suppose that such a state of facts in the opinion of the court was possible under the evidence, and might be considered by them.*” (Italics ours.)

In the case of *State Bank of Beaver County v. Hol-*

*lingshead*, 82 Utah 416, 25 P. (2d) 612, at page 432, of the Utah Reports, the Supreme Court of Utah discusses this question as follows:

“It is proper and generally necessary for the court in its instructions to submit to the jury the theory of the case as presented by the defendant as well as that presented by the plaintiff. It is necessary, however, that whatever theories are presented by pleadings or otherwise, in order to be entitled to be submitted by way of instructions to the jury, some evidence must have been received by the court in support of such theory. Instructions to a jury must be responsive to the issues and of such nature that they are applicable to the evidence received and submitted to the jury.”

In that case the court found that there was no evidence supporting part of an instruction and on that basis, as well as other errors, reversed the holding of the trial court and returned the case for a new trial.

A more recent pronouncement by Justice Wolfe, concurring in the case of *Clawson v. Walgreen Drug Company*, 108 Utah 577, 162 P. (2d) 759, is found at page 593:

“I note a change in the policy of this court in regard to determining whether inapplicable instructions are prejudicial. In earlier days, this court held that an inapplicable instruction would be presumed to be prejudicial unless it clearly appeared that it could not have been so. (Citing cases.) Of late, and in this case, we have held



that an instruction not applicable to any evidence will be presumed to have been ignored by the jury. This means that we will assume that the jury exercised more discrimination than the judge. Certainly I am not one to hold that the mere giving of abstract instructions not applicable to any evidence necessarily constitutes prejudicial error. Trial judges under the pressures put upon them by jury trials give instructions at the time thought to be applicable, which we, in a careful survey may find inapplicable.”

Justice Wolfe goes on to state that there are two types of inapplicable instructions. One is the harmless kind, which a jury could reasonably ignore. The other kind is discussed by Justice Wolfe at page 596:

“This case presents an example of one erroneous instruction which may be held not prejudicial. I refer to that instruction in respect to what I consider a non-applicable ordinance hitherto considered. It also presents in the instruction being presently considered an excellent example of one which is prejudicial.

“The mind of the jury would be pointedly directed to the fact that the judge considered that there was evidence from which it could be concluded that the plaintiff had fallen into the vault because of lack of protection from the South Side. The instruction was actually calculated to do that. Yet the accident definitely was caused by the plaintiff not falling into the hole, but actually walking against a raised barrier, falling over it—an act in itself strongly indicative of lack of care for his own protection. To divert the mind of the

jury from a chain of circumstances which culminated in the accident to a false chain on which could be predicated a conclusion of different and perhaps greater culpability on the part of the defendant when both true and false chains themselves were so closely connected with the same physical object and the manner in which the accident happened may, with great likelihood, have influenced the jury to base a conclusion on the supposed more culpable delict. The differences between the two situations may at first appear trivial but upon reflection may reveal a very marked difference \* \* \* Their minds may too easily, without a wrong instruction to help them, import into the situation a fall into the unprotected hole, rather than a blind stumbling over an obstacle and their verdict reached accordingly. Add to that probability an instruction which is predicated on the misstep into the hole rather than the fall over a door and the likelihood that they were influenced by it is very greatly magnified. \* \* \*

The above reasoning applies with equal force in the instant case. The jury were to decide by answering the special interrogatories with the aid of instructions, whether Weber County was upon the plaintiffs' farms by any legal right. The instructions contain several theories which, if supported by the evidence, might have given Weber County and its employees a legal right of way over the Taylor drain. But the record reveals that no one theory is supported by the evidence, and most decidedly, the theory of agency. Instruction No. 13, setting forth a separate theory which defendants unsuccessfully attempted to bolster by evidence, tends only to con-

fuse the jury, or, at best, to suggest to them, without supporting facts, an additional theory upon which they can justify the County's entrance upon the Taylor farms. The likelihood that the jury were influenced by it is highly probable and the giving of the instruction was thus, prejudicial to plaintiffs.

V. THE TRIAL COURT ERRED IN HIS REFUSAL TO SUSTAIN PLAINTIFFS' OBJECTIONS TO THE TESTIMONY OF WITNESS LESTER ENGLAND, AND FURTHER ERRED IN REFUSING PLAINTIFFS' MOTION TO STRIKE THE TESTIMONY OF WITNESS LESTER ENGLAND AS TO CERTAIN MATTERS.

The trial court permitted the defendants' witness, Lester England, to testify over objection concerning a statement made by said witnesses' father, now deceased, many years before and in the absence of any of the plaintiffs of this case. The statement appears at page 189 of the transcript as follows:

Q. What do you know about the transaction?

A. Just that my father told me.

MR. CHRISTENSEN: I object to what his father told him. That isn't binding on us.

