

1956

Rebecca McKell v. Spanish Fork City et al : Brief of Defendant and Respondent Spanish Fork City

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *McKell v. Spanish Fork City*, No. 8494 (Utah Supreme Court, 1956).
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**In the Supreme Court of the
State of Utah**

FILED

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REBECCA McKELL,

Plaintiff and Appellant,

Clerk, Supreme Court, Utah

vs.

CASE

**SPANISH FORK CITY, a Municipal
Corporation, et al,**

NO. 8494

Defendants and Respondents.

Appealed from The Fourth Judicial District Court of
the State of Utah, in and for Utah County.

Honorable Maurice Harding, Judge

**Brief of Defendant and Respondent
Spanish Fork City**

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In the Supreme Court of the State of Utah

REBECCA McKELL,
Plaintiff and Appellant,

vs.

SPANISH FORK CITY, a Municipal
Corporation, et al,
Defendants and Respondents.

**CASE
NO. 8494**

Brief of Defendant and Respondent Spanish Fork City

STATEMENT OF FACTS

Respondents agree in substance with the procedural steps as outlined in appellant's "Statement of Case." We desire, however, to more fully discuss some of those steps which were merely touched upon by appellant. With respect to the remaining facts, appellant has simply mentioned carefully selected extracts and that part of the testimony which she believes supports her theory, a theory rejected by the Court. Respondent will endeavor to summarize the

evidence with respect to only those facts covered by appellant which we believe are not supported by the evidence.

This action was brought to recover damages to the land and personal property of plaintiff caused by errant flood waters which had escaped the natural channel of the Spanish Fork River and which plaintiff claimed were diverted across plaintiff's land by raising the elevation of a certain county road, and by blasting with dynamite a section of a ditch bank along the East line of plaintiff's property (R. 4 to 9 inclusive). The original basis of plaintiff's claim was under a trespass theory. Motions to dismiss were filed by all defendants (R. 59, 60, 61, and 62). In ruling on the motion of Spanish Fork City to dismiss, District Judge Wm. Stanley Dunford in his memorandum decision dated April 10, 1953, was of the opinion that defendant Spanish Fork City acted in a governmental capacity and that the motion of Spanish Fork City ought to be granted (R. 16 to 19 inclusive). On pages R. 18 and 19, Judge Dunford stated:

"However, because of the disconnection in time and circumstances between building of the dike and blasting of the trees, etc., and because the problems suggested by this memorandum could not reasonably have been foreseen by the plaintiff at the making of his complaint against so many defendants, the plaintiff should have an opportunity to state a cause against the City if the facts warrant it under the holding of this memorandum."

Thereafter, on April 18, 1953, plaintiff filed an amended complaint, which again was based upon a trespass theory (R. 20 to 32 inclusive). Defendant Spanish Fork City again filed a motion to dismiss the amended complaint (R. 60). Defendant's motion to dismiss was denied, as shown

by Judge Dunford's memorandum decision dated May 26, 1953 (R. 33 to 39 inclusive). Judge Dunford pointed out therein that even though the amended complaint was not founded on the taking of private property for public use, which theory was raised for the first time by counsel for the plaintiff in his oral argument on the motion to dismiss, the amended complaint, it was held, did state a cause of action. Thereafter plaintiff filed an amendment to the amended complaint (R. 54). Subsequently, defendant Utah County, together with the State of Utah, (not a party to this action), each paid plaintiff \$2,000.00, making a total of \$4,000.00, in full settlement of their differences. As a result thereof, plaintiff dismissed the action against defendants Utah County, its individual commissioners and employees. In addition thereto, plaintiff dismissed the action against defendants William R. Jex, Roy Bradford, Francis Lundell, John S. Davis, and Wendell Bradford without any consideration moving from them to the plaintiff (R. 63 and 64).

Thereafter, the remaining defendants filed a motion for summary judgment (R. 68). The motion for summary judgment was denied by Judge Dunford with certain qualifications as shown by his memorandum decision dated August 10, 1954 (R. 70 to 78 inclusive).

Prior to the time set for trial, District Judge Wm. Stanley Dunford passed away, and District Judge Maurice Harding was appointed his successor. The case came on for trial and was heard by District Judge Maurice Harding. Defendants proceeded in accordance with the trial court's memorandum of authorities. Plaintiff offered evidence in an effort to show that defendant Spanish Fork City participated in raising the elevation of the county road, which

evidence was received over the objections of the defendants (Tr. 6 and 13).

At the conclusion of plaintiff's case, a motion was made by the defendants for an involuntary dismissal on the grounds that the defendant Spanish Fork City was acting in a governmental capacity, and was not liable to plaintiff as a matter of law (Tr. 201 and 202), which was denied (Tr. 204).

The jury found in favor of the plaintiff and assessed her damage only against defendant Spanish Fork City, and found no cause of action against the individual officers and employees of defendant Spanish Fork City (R. 123). Thereafter, upon motion of counsel for defendant Spanish Fork City, the Court set aside the verdict and granted judgment in favor of defendant Spanish Fork City and against the plaintiff, no cause of action (R. 135 and 136).

