

1955

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

Utah Supreme Court

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Maurice Richards; Max D. Lamph; Attorneys for Respondents;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

DEC 13 1955

Supreme Court, Utah

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 GRIFFIN  
and GOLDEN NIELSEN,

*Defendants and Respondents.*

**Brief of Respondent**

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# I N D E X

	Page
CORRECTION OF APPELLANTS' STATE-	
MENT OF FACTS .....	1
RESPONDENTS' STATEMENT OF FACTS .....	5
STATEMENT OF POINTS .....	17
ARGUMENT	
ANSWER TO APPELLANTS' POINT I. ....	17
ANSWER TO APPELLANTS' POINT II. ....	24
ANSWER TO APPELLANTS' POINT III. ....	30
ANSWER TO APPELLANTS' POINT IV. ....	33
ANSWER TO APPELLANTS' POINT V. ....	41
CONCLUSION .....	45

## CASES CITED

A. W. Sewell Company v. Commercial Casualty	
Insurance Company, 15 P. (2d) 327, 80 Utah 378 .....	18
Bertolina v. Frates, 57 P. (2d) 346, 89 Utah 238 ....	20 & 31
Bruner v. McCarthy, 142 P. (2d) 649, 105 Utah	
399 .....	25 & 27
Buckley v. Cox, 274 P. (2d) 277, (Utah, 1952) .....	20
Clawson v. Walgreen Drug Company, et al, 162	
P. (2d) 759, 108 Utah 577 .....	37
Daley v. Salt Lake and U. R. Co., 247 P. 293,	
67 Utah 238 .....	40
Davis v. Hiener, 181 P. 587, 54 Utah 428 .....	27 & 29
Farmers and Merchants Savings Bank vs.	
Jensen, 232 P. 1084, 64 Utah 609 .....	27 & 29
Funk v. Anderson, et al, 61 P. 1006, 22 Utah 238 .....	31
Hines v. Gale, 213 P. 395, 25 Ariz. 65 .....	27
Jensen v. Gerrard, 39 P. (2d) 1070, 85 Utah 481 ....	20 & 36

Knowlton v. Thompson, 218 P. 117, 62 Utah 142 .....	44
Moore v. Utah-Idaho Cent. R. Co., 174 P. 873, 52 Utah 368 .....	40
Morrison v. Noone, 78 N. H. 338, 100 At. 45 .....	43
Pulsipher v. Chinn (Schmutz, Intervenor), 255 P. 439, 69 Utah 401 .....	37
Rush v. Collins, 366 Ill. 307, 8 N. E. (2d) 659 .....	42
Schofield v. Zion's Co-op Mercantile Inst., 39 P. (2d) 342, 85 Utah 281 .....	44
Shields v. Utah Light & Traction Company, 105 P. (2d) 347, 99 Utah 307 .....	27 & 29
Smith v. North Canyon Water Company, 52 P. 283, 16 Utah 194 .....	32
State Bank of Beaver County v. Hollingshead, 25 P. (2d) 612, 82 Utah 416 .....	36

## AUTHORITIES CITED

3 Am. Jur., Sec. 1027, Page 576 .....	44
53 Am. Jur., Trials, Sec. 332 .....	18
96 A. L. R. 1083 .....	44
Compiled Laws of Utah, 1888, Sec. 2783 .....	32
64 Corpus Juris 760 .....	40
5 Corpus Juris Secundum, Section 1763, Page 1113 .....	30
5 Corpus Juris Secundum 1118 .....	40
5 Corpus Juris Secundum 1114 .....	40
5 Corpus Juris Secundum, Pages 1153, 1154 .....	40
14 Ruling ase Law, 736 .....	40
Wigmore on Evidence, Vol. 5, Sec. 1563-1571 (3rd Ed.) .....	41

# 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 corporation, LYMAN HESS, ARTHUR BROWN, ELMER CARVER, J. PIERCE GRAHAM, ELLIS GRIFFIN and GOLDEN NIELSEN,

*Defendants and Respondents.*

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## CORRECTION OF APPELLANTS' STATEMENT OF FACTS

While appellant's statement of facts is accurate in most particulars, it is incorrect in several matters which are very material. We shall consider these briefly.

First, appellants in the first paragraph of their Statement of Facts on page 2 give an incorrect statement as to how and why the drain was cleaned.

The evidence at the trial was that Weber County had at all times, and particularly while the present respondents were agents of the County, maintained that Weber County had an absolute right to clean, drain

through, and otherwise maintain the drain through the Taylor property, as will be discussed in Respondent's Statement of Facts. Counsel give the impression that the purpose of cleaning the drain was to drain an existing swamp and pond to the north of the Taylor property. This is not correct. The purpose was to clean out the drain so that water naturally flowing from the saucerlike area to the north of the appellants' property, and which had so flowed during the lifetime of all the witnesses, could continue to flow and not pond up along the County road drains on Center Street and make swamps on farms in the drainage area (T. 128, 129).

Appellants' brief on page 2 indicates the water had been backing against and over the newly constructed highway, known as Center Street—and that it was to protect this highway that the drain was built. This is not correct. The old graveled road of Center Street, according to testimony, had, of course, been there for more years than anyone could remember. The new, hard-surfaced highway was not constructed until the summer of 1954, a year after the County cleaned the drain (T. 128). Appellants attempt to show that there had been some prior negotiation concerning the widening and deepening of the drain through the Taylor property before November 20, 1953. This gives an incorrect inference which will be discussed near the last of Point I of respondents' brief.

Second, appellants' brief on page 2 states that the respondents cut the fence of Hance Taylor to get on and clean the drain. Hance Taylor stated that the place where the dragline came through his property was

fenced with four wires and cedar posts (T. 20). He admitted on cross-examination that he never saw the fence on the north of his property where the dragline was supposed to have come through when it was down; that at all times when he saw it during and after the time the dragline was there, the fence was up (T. 32). Mr. Taylor acknowledged that the fence on the north end of this property through which the dragline entered his property was owned half by Lester and Merl England, brothers, and half by himself (T. 44, 45). Lester England stated he was familiar with the place where the dragline had gone from the England property onto the Taylor property, and said there was no fence standing there at the time; that his nephew, while cleaning the ditch, set a brush fire and burned the fence out; that the wire was lying flat on the ground, and that the dragline went into the Taylor property where the fence was laid down. (T. 200, 201)

Third, on page 4 of appellants' brief, last paragraph, appellants mention the damage done to the property of appellants by trespass of respondents and state that the "results of cutting and washing away plaintiffs' ground was not controverted by defendants". This, of course, is not a correct statement, as will clearly be shown in respondents' Statement of Facts by their witnesses and by admission of appellants.

Fourth, the first paragraph on page 5 of appellants' brief makes an incorrect statement of respondents' views and of the drain history. These will also be correctly set out in respondents' Statement of Facts.

Fifth, on page 6, appellants state that none of defendants' witnesses testified that they had gone onto the

Taylor farms without seeking permission from the Taylors to so do. This is, first, a misleading statement because no one of defendants' witnesses ever testified he *had* asked for permission to clean the drain, but merely related the things that he did in cleaning it; and it is, secondly, an incorrect statement as several of defendants' witnesses made direct statements to the effect that they had cleaned the drain without asking for permission from the Taylors. These instances will be clearly pointed out in respondents' Statement of Facts.