Q. Maybe it is.

MR. CHRISTENSEN: Then establish a foundation for it.

Q. Where were you when your father made these statements to you?

A. Well, one time we were right here on this drain here.

Q. Now, you are indicating what?

A. The main drain that goes through Taylors' places.

Q. Yes.

A. And he told me he said "they can't stop you from cleaning that drain because we bought a right-of-way at one time."

MR. CHRISTENSEN: I move the answer be stricken as not responsive to any question asked, and on the further ground that it's hearsay as to any of the parties to this—the plaintiffs in this case, no proper foundation for the admission at this time.

THE COURT: The objection is overruled. It may remain. It shows hostile assertions to the Taylors.

MR. CHRISTENSEN: Your Honor, he hasn't shown that John Taylor was there. He hasn't shown the plaintiffs were there. He hasn't shown it's a reputation. All he said is that it's shown that his father said that to him. I don't think that is material to this case. It's certainly hearsay.

THE COURT: The matters you refer to—I judge is what he has got is circumstantial evidence of an adverse claim.

MR. CHRISTENSEN: Well one isolated

statement isn't any evidence of hostility or anything else if it isn't a general reputation in that area. It's absolutely immaterial.

The transcript reveals that at this point counsel for the County stated that an exception to the ordinary hearsay rule existed as a result of a whole series of boundary line and land cases before the time when surveyors were able to get out on the lands, based on some theory of law not stated in the record by counsel, and yet, an exception to the hearsay rule reportedly allowed "in many English and American cases." We know of no such exception to the hearsay rule. If defendants' counsel refers to the exception treated at 5 Wigmore on Evidence (3rd Ed.) § 1563, entitled "Declarations About Private Boundaries," it is submitted that no question of boundary existed in the instant case.

This statement by the witness Lester England is clearly hearsay and should have been stricken by the court at the request of counsel for the plaintiffs. At page 281 of the transcript, the trial court discusses and rules upon plaintiffs' motion to strike the entire testimony of Lester England with respect to the conversation between him and his father, as hearsay, there being no foundation showing that such knowledge as the father had was a part of the general knowledge of the community. Counsel further objected that even if there were such a conversation it would relate to the right of Mr. England, that is, the witnesses' predecessor in title, and not to the rights of the defendants; and further objected on the ground

that Mr. Lester England's testimony relating to the payment of any money to John H. Taylor has no connection with the case since there is no showing that any of those rights had been assigned to the defendants in this case. The court states at page 281 :

"Insofar as this business about conversations with Mr. England and his father, it's admissible, if for no other purpose to show how Mr. England viewed the matter. I recognize the England's do have a right, that there is no showing directly that the county has picked up his right and acted as his agent as such. There is some evidence of it, but it would affect damages anyway. That water had a right to run down there. It had a right to run down there. He can't complain if Weber County ran it down there at Mr. England's request, or whether Mr. England ran it down there. I think the evidence is admissible for many purposes. First you will be able to argue to the jury the phases of it you have asserted in here.

"Why don't you bring this Wigmore with you tomorrow on this business about the rule of law."

It is apparent from the above quotation that the trial court in his search for some basis for admitting the testimony of Lester England, found none at all, and could only state in summary :

"I think the evidence is admissible for many purposes."

Certainly the error of the trial court's refusal to

strike this inadmissible testimony cannot be remedied by telling counsel: "You will be able to argue the jury the phases of it you have asserted in here." A reading of the record will readily disclose the harmful effect of Lester England's testimony to plaintiffs' case. This was the only witness through whom evidence was introduced concerning any right of way over the Taylor property purportedly acquired by others than the Taylors themselves. The jury, being permitted to speculate on this incompetent and inadmissible evidence, could readily jump to the conclusion that if a grant of a right of way were given by the Taylors' predecessors to the Englands, possibly through some mysterious means, it could have descended to Weber County. We submit that the failure to strike this testimony from the record constituted prejudicial error.

## CONCLUSION

The court's instructions were misleading and confusing to the jury and contained erroneous statements of law. Further, the court suggested to the jury theories of defense entirely unsupported by the evidence in the case. Finally, the court admitted into evidence and refused to strike testimony clearly hearsay and immaterial to the issue as to whether *Weber County* had acquired a right of way by prescription, by grant, or otherwise, and which testimony was highly prejudicial to plaintiffs.

The cumulative effect of these errors was to deprive the plaintiffs of a fair and impartial trial, with the re-

sultant effect that the plaintiffs have been unlawfully deprived of their right of private property by the action of Weber County.

It is respectfully submitted that the judgment should be reversed and a new trial ordered with instructions to direct a verdict for plaintiffs on the issue of liability and permanently enjoining any further trespass on plaintiffs' lands by Weber County.

Respectfully submitted,

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*Attorneys for Appellants.*