The Spanish Fork River heads in the top of the East slope of the Wasatch Mountains and courses, in a general Northwesterly direction through Utah Valley to Utah Lake. The natural channel passes through the West portion of plaintiff's land where it meanders around several pronounced curves. (See defendant's Exhibit No. 26).

In the month of March, 1952, there was an above average cover of snow on the water shed of the Spanish Fork River. Since the mean temperature during the early spring months was below average, the snow was being held on the lower water shed, which otherwise would have begun to melt. It was anticipated that if the temperature should climb above average for a sustained period, that a large volume of water would be discharged through the Spanish Fork River (Tr. 121 and 122).

Although it was generally anticipated that a flood would occur, no one anticipated that it would reach the magnitude that it did (Tr. 122). In anticipation of the potential flood hazard, a number of farmers owning land adjacent to the Spanish Fork River and a number of individuals owning residential property near the river bottom, both inside and outside of the corporate limits of Spanish Fork City, held several meetings for the purpose of combining their efforts to protect their properties in the event that the Spanish Fork River should overflow its banks (Tr. 244 and 252). Dean S. Ludlow testified that A. T. McKell, the original plaintiff, attended some of the meetings (Tr. 245). Plaintiff, Rebecca McKell, testified that to her knowledge, A. T. McKell did not attend any of the meetings (Tr. 329 and 330). A committee of land owners was selected to determine what could be done to alleviate the threat of the flood (Tr. 245). In an effort to gain help from Spanish Fork City, a meeting was held with the Spanish Fork City Council at the request of the committee members (Tr. 245, 246, 261, 286, 288, and 315). At the meeting, the committee members requested that a representative from the Spanish Fork City Council be placed on the committee to facilitate the acquisition of equipment if necessary (Tr. 261). Ed M. Beck was so appointed, and the committee selected its own chairman (Tr. 92, 93, 261, and 321). The committee members requested that their names be placed in the minutes of the Council meeting, which accordingly was done (Tr. 92, 93, and 261). The committee was not appointed by the Spanish Fork City Council (Tr. 261, 286, 287, and 321).

The potential flood condition was surveyed by several groups of officials to determine what action should be taken.

The survey revealed that flood waters which might overflow the East bank of the Spanish Fork River could cause serious damage and destruction to the gravel county road which extended Easterly from the Northeast corner of the plaintiff's property, privately owned farm lands extending North from the county road, property owned by Spanish Fork City upon which there existed buildings, sheds, stock yards, and a race track, a public school and seminary building, a railroad bridge and trestle, U. S. Highway No. 91 and large concrete bridge structure, and private residential property owned by citizens of Spanish Fork City within its corporate limits in the Northwest part thereof (Tr. 8, 9, 29, and 33). It was suggested by General West, a member of the Civil Defense Committee of the State of Utah, (Tr. 6, 276), that the county road extending east from the Northeast corner of plaintiff's land be raised. The purpose of raising the road was to protect the above properties (Tr. 27, 29, and 249). In response to a request by Utah County for assistance, a meeting of the Spanish Fork City Council was held wherein the Council voted to send some City-owned trucks to help the County raise the road (Tr. 277). The Spanish Fork City Council approved an oral cooperative agreement between Spanish Fork City, Utah County, and the State of Utah, whereby Spanish Fork City was to furnish \$2,000.00 in labor to assist in raising the level of a county road as shown by the following minute entry of Spanish Fork City dated April 11, 1952, which, incidentally, is incorrectly quoted in appellant's brief:

"Councilman Anderson moved that we go along with the County and State in furnishing \$2,000.00 worth of labor along with the County and State \$2,000.00 each on dike road, and to do all we can to cooperate with

County and State in construction of road dike and to authorize mayor and recorder to sign county agreement."

The oral cooperative agreement was later reduced to writing and was signed by the officials in Spanish Fork City on June 4, 1952, which was some time after the flooding took place (Tr. 16). (See defendant's Exhibit No. 1).

The officials of Spanish Fork City and Utah County deemed it advisable to procure a written release or waiver from the land owners along the Spanish Fork River for any damage resulting from the flood control work prior to the performance of any work (Tr. 92 and 309). In accordance with the foregoing, on April 2, 1952, a written instrument entitled "Release" was executed by a number of the owners of land adjacent to the Spanish Fork River. Included among the signers was A. T. McKell, the original plaintiff in this action. (See defendant's Exhibit No. 39. Tr. 198 and 303).