Sixth, on page 7, appellants state that a Weber County Commissioner Randall in 1928 and a Commissioner McEntire in 1943 agreed to tile the drain through the Taylor farm if the County were given permission to enter the farms to clean the drains. Appellants state this was not denied by the defendants. This claim of lack of denial leaves an erroneous impression of the facts. Both Commissioners picked to have made these ditchbank agreements without any known record thereof and without knowledge or concurrence of the other Commissioners, were Commissioners who were dead at the time this law suit started and not available to make denial.

Seventh, on page 7, appellants further speak of a 1948 meeting in the County Building with the County Commissioners in which the County attempted to acquire a right-of-way through the Taylor farm. This will be discussed at the last of Point No. I of respondents' brief.

Eighth, on page 8, appellants quote Commissioner Carver as saying that when the drain was cleaned, the Commissioners were not acting under the direction of



the farmers in the vicinity. This is not a correct interpretation of Mr. Carver's statement, as will be pointed out in respondents' argument of Point IV of their brief.

## RESPONDENTS' STATEMENT OF FACTS

### *Early Drain History*

Appellants Hance A. and Erma G. Taylor, his wife, from 1946 and up to and including the time of this action, were the owners of a long, narrow strip of land lying in Plain City in Weber County, Utah. The strip was 379½ feet wide by 1,452 feet long, running in length north and south. Appellant Parley P. Taylor owned the land adjoining the Hance Taylor property on the south, his land being the same width but considerably shorter. For as far back as any of the parties to the action could remember, this narrow strip of land running between the farm lands on the east and west had been a low natural swale in which drainage water ran through the bottom land (T. 183). As long as fifty-five years ago, it was remembered as a meadow running from each side of the property down towards this swale where the water was running (T. 184). The channel now known as the Taylor drain was originally the bottom of this long, narrow swale. The drain here in question starts at approximately the Center Street road and drains the drain along that road and then runs south between the Baker and England property about 80 rods to the appellants' property, then through their property and a considerable distance beyond to a creek known as Four Mile. The drain, and particularly its head near Center Street, is the center and low point of a tremendous

natural valley lying west, north, and east of this swale and containing in this drainage area between 1,200 and 2,000 acres of land (T. 193, 194).

Commissioner Carver spoke of this saucerlike area as one draining water from practically every direction (T. 107). At trial, the testimony was undisputed that this Taylor drain drained an area going east between one-half and one mile to Farr West, and going west at least a mile to the Robinson property on the Clearfield Road (T. 40, 41, 42) and north of the Center Street road onto the Christensen property (T. 193, 130, 131). The only deviations from these statements were that appellants and their counsel throughout the trial spoke of ponds and lakes up to the north of Center Street which in times past drained through this area. These were not remembered by witnesses for respondents except as to ponds built up near the Center Street head of the drain when the drain became clogged every few years.

Mr. England, in describing the area of land that this drain carried the water away from, stated that when the drain becomes clogged with rushes and weeds, that the water backs up in the drain north under the Center Street road into Ted Christensen's pasture, and that if the drain is not kept open, the water will gradually fill up the whole pasture (T. 203). He stated that two or three years before the trial, when the drain was not properly cleaned, it backed up and caused a pond in Christensen's pasture large enough to row a boat on. It stayed there approximately six weeks (T. 207). He stated that approximately twenty-five years ago, there was a pond across Center Street at the head of the

drain in Christensen's pasture, and that there was more or less a permanent pond there when the drain became full of reeds and weeds, but when they cleaned the drain, no water stayed in there (T. 208, 209).

Lester England testified that he personally remembered the land when it was just a swale (T. 216). He remembered the Taylor drain for a period of at least fifty-five years (T. 183). At that time, in the center of the swale, there was approximately a three foot ditch which they cleaned out with teams and scrapers (T. 217). Mr. England further testified that thirty, forty, or fifty years ago, the early owners of the Taylor land started pulling and scraping dirt down from the sides of this narrow strip of land and up to the sides of the ditch, thereby cutting down the high sides of the land and filling in the swampy, meadowy edges of the swale. This action, along with the scraping out of the channel, made a definite drain in the center of the swale where originally it had just been a natural bed. The leveling of the surrounding high land down to the edges of the drain made it so that the sides and the banks of the drain were higher than normal. This was done so that the land could be used right up to the edges of the drain as cultivated farm land rather than just pasturage in the rolling swale (T. 183, 184, 185).

The appellant Hance Taylor testified that the reason the channel was originally dug in the location where the drain is now was because originally there was a small swale going through there. He remembered seeing them cut wild hay across there (T. 312).

This action by the early owners prevented the entire swale from being the natural course of drainage and

channeled it instead into this one drain. Mr. England further stated that the England property which lies north and east of the Taylor property and the Taylor master drain, had drained into the drain along Center Street and west into this master drain through the Taylor farm for at least seventy-five years (T. 186).

Appellant Hance Taylor admitted that there was an eight or ten inch tile drain running across his property from the west over to the main Taylor drain and draining water from an open drain coming from about one mile west through the Lawrence Stander and Robinson properties. He stated that he had never been to the end of this open drain, so he didn't know just how far it went. His estimate was that this tile drain through his property was far enough underground so that it came into the main Taylor drain approximately six inches from the bottom (T. 40, 41, 42, 43). It was testified that there is also a 4 inch tile drain buried under the Hance Taylor farm and running from the west into the Taylor drain (T. 109, 110, 116, 117). No witnesses at the trial, including appellant Hance Taylor, could recollect when these two tile drains were placed under the Taylor farm.

Mr. Lester England testified there is another drain draining into the Taylor drain from the east just north of the appellants' properties. He stated that this drain came from approximately one mile east in a group of sloughs in Farr West and ran down through a natural swale almost to the present Taylor drain; that it then went north to Center Street into the Center Street drain, then west a very short distance through the Center Street drain to a point where it joined the Taylor drain,

and then ran south through the present Taylor drain. He said that about the time of the great flu epidemic in 1920, Ether Taylor, brother of appellant Parley Taylor, filled up this natural drain so that the land over it could be farmed. A Mr. Bell, whose property was up by Ether Taylor's property, threatened to start a law suit against Ether for filling up the drain. The drain was then reopened by agreement of the parties, allowing the water to flow naturally down toward the Taylor drain, and Weber County at that time, with its dragline and at the request of the parties then involved, cut the end of the drain through Wilford England's property so that it ran directly west from Ether Taylor's property into the Taylor master drain, where it now runs, without going into it by way of the Center Street drain (T. 176, 177, 178, 179, 180, 181, 182 and 314).

#### *Taylor Drain History During the Last 35 Years*

Mr. England testified that he had an early recollection of the County using power equipment in the drain, and that a man by the name of Louie Shummers, in approximately 1918 or 1920, drove the first dragline for Weber County through this drain when Mr. Skeen's father was Road Supervisor (T. 191, 192).

Delwin Sharp, the Road Supervisor for Weber County for the District of Plain City, stated that in approximately 1918, he went along the drain in question for Weber County and dug out the drain to its approximate present width and depth. At that time, just north of the appellant's property, he put in a cement and tile culvert under the canal for the drain to run through and while cleaning out the drain, he put in two other concrete culverts, one on the Hance Taylor property

and one on the Parley Taylor property (T. 226 to 229). Weber County did this work, furnished the materials, and paid for all the labor. He stated that the two culverts which he placed in the appellants' property are still there in the same position in the drains where he placed them. He stated that the drain might be six inches to twelve inches wider now than it was then. *Mr. Sharp made it clear that he cleaned the drain at that time without obtaining permission from the Taylors.* He went on to say that the fellow who owned the ground at the time, John H. Taylor, was there, and that he was hired, along with Ether Taylor, to work for the County in cleaning the drain.