A canal known as the Bradford ditch runs along the East boundary of plaintiff's land. (See defendant's Exhibit No. 26). (Tr. 83). Plaintiff's land is irrigated with waters from the Bradford ditch, as is the land situated immediately East. (See defendant's Exhibit No. 26 and Tr. 89). The general slope of the land East of the river is in a North-westerly direction, i. e., towards the river channel as shown by the course of the flood water in defendant's Exhibit No. 3. The land immediately East of plaintiff's land has a very slight slope to the East, being about one and three-fourths inches per hundred feet, and a slope of three-fourths inch per hundred feet to the North, and is irrigated to the North-east (Tr. 65).

Although the land has been irrigated in that direction as long as the witness Clifford McKell, who owned the land for the past twenty-five years, could remember, the only logical conclusion is that at one time the land was graded with a slope to the Northeast, so that it could be irrigated from the Bradford ditch.

The banks of the Bradford ditch are higher than either the plaintiff's land or the land to the East thereof. (See plaintiff's Exhibit No. 6). The Bradford ditch has always passed under the county road by means of a culvert, and at that point the elevation of the road has always been higher than the banks of the ditch (Tr. 23, 83, and 250). The elevation of the county road was higher than the land immediately South thereof prior to the raising of the elevation of the road (Tr. 250).

During the latter part of the month of April, 1952, the river began overflowing its East banks approximately one to one and one-half miles Southeasterly from plaintiff's property (Tr. 10). The course of the flood water was in a general Northwesterly direction, and its path of destruction is clearly shown in defendant's Exhibit No. 3.

As the errant flood waters innundated a large area of land East of the river and coursed their way in a general Northwesterly direction towards the county road, it became apparent that to save and protect the county road, the state highway and bridge, Spanish Fork City property, and privately owned farm land, and residential property owned by citizens of Spanish Fork City within its corporate limits, the elevation of the county road had to be raised (Tr. 7). Two trucks owned by Spanish Fork City were loaned to Utah County and were placed under its su-

pervision (Tr. 33, 280, and 283). There was a total of seven or eight trucks which worked steadily for three or four days and nights hauling gravel to raise the elevation of the road (Tr. 15). The elevation of the road was raised about two feet on the East and about four feet on the West (Tr. 26).

Upon reaching the county road, which extends Easterly from the Northeast corner of plaintiff's property, the errant flood waters were impounded and prevented, at least temporarily, from proceeding any further North. The elevation of the impounded flood waters gradually raised, and when it exceeded the elevation of the bank of the Bradford ditch, the water began overflowing to the West onto and over the plaintiff's lands and back into the river. The flood water overflowed the bank of the Bradford ditch approximately two to three feet deep, and for a distance of from fifty to seventy-five yards, and began washing gulleys, rivulets, and fingers, thereby washing away the top soil over a considerable area along the Northern portion of plaintiff's land (Tr. 20, 21, 101, 107, 116, and 257).

Thereafter, the original plaintiff, A. T. McKell, went to the place of business of William R. Jex and asked if Mr. Jex could do something to confine the water washing across plaintiff's property into one channel to save his property from being entirely washed away (Tr. 254, 255). In response to the request of Mr. A. T. McKell, Mr. Jex contacted Francis Lundell, and together they set a series of dynamite charges known as ditching powder along the Northern portion of plaintiff's land, beginning on the West near the McKell barn, where the water had already cut the land back, and extending East to and including the West bank of the Bradford ditch (Tr. 103). The first blasting occurred

on the night of April 26, 1952 (Tr. 102, 188, and 255). A few days later, Arthur T. McKell again went to William Jex and asked that a second hole be cut through the Bradford ditch (Tr. 256). In response to Mr. McKell's request, Messrs. Jex and Lundell blew out a second channel through the West bank of the Bradford ditch a short distance South from the original cut (Tr. 102, 256).

There is not one scintilla of evidence to show that either William R. Jex or Francis Lundell were employed by or were authorized or acted for Spanish Fork City to do any blasting whatever. In fact, all of the evidence shows otherwise (Tr. 256, 286).

The only evidence touching on the exact acreage of plaintiff's land washed away by the flood waters was the testimony of Hugo Price, a registered, professional engineer and land surveyor, and defendant's Exhibit No. 26, which was a map prepared by Mr. Price in January, 1953, when he was Utah County Engineer. The evidence showed that 7.6 acres of river bottom land had been washed away by the turbulent flood waters which remained in the natural channel. (See defendant's Exhibit No. 26, Tr. 209). A total of 1.87 acres of plaintiff's land had been washed away by the errant flood waters which had escaped the natural channel. Plaintiff contends that he could have saved some land along the river bottom and machinery if the flood had not prevented him from reaching that land. (See deposition of A. T. McKell, page 9). Mr. Francis Lundell testified that the South end of the McKell property could have been reached by wearing hip boots at any time that he was there during the flood (Tr. 117).

On May 4, 1952, the Spanish Fork River reached a peak flow of 3500 second feet of water, measured in the mouth

of the canyon at Castilla. The highest flow at flood stage previously recorded was 1520 second feet in 1920. (See defendant's Exhibit No. 29, Tr. 220). Thus it can be seen that the flow in 1952 was approximately 2000 second feet higher, which was more than twice as high as any previous recorded flow at flood stage. Francis Lundell testified that he had lived at Benjamin, Utah, for sixty-one years, and he had never before seen such a flood (Tr. 113).