Mr. Sharp added that he acted just on the County Commissioners' instructions (T. 231, 232).

Ernest Jensen testified that he cleaned the entire Hance and Parley Taylor drain in approximately 1928 at the instruction of the County Commissioners; that at that time, he saw Parley Taylor out near the drain, but that he had no conversation with him (T. 240-241). He stated that he cleaned the drain with a County dragline from a levee near the south part of appellant Parley Taylor's land north up through Parley's land and through Hance Taylor's land up to Center Street. He dropped the cleanings from the drain up on the bank and left them there. He stated that he saw the culverts put in by Delwin Sharp, that he cleaned the drain down to a point level with the bottom of them so that the water ran straight through, and that he cleaned out any bumps which went above the level between the bottoms of the culverts (T. 236, 237, 238, & 212, 213).

Mr. Jesse Singleton stated that in 1933, he went up

the ditch for Weber County with a shovel and pitchfork and cleaned out the rubbish (T. 244, 245).

In 1935, the Weber County Mosquito Abatement Project cleaned the drain again (T. 245, 246). At that time, they put in some new pipes in the drain coming from the west into the Taylor drain from the Stander property where the pipes had apparently been broken (T. 252, 253).

Mrs. Delilah Taylor Urry (prior owner of appellant Hance Taylor's land) stated that the W. P. A. cleaned the drain with approximately twenty-five men (T. 302). Mrs. Urry, on direct examination, indicated that when the W. P. A. cleaned the drain, "they came in and asked us if they could go through" (T. 301). On cross-examination of Mrs. Urry concerning whether permission was requested by the W. P. A. to clean the drain, it became clear that the only permission requested was to go through several of her gates down on the south end of her property to get up to the drain (T. 302, 303).

Mr. Lester England testified that in approximately 1933, the P. W. A. (probably referring to the same group as Mrs. Urry's W. P. A.) cleaned this drain, starting at Four Mile Creek on the south, running all the way up through the Taylor property, and up to and including the England property (T. 192). At that time, they sloped the banks in a semi-round condition, as shown in plaintiff's Exhibit C photograph. They moved in with approximately five hundred men and stationed them six to eight feet apart with shovels, and made the drain the same as it is today. He stated that the drain is the same now as it was when the P. W. A. finished

with it as to width and depth (T. 201, 202).

Mr. Jessie Singleton stated in approximately 1938 he went through the drain again, as Weber County's Supervisor, and had the rushes cut out and hauled off. He hired appellant Parley Taylor and his son to help with this work. He showed his County time book (defendants Exhibit 5), where he had credited their time for work on this job. They were paid for the work by Weber County under his supervision (T. 247, 248, 249 & 259). Mr. Singleton stated that again in 1943, he took the County dragline and cleaned part of the Hance Taylor drain — a part just north of Parley Taylor's which was clogged (T. 251, 252, 254). *He stated that when he did this job, he did not ask permission from the Taylors to do it* (T. 255).

Commissioner Lyman Hess testified that in approximately 1944, which was possibly the last time spoken of by Mr. Singleton, he, as Commissioner, had the Taylor drain cleaned through all of appellant Hance Taylor's property, but stated that it did not need cleaning down in Parley Taylor's farm because of the fall (T. 261, 262). At that time, he cleaned down to the bottom level of the drain that came into the Taylor drain from the west (T. 261, 262). *He testified that he went onto the drain without permission from anyone*, but discussed the spreading of the sediment with Emry Taylor (T. 264, 265, 267, 268).

The evidence introduced, including the statement of appellant Hance Taylor (T. 56), was that by the fall of 1953, this drain again had filled up with sediment, rushes, and other brush far above the level of the bottom of the culverts (placed there in 1918 by Delwin Sharp).



The Commissioners had been advised by appellants that they could not clean the drain this time unless they agreed to tile it. The Center Street road near the head of the drain on the north end had been flooded the year before, and they had been repeatedly requested by Mr. Lester England, owner of the property on the north of the Taylor land, and by Mr. Christensen and Mr. Gibby, who also own land on the north, to clean this drain (T. 323, 324, 325, 204, 205, 206). Approximately ten days before the drain was cleaned, the County Commissioners sent a letter to appellants' (plaintiffs' Exhibit B), advising them that they intended to exercise their right-of-way and clean the drain. The respondents', on November 20, 1953, moved the dragline down the drain and along their bank right-of-way and cleaned the drain.

### *No Damage in Drain Cleaning*

At trial, the respondents elected to try the case solely on the question of whether or not respondents have a right to clean the drain and whether or not they exceeded that right. It was clearly shown at trial by testimony of both appellants and respondents that no actual damage had been done by the respondents in cleaning the drain.

Commissioner Carver stated that the drain was approximately the same now as it was in 1920 (T. 131, 132).

Mr. England stated that twenty-five years ago, the drain was the same as now, except that the W. P. A. sloped the banks (T. 210, 211, 214).

Mr. Sharp stated that in 1918, he widened and deep-

ened the drain into approximately its present position (T. 228).

Commissioner Hess stated the drain was no bigger after cleaning it in 1953 than it was after he had cleaned it in 1944 (T. 262).

Appellant Hance Taylor, after testifying to the severe damage done to his property by the cleaning of the drain, on cross-examination repeatedly testified that after the drain was cleaned, it was not necessarily too much wider, it just went deeper. He further testified that it caved in some years ago (T. 21, 23, 24).

Commissioner Carver stated that after the drain was cleaned, he talked to appellant Hance Taylor about it and Hance said that the damage hadn't been done now, but wait until the water runs through (T. 322).

Lester England testified that he had gone over the drain just before the trial and he couldn't see any place where the drain had sluffed in from the sides (T. 198, 220).

Mr. E. Paul Gilgen, Weber County Surveyor, testified that he made a complete survey of the drain just before the trial and that he had taken cross-sections every one hundred feet down the drain to show the cross-sectional picture of the drain banks and the drain bottom (T. 140).

He stated that the average depth of the Taylor drain was four feet. He presented a graph (defendants' Exhibit 4) showing a profile of the drain. The green average line on this map was the average elevation of the east and west banks (T. 148). The red line below the green line represented an imaginary straight line

drawn between the inside bottoms of the pre-existing culverts in the drain. Mr. Gilgen called it the flow line of the pipes and culverts as they sat in the drain (T. 150, 153). Mr. Gilgen described the first of these culverts as lying approximately 100 feet south from Hance Taylor's north property line fence, the second one as being near the south end of the Hance Taylor property, and the third one being on the Parley Taylor property. He stated that all of these pipes were in the bottom of the drain as shown on defendants' Exhibit 4 (T. 152). These culverts used by Mr. Gilgen in determining the flow line of the drain were the same ones pointed out by Mr. Delwin Sharp as the ones placed in the drain by him in 1918 for Weber County and which he described as being in the same position now that they were in at the time he placed them there (T. 226, 228).

The two culverts on the Hance Taylor property were located in the bottom of this four foot drain with dirt piled above them to the level of the land. Mr. Hance Taylor stated that over the top of the south culvert on his property the dirt was piled up two feet deep to make it level across there for a private road (T. 35, 36, 38). He stated that above the north culvert there would be about three feet of dirt (T. 40). He clearly established that these were permanently established culverts and ones not apt to shift or sink. Mr. England corroborates Mr. Gilgen's statements concerning flow lines in his testimony on pages 202, 203.

Mr. Gilgen then testified that the black horizontal line on defendants' Exhibit 4 represented the actual elevation line of the bottom of the drain at the time he made his survey (T. 153, 154). His survey, as shown

on defendants' Exhibit 4, showed that the drain was cleaned out generally just down to the natural flow line of the drain as it was finally dug in 1918. Mr. Gilgen stated there was a small section just south of the north corrugated metal pipe on the Hance Taylor property where the drain at the time of his survey was slightly below the red line. At this point, the actual drain bottom was approximately one inch below the red average flow line between the culverts.

The only other place on either of the appellants' land where the drain, as surveyed by Mr. Gilgen, was lower than the average flow line drawn between the prior existing pipes and culverts, was down on appellant Parley Taylor's property, just before the drain enters the twenty-four inch tile and corrugated metal pipe, (the point being described as fifteen to twenty-five feet north of station 37, plus 13, shown on defendants' Exhibit 4). At the head of this culvert for a very short distance, as shown on Exhibit 4, the drain was approximately three inches below the average flow line (T. 159). In all other places along the drain, it was not cleaned down below what Engineer Gilgen computed to be the prior existing average flow line.

Mr. Gilgen's survey further showed that the actual present bottom of the drain was between one and two inches below the visible bottom of the eight inch drain running into the Taylor drain from the west (T. 156, 157), and that the actual bottom of the drain at this point where the eight inch pipe entered it was still, after having been dredged out by respondents, four to five inches above the natural flow line of the drain (T. 160). The jury was taken out to and allowed to view the drain.

## STATEMENT OF POINTS

The respondents will answer and argue the five points posed by appellants in the order set forth and argued in appellants' brief.

### ARGUMENT

#### POINT NO. I

Appellants' Contention that the Trial Court Erred in its Refusal to Grant Plaintiffs' Motion for a Directed Verdict as to Liability at the Close of all the Eividence.

Respondents' answer to this contention is that the trial court properly refused to grant plaintiffs' motion for directed verdict as to liability. Plaintiffs' case was based solely on the question of trespass to real property. The evidence of the appellants did not, as appellants' counsel suggest, conclusively show that they were the owners and in possession of that portion of the land known as the Taylor drain. Respondents' evidence received from witnesses for respondents and by admissions of appellants, disproved this claimed ownership and possession of the drain. Respondents' evidence established three controverting facts:

(a) The drain in question was originally the natural course of drainage for the saucerlike area surrounding the point of origin of the drain near Center Street, and the natural drainage, although channeled by early land owners, members of the community and Weber County, has been actually maintained in the same location as a course of drainage by the people of the community and Weber County for a period of at least 75 years.

(b) Weber County has by open, notorious, hostile, adverse use and possession, with the knowledge of the appellant landowners and under claim of right, maintained a right-of-way through the property of appellants to clean this master drain when needed and to allow water from other parts of the county within the natural drainage area to run through the drain.

(c) Two original owners of land lying immediately north of appellants' land paid appellants' predecessor in interest, John Taylor, for the right to have their drainage water run down this channel and to maintain the channel so that it might properly do so. This right continued down to the time the drain was cleaned by respondents. Respondents, in cleaning the drain, did so at the express request and instruction and under the authorization of the successors in interest of these landowners who purchased this right.

In denying plaintiffs' motion for directed verdict, the trial court was guided, and properly so, by the general law and the law of the State of Utah. The writer in 53 American Jurisprudence, Trials, Sec. 332, discusses the general law:

“ . . . if there is conflict in the evidence, particularly when the evidence consists of oral testimony, if different inferences may reasonably be drawn from the evidence or if the court would be called to pass upon the credibility of the witnesses or their testimony, the court should not and ordinarily will not direct a verdict.”

This court discusses the Utah law in *A. W. Sewell Company v. Commercial Casualty Insurance Company*, 15 P. (2nd) 327, 80 Ut. 378:

“The rule is well established in this state by a long list of authorities that where there is any substantial evidence upon which the jury could find for the plaintiff under the pleadings, the trial court must submit the issues to the jury and cannot direct a verdict . . . . In determining this question, the evidence must be viewed in the light most favorable to the plaintiff.”

This statement of law was in a case where the defendant made the motion for a directed verdict, but applying it to plaintiffs’ motion, it clearly shows that the motion should have been denied. The evidence establishing respondents’ right-of-way and right to clean the drain in question without being liable in trespass is as set out at length in respondents’ Statement of Facts.

It appears clear from the testimony that the Taylor drain was the natural drain as described in respondents’ pretrial statement for the saucerlike area north of and surrounding the drain’s point of origin near the Center Street road. The appellants’ misinterpret the evidence on page 10 of their brief where they say that the natural drainage for the head of the Taylor drain was to the north. It is obvious from Mr. England’s answer that he is referring to another drain (T. 195). In all of Mr. England’s testimony, he makes it clear that the drainage from his place and all around him was and is to the south through the Taylor drain (T. 203 204, 207, 208, 209, 186). His testimony on page 195, referred to by appellants on page 10, is slightly disconnected, but was clearly not intended by Mr. England to convey the idea that the natural drainage from the head of the Taylor drain was north.

In ruling that appellants were not entitled to a

directed verdict, the court had before it respondents' evidence that Weber County had a right-of-way acquired by prescriptive use of the drain for a period of more than twenty years. The evidence clearly negated the idea that this was a private drain. Appellants cite the cases of *Bertolina vs. Frates*, 89 *Ut.* 238, 57 *P.* (2d) 346; *Jensen vs. Gerrard*, 85 *Ut.* 481, 39 *P.* (2d) 1070; and *Buckley vs. Cox*, 274 *P.* (2d) 277 (*Ut.* 1952), as setting out the elements necessary for acquiring a right-of-way by prescriptive use. Respondents have no question but what these cases set out the law of Utah on this point.

The evidence submitted by respondents at trial and admitted by witnesses for appellants clearly meets every burden of proof and all of the tests set forth by the Utah Supreme Court for establishing a right-of-way by prescriptive use. From the facts more fully stated before, it is clear that Weber County for more than thirty years has been cleaning and maintaining this drain, placing new culverts and pipes in it at its own expense and discretion. All of the work for more than thirty years was done openly, notoriously, and adversely to appellants. That it was done by Weber County under claim of right cannot be doubted. The fact that on two different occasions the early owners, and in fact appellant Parley Taylor himself, worked under County supervision, direction and control and for its money in cleaning this drain, clearly establishes that Weber County's claim of right was open and adverse. This unrefuted testimony is clearly irreconcilable with any theory holding that the Taylor drain was merely a private drain used by and kept open by the appellants.



It clearly discounts any claim that Weber County only cleaned the drain upon appellants' conditional permission.

These regular cleanings, channelings, and acts of dominion over the drain over a period of more than thirty years prior to the entry here in question show an open, continuous and uninterrupted use by Weber County for more than the required prescriptive period, and clearly took away from the trial judge any right to determine as a matter of law that Weber County did not have and had not established a prescriptive right-of-way over the Taylor drain. The evidence in this regard was clear, satisfactory and convincing that a right-of-way has existed and has been maintained and now exists.