A careful and exhaustive review of the entire record reveals that the only thing that Spanish Fork City or its officers had to do with the flood water which caused the damage complained of was to lend to Utah County the use of two city-owned trucks, which were under the supervision of the county for three or four days in hauling gravel to raise the elevation of the county road. It is upon this fact, and this fact alone, that appellant asks that this Court reinstate the verdict of the jury.

STATEMENT OF POINTS

We shall follow the general order of the points specified in appellant's brief, although we believe it unnecessary to answer all points raised by appellant to sustain the decision of the trial court. Respondent desires to present two additional points which are enumerated as Point VII and Point VIII and will be fully discussed hereafter. We shall endeavor to cover each point in the order enumerated.

POINT I

THE TRIAL COURT DID NOT ERR IN PERMITTING THE DEFENDANT SPANISH FORK CITY TO AMEND ITS PLEADINGS BY STRIKING FROM THE ANSWER THE ALLEGATIONS TO THE EFFECT THAT

THE DAMAGE SUSTAINED BY THE PLAINTIFF WAS CAUSED BY A CHANGE IN THE COURSE OF THE RIVER, AND SUBSTITUTING THE ALLEGATION THAT THE DEFENDANT HAD A RIGHT SO TO DO WHAT WAS DONE BECAUSE OF THE EXISTENCE OF AN EMERGENCY TO PROTECT ITS PROPERTY FROM A COMMON ENEMY.

Rule 15 (b), Utah Rules of Civil Procedure, provides in effect that amendments to the pleadings may be made at any time, even after judgment, to cause the pleadings to conform to the evidence.

Particular liberality is shown by the courts in allowing amendments to defendants answer, in order that there may be a trial on the merits. However, the allowance or refusal to defendant of permission to amend is ordinarily regarded as resting within the sound discretion of the court (71 C. J. S. Par. 294, P. 670). An amendment of an answer to deny a fact that has been admitted, or to admit a fact that has been denied is addressed to the discretion of the trial court (71 C. J. S. 296(f) P. 677). *LeCyr vs. Dow*, 30 Cal. 2d 457, 86 Pac. 2d 900). In the case of *Hall vs. Gordon*, 76 U. S. App. D. C. 33, 128 F 2d 461, it was held that permitting defendant at trial to amend answer to assert an additional defense was not error. Courts are more liberal in allowing amendments to answers than complaints. This liberality sometimes extends to the admission of entirely new defenses. *Cartwright vs. Ruffin*, 43 Colo. 377, 96 Pac. 261). The purpose of the liberal rule was pointed out by this Court in the case of *Hayden vs. Collins*, 90 Utah 238, 63 Pac. 2d 223). On page 225 it is stated:

“The person who brings an action, as distinguished from he who defends, has control of the action in the sense that he may choose the underlying set of facts which he thinks constitutes a cause of action against the defendant. There is reason then for saying that, after he so chooses a set of facts which he believes constitutes a cause of action, he should not be permitted to shift to another cause of action. Not so with the defendant. The defendant has been brought into court and made to defend. Any set of facts which he may set up, whether sounding in contract or in tort and which would tend to defeat the claim of the plaintiff is permitted. And if he should, for the time, fail to set up some facts which would constitute an affirmative defense or counterclaim, and then later conclude that these facts would constitute a good counterclaim or defense, he should be able to do so as long as they are not advanced at such a late date as to make the tardiness prejudicial to the plaintiff.”

Appellant has made no showing that the time at which respondents' motion to amend was made and granted was prejudicial to her. She made no motion for adjournment to procure further evidence to meet the amendment. (See *Voltmann vs. United Fruit Company*, C. C. A. N. Y. 1945, 147 F. 2d 514). There is no showing whatever that the trial court abused its discretion in permitting the amendment.

There is no evidence to show that defendant Spanish Fork City had anything to do with any blasting or straightening of the natural channel of the Spanish Fork River West of U. S. Highway No. 91. Mayor Nielsen unequivocally refused to authorize any blasting anywhere and specifically West of U. S. Highway No. 91 (Tr. 296). Francis Lundell testified that on his own initiative he used dynamite to blast

a new river channel West of U. S. Highway No. 91 (Tr. 104). The only evidence with respect to any damages caused to plaintiff's property thereby was speculative and by conjecture (Tr. 104, 105).