Appellants' brief at page 10 attributes to respondents the claim that the County acquired a right-of-way through the general use of the drain by the people of the community for a period of years. This, of course, was not respondents' contention at trial, nor is it now. Appellants confuse the issues and the evidences presented at trial by what they label defendants' "Second Theory". Respondents had three theories at trial upon which evidence was presented: One was a right-of-way over the drain obtained by prescription; second was the sovereign right of the state and county governments to clean and allow water to run through a natural waterway or course; and third, a right to clean the drain as agent of Lester England and the other landowners whose predecessors purchased this right. The general use of the drain by those in the natural drainage area was properly admitted to show a continuation of the

original natural drainage.

On page 11 of their brief, appellants quote a portion of Commissioner Carver's testimony which they claim is an admission that the County in no way acted as the agent of someone else in cleaning the drain. The testimony was correctly quoted, but it evidences a danger so often encountered when statements are taken out of context. Mr. Carver was not stating that Weber County was not in any way acting for Mr. England in cleaning the drain—he was just stating that primarily he was acting for the County, as will be later discussed under Point No. IV.

Appellants' statement on page 12 of their brief that the "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 plaintiffs' knowledge" is, of course, not a correct statement of the facts, nor a proper analysis of the testimony, as shown by the transcript and the facts before set out.

Counsel for appellants repeatedly attempted to establish that there had been some meeting between appellants and respondents in the City & County Building where the question of tiling the drain was discussed. On page 270 of their cross-examination, appellants attempted to get Commissioner Hess to admit that he was present at a meeting, apparently with the Taylors. concerning this drain, at the courthouse in Ogden in the year 1948, at which meeting Commissioner Brown and

Commissioner Stratford were supposed to have been present. Commissioner Hess' answer was that Commissioner Brown was not a Commissioner at that time and Commissioner Stratford had been dead for ten years, and, further, he recalled no such meeting when the matter of the drain across Parley Taylor's property was considered. Further (T. 270, 271), Commissioner Hess stated he had searched the records and that there was no record of such a meeting.

Respondents admitted that after 1949, there were several attempts by the County Commissioners, individually and collectively, to meet with the Taylors and determine what their problem was concerning the drain, but at no time did any of the commissioners present in court admit that there had been any type of agreement with the Taylors to tile their drain, nor had permission to clean the drain been requested by these Commissioners, nor had any permission been granted conditional upon Weber County tiling the drain, as far as any of these Commissioners knew (T. 272, 273).

On cross-examination by Mr. Christensen, Commissioner Hess refuted the suggestion that in 1949 the County had asked the Taylors for permission to clean the drain (T. 277, 278).

Appellant Parley Taylor, in attempting to show an instance where the County had asked for consent to clean the drain, stated that in about 1943, he had a conversation out on the drain with a Commissioner McEntire (deceased at time of trial) (T. 288). He stated that his brother John was there to discuss the matter with the Commissioner. After gentle leading by his

counsel, he recalled that his brother John died in 1929 (T. 289).

Parley Taylor stated that the County Commissioners as a body in their legally constituted meeting never contracted with him or agreed to tile his drain (T. 297).

It is clear that the evidence of appellants satisfies in all particulars the requirements of the law and that the motion for a directed verdict was properly denied.

## POINT NO. II

Appellants' Contention that the Trial Court Erred in its Instruction No. 3, which Quotes Verbatim from the Defendants' Pretrial Statement as to Theories of Defense Which are not Substantiated by any of the Evidence in the Case

Respondents' answer to this contention of appellants is that the trial court properly exercised its discretion in its Instruction No. 3.

The theories of the defense instructed upon in this instruction were fully and properly substantiated by the evidence. Error is claimed here because the trial judge in part of one instruction quoted from a written statement made by the defendants upon court order after the pretrial hearing for the purpose of setting forth concisely what defendants' case would be at trial. No statement was made in the pretrial statement upon which evidence was not then later introduced at trial.

In summarizing plaintiffs' case, the trial court, although not quoting at all times verbatim from plaintiffs' pleadings and pretrial statements, still give an instruction in setting out plaintiffs' claims which was more

generous to plaintiffs than their own evidence actually was. The trial court, although using a portion of defendants' pretrial statement, still followed the rule laid down in *Bruner vs. McCarthy*, 105 Utah 399, 142 P. (2d) 649, by clearly defining the particular issues in the case and by specifically stating to the jury the material facts alleged, denied and admitted, and by clearly instructing the jury that its Instruction No. 2 was the position of the plaintiff and that Instruction No. 3 set out only the answer to that complaint by defendants.

The appellants, on page 14 of their brief, state that the instruction recites 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". This quoted statement was clearly not the statement of the court in its instructions, but is one formulated by the appellants. It was not at any time during the trial the contention of the respondents.

The points set out in the judge's Instruction No. 3 and in defendants' pretrial information, although numbering from 1 to 4, set out only three theories of defense, not four, as appellants suggest. The first one is that the drain was originally the natural course of drainage for the saucerlike area around its point of origin and that it has continually been maintained as the natural drainage by the interested people in that area.

The second theory was that Lester England's father and another early landowner, O. J. Swenson, purchased from John Taylor, an original owner of appellants' property, the right to run their water through and to maintain the drain. This payment very possibly was

like the early payments of the United States to the Tripolian pirates to allow the United States to run their shipping through the Mediterranean Sea without being continually harassed, but however this money may have originally been paid, the rights either obtained or shored up were passed on down to the present landowners, including Lester England. Any right obtained by Weber County to clean the drain in November of 1953 at the request of Lester England would be as an agent or a servant of Lester England. No right-of-way at any time was claimed by respondents from this purchase for themselves.

The portion of the pretrial statement quoted by the court in its instruction "that the people of the community" had maintained the drain for thirty-five to forty years was, of course, a fact clearly borne out by the respondents' evidence. The only correction should have been that it had been for a period of from thirty-five to seventy-five years. This allegation would be material, as it clearly tends to show that appellants were not the owners and in possession of the actual drain running through their property and that said drain was not merely a private drain constructed by appellants for their own benefit, but was, rather, a natural public drain in which many people, including Weber County, held an interest.

The argument of appellants at page 14 of their brief that paragraph 3 of Instruction No. 3 was supported by hearsay evidence only will be answered under Point No. V of this brief and will not be further commented upon here.

Appellants' comment on page 15 of their brief that such evidence "if admissible, would 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 Weber County" is, of course, admitted, as it has never been the intention of respondents to claim a right-of-way by reason of the purchase of right-of-way by those early landowners. This argument by appellants raises a point not maintained by respondents.

Appellants' statement of Utah law in their citations from *Bruner vs. McCarthy*, 105 Utah 399; *Farmers and Merchants Savings Bank vs. Jensen*, 64 Utah 609; *Davis vs. Hiener*, 54 Utah 428; *Hines vs. Gale*, 25 Ariz. 65; and *Shields vs. Utah Light & Traction Company*, 99 Utah 307, all cited in *Bruner vs. McCarthy*, properly set forth the law as quoted in those cases. Appellants have not, however, properly applied the law in those cases to the facts at hand. The case of *Bruner vs. McCarthy, et al*, in 105 Utah 399, 142 P. (2d) 649, summarizes the established Utah law on the question of the trial court reading from the pleadings, adds thereto a general rule on the matter to which the Utah court apparently subscribes, and discusses also an Arizona ruling to which this court would subscribe. A digest of the majority opinion of this court in that case would be as follows:

(1) It may be misleading, prejudicial and a reversible error for a trial court to merely read a verbatim statement of the complaint, answer and reply in lieu of giving a concise statement of the issues in the case to the jury.

(2) It may be reversible error for a trial court to

read a long, involved pleading to the jury where there is no evidence to support some of the allegations made in the pleadings.

(3) It may be a prejudicial error to read parts of pleadings relating to issues upon which no evidence has been introduced (Arizona law, possibly dicta here).

(4) It is better practice, and the court should itself make a plain and concise statement in its own language of the issues to be determined by the jury, and should specifically state to them the material facts alleged, denied and admitted in respect to all of such issues, and the court should carefully omit any and all issues that may have been eliminated by the parties themselves or the court during or before the trial.

(5) 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.

(6) Prejudice will not be presumed on appeal simply from a showing that the trial court failed to construe the pleadings and to charge the jury upon the issues. It does not necessarily follow that the losing party has been prejudiced simply because the trial court copied in his instructions and read to the jury the pleadings in the case instead of a statement of the issues in the language of the court.

(7) The burden rests on the complaining party to go further and point out to the court wherein and in what respect he has been prejudiced by the court's failure to define the issues and state to the jury the material



facts alleged, denied and admitted in the court's own words.

The trial court in the case at hand neither ignored nor violated any of the rules of law summarized in the Brunner vs. McCarthy case. In this case, the trial court did not quote verbatim the entire complaint, answer or reply in giving its instruction to the jury, as was objectionable in *Farmers and Merchants Savings Bank vs. Jensen*, 64 Utah 609, 232 P. 1084, nor did the court read a long and involved pleading to the jury when there was no evidence to support some of the allegations made in the pleadings, as was objectionable in *Shield vs. Utah Light & Traction Co.*, 99 Utah 307, 105 P. (2d) 347. In quoting from respondents' pretrial statement, the court was not attempting to make a statement of all the issues in the case, but was only covering certain of defendants' claims, and in fact went on, in the court's own words, to further instruct on other of defendants' claims after having, in its own words, stated the grounds upon which plaintiffs were basing their case, and by so doing removed this instruction from the objections set out in the *Davis vs. Hiener* case, 54 Utah 428, 181 P. 587. The trial court in fact did make a plain and concise statement in its own language of practically all of the issues to be determined by the jury, carefully admitting any and all issues that were eliminated by the parties themselves or by the court during the trial. Its incorporation in one part of Instruction No. 3 of a part of defendants' pretrial statement would not be prejudicial error. Appellants nowhere in their brief have pointed out in what respect they have been prejudiced, as is required under the

Bruner vs. McCarthy case above cited. This problem is discussed in 5 Corpus Juris Secundum, Sec. 1763, at page 1113, where it states that "copying the pleadings, or reading them to the jury for the issues it not reversible error in the absence of prejudice".

The only suggestion of error given by appellants is on page 16 of their brief, where they interpret the court's Instruction No. 3 as setting forth four possible theories upon which the jury could find an acquisition of right-of-way by Weber County over the Taylors' farm. Instruction No. 3, of course, did not do this. It merely sets out the points and reasons for which the defendant allege and claim that Weber County lawfully cleaned the drain. The reading of a portion of a pre-trial statement of this nature as part of an instruction should not be as subject to danger as the reading of the complaint, as appellants' suggest in their brief. The reason is that at this stage of the proceedings, all of the chaff should have been taken out of the matter. Counsel, at the court's instruction, should only have presented those things to the court by way of a pretrial statement that it was known could and would be supported at trial.

Justice Wolfe's statement made in Bruner vs. McCarthy, quoted in the center of page 15 of appellants' brief, aptly summarizes the argument on this point under the facts of this case and it need not be again set out here.

### POINT NO. III

Appellants' Contention that the Trial Court Erred in His Instruction No. 6, Setting Forth

## “Basic Principles of Drainage Law”

In Instruction No. 6, the court stated the Utah law with respect to acquisition of a prescriptive right-of-way.

In *Bertolina, et al, vs. Frates*, 89 Utah 238, 57 P. (2d.) 346, at page 348 of the Pacific Reporter, the court stated:

“Where a person claims to have acquired an easement by prescription over another’s land, he must show that he has acquired it by his own continuous, open, uninterrupted, and adverse user under claim of right for the twenty year prescriptive period. *The prescriptive right is based originally upon the theory of a grant implied from long use.*”

See also *Funk vs. Anderson, et al*, 22 Utah 238, 61 P. 1006. At page 1006 of Pacific Reporter, the court said:

“This period unless other provision was made in the local statutes of the state in which the questions have arisen has been assumed to be twenty years. So that now an enjoyment of an easement for the term of twenty years raises a legal presumption that the right was originally acquired by title . . . . the presumption of a grant is the foundation of the doctrine of prescription, *and is, in effect, the same*, whether it arises because of an adverse user for a period of twenty years or, by analogy because of such user for the period prescribed by the statute of limitations.”

In Instruction No. 6, the court does set out the element of adverse use, and we quote from that portion of the instruction which sets it out:

“2B. That the user of the right affecting the lands involved has made this use under a claim of right as against the owner of the land as con-

trusted with a temporary permission of the owner.”

In addition, the other elements necessary to obtain a right-of-way by prescription were set out by the court in this instruction.

In Instruction No. 9, the court stated that defendants claimed that Weber County acquired a right-of-way for the drain across the property of plaintiffs and that this right-of-way was acquired as a result of adverse use of the drain under a claim of right hostile to plaintiffs; it further stated that if Weber County used the drain with permission or consent of plaintiffs, that Weber County could not acquire a right-of-way under such use; and further, that if the drain was used by Weber County without a claim or assertion of right to use the drain, that the use of the drain by Weber County would not be adverse and Weber County could not acquire right-of-way under such use. This instruction merely elaborated on item 2B set out in the court’s Instruction No. 6 and was not in conflict therewith.

The case of *Smith vs. North Canyon Water Company*, 16 Utah 194, 52 P. 283, cited by appellants, is not in point inasmuch as the court in that case discussed the elements necessary to appropriate water by adverse possession under a particular statute then in force in Utah (Section 2783, Compiled Laws of Utah 1888) and did not discuss the elements necessary to gain a right-of-way by prescription.

Appellants’ Point No. III is not well taken, as the court’s Instruction No. 6 is a correct statement of law and was fully supported by the evidence, as shown by the transcript and as before set out.

## POINT NO. IV.

Appellants' Contention that the Trial Court Erred in Its Instruction No. 13, There Being No Evidence at all in the Record to Support The Instruction

Respondents' answer to this contention is two-fold.

First, it is submitted that there was evidence introduced at trial and in the record to the effect that Weber County and respondents were in part acting as agents or servants for Lester England, who had a right-of-way for drainage and maintenance of the drain in question when they in fact cleaned the drain in November of 1953. The following testimony, brought out at the trial, was sufficient so that it could not be ignored by the trial court and could have properly been considered by the jury.