Appellant takes the position that the mere fact that respondent entered into an agreement with the State of Utah and Utah County to assist in flood prevention work, respondent assumed full responsibility for the rampaging Spanish Fork River and became an insurer for all damages left in its path of destruction. Not only is such position untenable, but it is contrary to common sense and reason. Now appellant seeks to go even further and claims that the original allegation in respondents' answer, to the effect that by reason of changing the course of the river West of U. S. Highway No. 91 "and lowering the same ten or twelve feet, this made a heavy draw and washed out plaintiff's land and other lands above Highway No. 91" was an admission by respondent that might well have constituted negligence. We submit that the conclusion is absurd and the argument is without merit. In view of the fact that there was no evidence to show that respondent had anything to do with the Spanish Fork River or channel West of U. S. Highway No. 91, it properly exercised its discretion in permitting the amendment. Since a motion to amend the pleadings is addressed to the discretion of the trial court, the ruling on the motion to amend may not be reviewed on appeal, except for abuse of discretion. (Goodson vs. Goodson, 105 Cal. App. 2d, 232 Pac. 2d 876. Lewis and Q. vs. S. Edmundson and Sons, 113 Cal. App. 2d 705, 248 Pac. 2d 973).

POINT II

"THE EVIDENCE SHOWED THAT PLAINTIFF RELEASED THE DEFENDANT CITY FROM LIABILITY FOR THE DAMAGES COMPLAINED OF."

The best evidence of the release from liability is the written instrument itself, which bears the signature of A. T. McKell, the original plaintiff. (See defendant's Exhibit No. 39, Tr. 198 and 303). The first paragraph generally describes the activities from which respondent was relieved of liability if any damages resulted to the property owners thereby. The second paragraph, which was omitted from appellant's brief on pages 6 and 7, is as follows:

"This release shall be effective from date hereof until the end of 1952, and shall release the above bodies politic from any liability whatsoever whether by reason of the above described activities or by reason of moving equipment, men, or supplies onto the land owned by the signers and the signers hereto expressly give the above described bodies politic, or their agents, free access to the land in order to undertake flood control or prevention work along the said Spanish Fork River, its canals, or tributaries."

A. T. McKell testified on direct examination that all he signed was permission to take heavy equipment across his land to clean out the river (Deposition of McKell, page 18). On cross examination, he testified that he intended to agree to whatever the agreement said and what he signed, he agreed to because he read it (Deposition of A. T. McKell, page 19). The release was taken to A. T. McKell for his signature by Garland Swensen. Mr. Swensen testified that there was no conversation about the purpose of the

release except as to the flood condition (Tr. 302). Mr. McKell read the document and raised no question or objection (Tr. 198, 303). The position taken by appellant and asserted during the entire trial, that A. T. McKell consented only to allowing equipment to be brought across his land to clean out the river is contrary to the express wording of the release. In the second paragraph it provides that:

“ and shall release the above bodies politic from any liability whatsoever by reason of the above described activities or by reason of moving equipment, men, or supplies onto the land owned by the signers.”

It is clearly manifested that the release of liability through moving the equipment is in addition to the release of liability from the activities described in the first paragraph thereof. Appellant attempts to narrow and restrict the interpretation of the instrument to cover only a release of liability for doing work along the Spanish Fork River channel to keep the water from overflowing its banks. Such contention is again contrary to the express wording of the instrument. In the first paragraph it provides that:

“ do hereby release the City of Spanish Fork from any liability for damage to any real or personal property owned by the signers hereto in the above described sections along the Spanish Fork River, or along its canals and tributaries.”

It is clear, therefore, that the release covers activities along the various canals which divert water from the Spanish Fork River at places which may be distant from the natural channel. The wording of the release is very general, and covers any work to alleviate flood conditions. The evi-

dence shows that the bodies politic named in the release were insistent that the property owners sign such a waiver before they would undertake any measures for any flood prevention work (Tr. 92, 309, 310).

Respondent will concede that Mr. McKell did not consent to have his farm destroyed. We contend that Mr. McKell did consent to whatever action was necessary under the circumstances to save as much of his property as was possible. The testimony in the deposition of Mr. McKell as to what he intended in signing the release was given on the twenty-eighth day of April, 1954, approximately two years after the flood took place. The actions of Mr. McKell at the time the release was signed, which was during the threat of a potential flood, are certainly inconsistent with his testimony given two years later, as shown by his deposition. Appellant apparently makes no claim that the release itself is invalid for any other reason. However, we desire to comment briefly on two aspects which may cause this Court some concern.

Although a release ordinarily operates only with respect to matters which are in existence at the time it is given, claims arising subsequently are discharged thereby if they fall within the fair import of the terms employed (76 C. J. S. Release, Paragraph 53). The doctrine that a release cannot discharge a future claim without such mention of it is merely a canon of construction, and a release in general terms will serve to release such a claim if the intent is plain from the recitals thereof. (Altman vs. Curtis Wright Corporation, C. C. A. N. Y. 124 F 2d 177). As a general rule, a release, in order to be effective, must be supported by a valuable consideration (76 C. J. S. Release, Section 10). However, there is an exception to the fore-

going general rule where one has been induced by a release without consideration to alter his position to his prejudice. Respondent concedes that the release recites no consideration. However, the facts of this case fit squarely within the foregoing exception. Respondent would not have engaged in any flood prevention work without a written release from the property owners.

In reliance on the release, respondent loaned two trucks to the county to assist in raising the elevation of the county road and subjected itself to possible litigation. Respondent changed its position to its detriment, and appellant should be estopped from asserting a lack of consideration.

POINT III

DEFENDANT SPANISH FORK CITY ACTED IN A GOVERNMENTAL FUNCTION AND CANNOT BE HELD LIABLE FOR THE ACTS COMPLAINED OF.

At the very beginning of this action, the trial court was of the opinion that assuming the allegations of the original complaint were true, Spanish Fork City was performing a governmental function, and could not be held to respond in damages, as shown by the memorandum decision of Judge Wm. Stanley Dunford dated April 10, 1953 (R. 16 to 19 inclusive). However, in his subsequent memorandum dated May 26, 1953, Judge Dunford expressed the opinion that the facts alleged in the amended complaint stated a cause of action under the theory that there was a taking or damaging of private property for a public use (R. 33 to 39 inclusive). Apparently Judge Dunford concluded that if the private property of McKell was damaged for a public use, it is no defense to say that it was done in furtherance of a governmental function.

At the conclusion of plaintiff's case, defendant Spanish Fork City moved for an involuntary dismissal on the ground that plaintiff's evidence showed that the defendant City was performing a governmental function (Tr. 201). The motion was based upon the theory that the defendant City acted to protect the safety, health, and welfare of its inhabitants and their properties. The motion was denied (Tr. 204). Municipalities or other governmental subdivisions are not liable in damages for their negligence or the negligence of their officers and agents in the exercise of a governmental function, but are liable in damages for negligence in the exercise of proprietary, municipal, or non-governmental functions. (Sehey vs. Salt Lake City, 41 Utah 535, 126 Pac. 691. Gillmor vs. Salt Lake City, 32 Utah 180, 89 Pac. 714. Rollow vs. Ogden City, 66 Utah 475, 243 Pac. 791. Niblock vs. Salt Lake City, 100 Utah 573, 111 Pac 2d 800. Davis vs. Provo City Corp., 1 Utah 2d, 244, 265 Pac. 2d 415. Ramirez vs. Ogden City, 3 Utah 2nd 102, 279 Pac. 2d 463).

There is a great divergence of opinion as to what acts or functions fall within one or the other of these categories. (See 38 Am. Jur. 261, Municipal Corporations, Section 572). This divergence of opinion seems to prevail on the question whether the construction of flood control measures constitutes a governmental or merely a proprietary or municipal function. (5 A. L. R. 2d 57, Damage by Flood Protection Measures, Section 18). The foregoing annotation cites cases and gives circumstances under which it has been held that the municipality was acting in a governmental capacity and not liable for the negligence in the construction and maintenance of flood control works and the circumstances under which it has been held that the municipality

was acting in a proprietary capacity, and therefore liable. Appellant seems to emphasize the fact one of the properties respondent endeavored to protect was leased for a stock sale and is not the performance of a governmental function. In the case of *Ramarez vs. Ogden City*, supra, this Court held that the defendant City which owned a community center employing a director to supervise recreational activities and contributed \$6,000.00 per year, was engaged in a governmental and not in a proprietary activity and was not subject to tort liability. This Court pointed out on page 465 that a governmental function must be something done or functioned for the general public good, and whether there is a special pecuniary beneficial profit to the municipality, and whether the activity is of such a nature as to be in real competition with free enterprise are facts to be considered. In the case of *Sehey vs. Salt Lake City*, 41 Utah 535, 126 Pac. 691, this Court held that where police officers of a City extended netting across a stream in an endeavor to recover the body of a drowned boy, the act was not in the discharge of any corporate power or function of the municipality or on account of any municipal benefit, but in discharge and in pursuance of a mere governmental duty, so that the City could not be held liable for the negligence and wrongful discharge of such duty whereby a portion of the wire remained in the stream and caused an obstruction of the flow. It has apparently been felt by some judges that there is something more sacred in rights in land than in rights of personal liberty and security, but a close analysis of the decisions will show that this is not the generally accepted view. (38 Am. Jur. 280, *Municipal Corporations*, Section 584).

There is some difference of opinion among the courts

as to whether the riparian landowner is entitled to recover damages by way of compensation where as a result of the construction of flood control measures his land has been flooded or otherwise damaged. (5 A. L. R. 2d, 57, Damage by Flood Protection Measures, Section 4).

Some authorities exist upholding the right to recover damages under the constitutional provision that private property shall not be taken or damaged for public use without just compensation where the damage was direct and not merely consequential. (See cases cited in the foregoing annotation, page 60).