Mr. Lester England testified that he owned the farm land lying north of appellant Hance Taylor's land and running up to Center Street, abutting on the drain in question (T. 174, 175), and that the property had originally been his father's. His land had been drained through the Taylor drain for a period of over seventy-five years (T. 186). His father and a Mr. O. J. Swenson had purchased the rights from Grandad John A. Taylor, a prior owner of appellants' land, to drain the water from their lands through the Taylor drain (T. 187, 188, 189, 190, 191). Shortly before November of 1953, Mr. England requested and authorized the County Commissioners and Weber County to clean the drain for him so that his water might run through (T. 204, 205). Mr. England stated that the ones he told to clean the

drain were the County road men, Commissioner Elmer Carver, and the man Griffin who drove the County dragline (T. 205). That respondents were authorized to clean the drain by and for Mr. England was made clear when Mr. Christensen cross-examined him as to a conversation that he had with Commissioner Carver (T. 224).

CROSS-EXAMINATION OF MR. ENGLAND  
BY MR. CHRISTENSEN:

“A: I said, ‘Go ahead and clean it out’.

“Q: And he said he would?

“A: Witness nodded his head.

“Q: So you at that time gave him permission to clean your drain, didn’t you?

“A: Yes.

. . . . .

“Q: Well, that was just before they went on the Taylor property, wasn’t it? Just a few days before?

“A: I think it was. They done some other work.”

On page 11 of appellants’ brief and again on page 20 under this point, it is stated that Commissioner Carver testified that the County did not act as agent for Lester England in cleaning the drain. On page 11 of appellants’ brief, a part of Mr. Christensen’s cross-examination is set out to prove that Weber County was not acting in any way as agent for anyone else in cleaning the drain. If the preceding testimony of Commissioner Carver is added to that quoted by appellants, it correctly sets out what Commissioner Carver said.

## CROSS-EXAMINATION

BY MR. CHRISTENSEN:

“Q: Now, you mentioned some of these land-owners around there had been asking you to clean that drain. Were you cleaning the drain for those landowners?”

“A: No, not primarily. The thing that brought it to a head, as I told you in my testimony the other day, is when Center Street road, which is a Federal project . . . ” (Here Mr. Carver was cut off by Mr. Christensen) (T. 323)  
and if added to this is the

RE-DIRECT EXAMINATION OF MR. CARVER

BY MR. RICHARDS:

“Q: Had you or had you not been instructed or ordered by other people up north of the Taylor land to clean the drain prior to the time you cleaned it?”

“A: Yes.

“Q: Who had ordered you to do that

“A: Mr. England, Mr. Christensen, Mr. Gibby . . . ” (T. 324)

it then becomes clear that what Commissioner Carver was saying was that he had been instructed to clean the drain by Mr. England and others; that these instructions prompted part of the County’s action but not all of it; that the Commissioners still checked the drain and determined that it did need cleaning, and when they cleaned it, it was primarily for Weber County, but at least partially because of the promptings of Mr. England and others.

Although the support for the court's Instruction No. 13 in the evidence may have been limited, it is not correct, as appellants state, that there is no evidence at all in the record to support it. Further, to say that Weber County expressly denied at trial that it was acting for anyone other than Weber County in cleaning the Taylor drain is not a correct statement of Commissioner Carver's testimony.

Appellants' quotation on the law of instructions from the case of *State Bank of Beaver County vs. Hollingshead*, 82 Utah 416, 25 P. 2d 612, is a good statement of law but is not controlling in this case as appellants have attempted to apply it. It in fact substantiates the contention of respondents, as it states at page 432 of the Utah reports:

"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."  
(Italics ours)

Had it proved necessary that the case be determined on the question of whether the defendants acted only through a right-of-way owned by Lester England, then there was sufficient evidence to allow the jury to make a determination as to whether Mr. England had such a right-of-way and whether the County when they went upon the drain acted upon the instruction of Mr. England and as his servant or agent. The case of *Jensen vs. Gerrard, et al*, 39 P. (2d) 1070, 85 Utah 481, supports Lester England's theory of right-of-way through



the Taylor drain by asserting that an ineffectual parole grant may ripen into an easement by prescription. To do so, of course, it would require the adverse use and enjoyment under claim of right, uninterrupted and continuous for twenty years. Mr. England's uncontroverted testimony established that these requisites had been met regarding his right-of-way.

Second, for the second division of our argument, let us assume, as have counsel for appellants, that there is no evidence in the record to support Instruction No. 13. Then, whether or not the giving of this instruction by the trial court was reversible error must be determined under the Utah law by the further question of whether or not it was prejudicial to appellants.

The case of *Pulsipher vs. Chinn* (*Schmutz, Intervenor*), 255 P. 439, 69 *Utah* 401, held that although an instruction is shown to be clearly erroneous, it must still be shown to have been prejudicial before it will be considered as reversible error.

In the case of *Clawson vs. Walgreen Drug Company, et al*, 162 P. (2d) 759, 108 *Utah* 577, from which appellants have quoted at length from the concurring opinion of Justice Wolfe, it is interesting to note that in the case itself, the trial court gave two erroneous instructions, neither of which, according to this court, was supported by evidence in the case. In this case, two interesting determinations were made concerning these instructions. The first was that this court may look at the overall case and if it determines that the possibility was very remote that the jury took into consideration the fact erroneously placed before it by the court's instruction,

then the error in the improper instruction would not be prejudicial. The second determination was that where an erroneous fact is placed before the jury by an instruction not supported by the evidence, then where all the other evidence in the case is sufficiently conclusive so that the jury might have reached its verdict without considering the facts erroneously placed before it, then, although the instruction was erroneous, this court may determine that the jury could not have been misled by the instruction and therefore the error would not be prejudicial. Justice Wolfe's concurring opinion in the Clawson case was quoted extensively in appellants' brief. The first of his "quotes" at the bottom of page 21 of the brief is applicable to the facts of this case.

Justice Wolfe's discussion and differentiation between prejudicial and non-prejudicial inapplicable instructions does not apply to the case at hand for the reason that clearly here, the matter was not prejudicial, and, second, it is clear in this case that the jury disregarded the instruction and did not rely on it in making their determination.

In this case, the jury had before them the major and this minor theory of defendants' case, the major theory being that respondents had a right-of-way over the drain in question, obtained by prescription. The minor theory in question under this instruction, was that respondents had a right to be on the drain in question by reason of agency through authority of Lester England.

Three special interrogatories were given to and answered by the jury. The first one was:

"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 C. Taylor and Parley P. Taylor 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 jury's answer: "Yes"

The second special interrogatory was:

"If you answered Special Interrogatory No. 1 yes, then do you find from the evidence in this case that Weber County on November 20, 1953, enlarged said drain where it passes through the land of the plaintiffs Hance A. Taylor, Erma C. Taylor and Parley P. Taylor to a greater extent than their right-of-way allowed?

"Answer yes or no"

The jury's answer: "No"

The third special interrogatory was not answered for the reason that the prior answer had been no.

This clear and absolute determination by the jury that Weber County had a right-of-way of its own through the drain and that the respondents did not exceed that right-of-way in their cleaning clearly establishes two things:

First, that since respondents had a right-of-way of their own to do everything on the drain that they did, then the question of whether or not they were there also as agents of Lester England is immaterial, and since they had such a right-of-way of their own, then Instruction No. 13, even though inapplicable and superfluous, would not be prejudicial to appellants.