There is considerable authority based upon various theories denying the right to recover damages or compensation. The foregoing annotation contains a long list of cases so holding on pages 60 and 61. Under one theory the ground of the denial of a right to recover for damage to property not taken is that the construction of the flood control measure is an exercise of the police power of the State acting by its subordinate agencies; the theory of this view being that property may be summarily taken or destroyed in the exercise of the police power of the sovereign in the promotion of the protection of the health, safety, and security of the general public. (See cases cited on page 61 of the foregoing anotation). The view is expressed in a number of cases that the constitutional provision as to the payment of compensation to a property owner for taking or damaging his property for public use does not contemplate a damage for a *damnum absque injuria* under the exercise of the police power, and that this constitutional provision has not modified the doctrine denying recovery for damage in the absence of a legal right. (5 A. L. R. 2d 57, Section 12, and cases cited thereunder).

POINT IV

THE EVIDENCE IN THIS CASE AS A MATTER OF LAW JUSTIFIES THE VACATING OF THE VERDICT OF THE JURY AND THE GRANTING OF A JUDGMENT FOR THE DEFENDANT CITY NOTWITHSTANDING THE VERDICT BY REASON OF AN EMERGENCY.

An emergency does not always or necessarily imply suddenness or unforeseeableness or a temporary condition for it may also comprehend a pressing necessity or exigency not necessarily wholly unexpected. This common meaning depends greatly upon the special circumstances of each case. (29 C. J. S. 760, Emergency). Prior to the actual flooding it was generally known that a potential flood hazard existed, and it was anticipated that a flood would occur if the temperature would rise above normal for a sustained period. No one anticipated that the flood would reach the magnitude that it did (Tr. 122). Francis Lundell, who lived in the vicinity of the Spanish Fork River for sixty-one years, testified that he had never before seen such a flood from the river (Tr. 113). The records show that on May 4, 1952, the flow of the Spanish Fork River was measured at 3500 second feet, being more than twice as high as any previously recorded flow at flood stage. (See defendant's Exhibit No. 29, Tr. 220). An extraordinary flood is a flood not foreshadowed by the usual course of nature and of such magnitude and destructiveness as could not have been anticipated or protected against by the exercise of ordinary foresight. (Wellman vs. Kelly, 197 Oregon 553, 252 Pac. 2d 816). One cannot escape the conclusion that the flow of the Spanish Fork River reached such

proportions and magnitude that an extraordinary flood occurred. When the river began overflowing its banks, it changed from a naturally controlled force into a wild monster on the rampage, the waters threatening damage and destruction to man and property without discrimination to whichever stood in its way. Not only was the property owned by Spanish Fork City threatened, but so was plaintiff's property, a public school, a seminary building, a railroad bridge and trestle, a large concrete highway bridge structure, a state highway and residential property covering approximately one-fifth of Spanish Fork City (Tr. 8, 9, 29, 33, 70, 71). We submit that then and there a great emergency arose. Under such emergency conditions, Spanish Fork City loaned two trucks to Utah County for the purpose of raising the elevation of the county road to ward off and prevent the errant flood waters from flooding over the above property and thereby protect the same from damage and destruction. It was intended thereby to protect the property by keeping the water in the river, and it was not designed or intended to divert water across plaintiff's property (Tr. 281, 282, 283). Appellant must concede that a little hindsight is better than a lot of foresight. We can look back now and criticize what was done or was not done and the good or bad that resulted therefrom. It must be remembered that after the river began overflowing its banks, no one could anticipate the magnitude the flood would reach. Mayor Nielsen described the condition very well in his statement:

".. . . because at that time we did not know whether there would be ten feet of water or six inches." (Tr. 284).

Under extraordinary water conditions, the landowner may use every reasonable precaution to prevent injury to his land, and whether his conduct is reasonable is determined by existing conditions and not subsequent consequences. (Jones vs. California Development Co., 173 Cal. 565, 160 Pac. 823. Higgins vs. Monckton, 28 Cal. App. 2d 723, 83 Pac. 2d 516).

The rule is well stated in I Nichols on Eminent Domain, 2d Edition, paragraph 263, as follows:

“When immediate action is necessary in order to avert a great public calamity, private property may be controlled, damaged or even destroyed without compensation. Under such conditions, any individual has the right to enter another's land and destroy his property and if he acts with reasonable judgment, he is not liable to the owner.”

A subdivision of the State has at least a right equal to the individual in protection against a catastrophe without liability. (Short vs. Pierce County, 194 Washington 421, 78 Pac. 2d 610).

There is no evidence in this case to show any negligence in the manner in which the road was raised, and apparently appellant so concedes, as shown on page 27 of her brief. It is the law that in meeting an emergency such as fire, flood, or pestilence, public officials may employ almost any available means in an endeavor to control the danger. (Short vs. Pierce County, *supra*).