Second, that Instruction No. 13 may be disregarded under the rule set forth in the *Clawson vs. Walgreen* case above cited for the reason that it is clear in this case that the jury in fact did disregard Instruction No. 13 concerning agency as it was not necessary in the primary decision in the case.

Counsel's statement of the law concerning instructions, set out on page 20 of appellants' brief and taken from 64 Corpus Juris 760 and 14 Ruling Case Law 736, is a correct statement of law but does not completely cover the question at hand. If appellants' statement is taken in conjunction with a statement found in 5 Corpus Juris Secundum at page 1118, the law applicable to this point is then before the court:

"The giving of instructions which are abstract or not authorized or applicable to the pleadings and the evidence will not constitute a ground for reversal where no prejudice results to the complaining party, and this is so whether or not the instructions state correct rules of law."

The cases of *Moore vs. Utah-Idaho Cent. R. Co.*, 174 P. 873, 52 Utah 373, and *Daley vs. Salt Lake and U. R. Co.*, 247 P. 293, 67 Utah 238, are cases supporting respondents' argument on this point that when error is made in instructing the jury, that error is harmless and may be disregarded where it is clear that the matter is decided on another point. In 5 Corpus Juris Secundum at page 1144 it is stated:

"Giving an erroneous instruction is harmless error where the verdict shows that the jury disregarded it."

Again from 5 Corpus Juris Secundum at pages

1153 and 1154, under subsection (c):

“Where special findings by the jury or a finding by them on one of a number of issues show that appellant was not injured by an instruction, errors therein will be deemed harmless.”

This Point No. IV of appellants' brief should not be sustained. It appears clear from the transcript that: (1) The instruction here in question was sufficiently supported by the evidence, and (2) In any event, the appellants could not have been prejudiced thereby, and any error would have been harmless as the jury clearly disregarded it in reaching a verdict.

#### POINT NO. V.

Appellants' Contention that the Trial Court Erred in His Refusal to Sustain the 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

Respondents contend that the court properly refused to strike the testimony of witness Lester England. The testimony of Mr. England with respect to the conversation with his father concerning his purchase of a right-of-way through the drain in question (T. 187, 188, 189, 190, 191), meets the tests set out in Wigmore on Evidence, Vol. 5, Sec. 1563 - 1571, (3d Ed.), concerning private boundaries:

1. The declarant was deceased at the time Lester England testified concerning the conversation.

2. The declaration was made prior to any actual or contemplated law suit concerning the drain.

3. The declarant was standing on the drain and on the land in question at the time he made the declaration.

4. The declarant had no apparent motive or interest to misrepresent.

5. The declarant appeared to have had knowledge of the boundaries of the drain in question.

The fact that the boundary here in question was one bordering a right-of-way rather than around a field of land should not make a difference as appellants' brief argues on page 26.

In the case of *Rush vs. Collins*, 366 Ill. 307, 8 N. E. (2d) 659, at page 663 the court said:

"It is contended, however, that the court erred in admitting in evidence conversations between the plaintiff and others, who were not in title to the Collins' property, and which conversations were out of the presence of and not acquiesced in by the then owner of the Collins' property. Where long possession is relied upon to establish the right of a claimant to an easement, the same strict rules of evidence are not required as where a claim is founded on an ordinary title. The most usual character of evidence in such a case would be parol and not documentary. Conversations will be found in cases of this character, either accompanying agreements or in explanation of conditions which existed, which aid or tend to defeat the presumption, after twenty years, of the right to use the property or way. The evidence was competent for the limited purpose of showing the character of the plaintiff's use of the alley, and there was no error in its admission."

The plaintiff testified that at the time he purchased the property adjoining the tract of land over which he claimed an easement he and the person from whom he was purchasing made inquiry from the defendants' predecessor in interest concerning the alley in question and the defendant's predecessor in interest replied, "we made the alley years and years ago and you have been using it ever since. There is no question about the alley".

Also, see *Morrison vs. Noone*, 78 N. H. 338, 100 At. 45. The defendant claimed a right to flow the plaintiff's land by virtue of a verbal agreement made in 1854 by his father, his predecessor in title, with the owners of land above the dam, at which time a letter "H" was cut in a rock near the pond above the dam to mark the height to which the parties agreed that Noone might raise the water. Defendant also claimed a prescriptive right to flow the plaintiff's land. The defendant, at the trial, testified that his father told him that the mark "H" was the point to which he had the right to raise the water, and what Mr. Gallup, superintendent of the mill, told him as to the placing of the mark upon the rock. This testimony was objected to by the plaintiff. The New Hampshire Supreme Court at page 46 of Atlantic Reporter had this to say regarding this testimony:

"The defendant claimed by prescription, and the statement that his father claimed that his right was to raise the water to the mark "H" was original evidence of the claim made by the defendant's ancestor in title. The evidence was also admissible as the declaration as to the

boundary of his real estate right by one now deceased having at the time the means of knowledge and no interest to misrepresent. Though Gallup was not an owner of the land, it was in evidence that he was connected with the mill for several years as superintendent. It could be he had the means of knowledge and was without interest to misrepresent, and after his decease his statements identifying the mark on the rock as a monument bounding the right of flowage were admissable."

However, even if we assume that the said testimony of Lester England was inadmissable and incompetent, then the following question must be answered: Was the testimony prejudicial to the appellants?

The law without any question is that the erroneous admission of evidence is not reversible error unless it is prejudicial. *Schofield vs. Zion's Co-op Mercantile Inst.*, 85 *Utah* 281, 39 *P.* (2d) 342; 96 *A. L. R.* 1083; *Knowlton vs. Thompson*, 62 *Utah* 142, 218 *P.* 117; 3 *Am. Juris.*, Sec. 1027, page 576.

Also, where the verdict of the jury otherwise renders immaterial, as regards the appellant, the issue upon which alone such evidence was admitted and used, the error is harmless.

The questioning of Letser England (T. 187-191) concerning the conversation with his father was with regard to his ownership and purchase from John A Taylor of a right-of-way to the drain in question and also the boundary of said right-of-way, and there was no testimony or inference from Lester England or any other witness that such right-of-way was transferred or



descended from his father to Weber County, as appellants agree on page 28.

As has previously been mentioned under Point No. IV, defendants had a major and minor theory concerning their right to clean the drain in question, their major theory being that they had a right-of-way by prescription, and their minor theory being that by reason of agency through authority of Lester England, they had a right to clean the drain. Through answering "yes" to the first special interrogatory before set out, the jury found that Weber County had a right-of-way through the drain and that they did not exceed the right-of-way in their cleaning thereof. Therefore, the question of whether or not they were acting through the agency of Lester England would be immaterial, and any testimony of a right-of-way owned by Lester England or his father would also be immaterial, and there could be no prejudice to appellants as a result of said testimony.

## CONCLUSION

It is submitted that the Taylor drain is and has since pioneer times been the natural course of drainage for land lying to the north, east, and west. Weber County, by prescription, has acquired a right-of-way for drain purposes along this drain where it runs through the land of appellants. Landowners to the north of appellants have acquired by purchase and con-

tinued use the right to drain their water through this drain. Respondents, in cleaning the drain, did not exceed their right-of-way and did no damage to appellants' land. The trial court properly exercised its discretion in giving its instructions and receiving evidence. The appellants were in no way injured or prejudiced.

This court should therefore affirm the judgement of the district court.

Respectfully submitted,

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