There are limitations on the doctrine denying a right of recovery to the land owner for damage to his land by flood control measures in the exercise of the police power where the damaging of the property is done unnecessarily

and avoidably as a result of negligence on the part of the municipality or other governmental subdivision rather than under compelling emergency or with reference to the riparian rights of property owners to protect themselves against flood water. (House of Los Angeles Flood District, 25 Cal. 2d 384, 153 Pac. 2d 950). The Court pointed out that the foregoing case was not one of such emergency as would preclude the defendant district from being held liable for unnecessary damage resulting from the alleged negligent planning, construction, and maintenance of a flood channel project. Again in *Smith vs. Los Angeles*, 66 Cal. App. 2d 562, 153 Pac. 2d 69, there was no emergency requiring split second action. It is clear that the facts of the instant case do not bring it within the foregoing limitation. The evidence in the instant case does show that a great flood emergency existed, and defendant Spanish Fork City had a right to do what it did to protect itself from a common enemy, as will be more fully discussed in the following Point V.

Respondent is at a loss to understand the materiality of what William R. Jex and Parley Neeley were concerned about, or what they did. There is no evidence to show that Either William R. Jex or Parley Neeley were authorized to act for, purported to act for, or did act for Spanish Fork City.

POINT V

THE EVIDENCE IN THIS CASE AS A MATTER OF LAW JUSTIFIES THE VACATING OF THE VERDICT OF THE JURY AND THE GRANTING OF A JUDGMENT NOTWITHSTANDING THE VERDICT UNDER THE DOCTRINE THAT FLOOD WATER IS A COMMON EN-

EMY AGAINST WHICH A LANDOWNER MAY DO WHAT WAS HERE DONE TO PROTECT ITS PROPERTY.

The main issue presented by this appeal is whether or not the so called "common enemy" doctrine is recognized as law in Utah and applies to the facts in this case. Although respondents have been unable to find any case whereby this Court has expressed itself on this subject, we contend that the common enemy doctrine is the law of this State, and does apply to the facts in this case. In ruling on defendant Spanish Fork City's motion for summary judgment, the trial court was of the opinion that such was the law of this State, as shown by the memorandum decision of Judge Wm. Stanley Dunford dated August 10, 1954 (R. 70 to 78 inclusive). Judge Dunford stated:

"Be that as it may, the cited authorities supra seem to leave no room for doubt that the City and the officials of the City individually, as between them and the plaintiff, had full right to raise the level of the road in question to divert the flood waters from their threatened rampage through the City and back into the channel of the river, **and this Court so holds.** If that were the only claim of responsibility, the cause could be ended here and now. It is quite a different matter, however, if the City, and/or its officers, by themselves, or by their, or any of their, agents, servants, or employees entered upon the lands of the plaintiff, or upon a dike which, except for their action, might have been adequate to protect plaintiff's property, and dynamited holes through such defense in order to save themselves by thrusting the flood upon him." (R. 77 and 78). (Boldface ours).

Defendants proceeded with the trial on that basis and strongly objected to the admission of any evidence with respect to raising the elevation of the county road, which objections were overruled (Tr. 6 and 13). The trial court instructed the jury as a matter of law that the defendant City was not liable to the plaintiff for any damage done to plaintiff's land or personal property or improvements thereon by reason of raising the elevation of the county road if the defendants were confronted with an extraordinary flood of water and the raising of the county road was to protect the property of the City and the property of its inhabitants from such flood water (Tr. 340, instruction No. 7). The evidence clearly showed that waters in this case are waters which had overflowed the banks of the Spanish Fork River due to an extraordinary flood. We are not here dealing with surface waters, or even waters of an ordinary flood.

Surface water is water diffused over the surface of the ground and derived from falling rains or melting snows, and it continues to be such until it reaches the well defined channels wherein it customarily flows with other waters whether derived from the surface or springs, whereupon it ceases to be surface water and becomes running water of a stream. (Wellman vs. Kelly, 197 Oregon 553, 252 Pac. 2d 816). Floods which occur annually, or at certain seasons or other regular intervals, and are not of unprecedented magnitude, are generally regarded as "ordinary floods." (Wellman vs. Kelly, supra). An "extraordinary flood" is a flood not foreshadowed by the usual course of nature, and of such magnitude and destructiveness as could not be anticipated or provided against by exercise of ordinary foresight. (Wellman vs. Kelly, supra). The main distinction between flood wa-

ters and surface waters is that "flood waters" have broken away from a stream, while "surface waters" have not yet become a part of a water course. (McManus vs. Otis, 61 Cal. App. 2d 432, 143 Pac. 2d 380; Southern Pacific Company vs. Proebstel, 61 Ariz. 412, 150 Pac. 2d 81). Thus, under the evidence of this case, it is clear that we are dealing with the waters of an extraordinary flood, Defendant's Exhibit No. 29, Tr. 113, 122, 220). The cases cited by appellant in her brief relating to surface waters and ordinary floods are not applicable to the instant case.

The law is well settled in California that flood waters of a natural water course are a common enemy, against which the owner of land subject to overflow by those waters may protect his land by the erection of defensive barriers, and he is not liable for damages caused to lower and adjoining lands by the exclusion of the flood waters from his own property, even though the damage to other lands was increased thereby. (Clement vs. State Reclamation Board, 35 Cal. App. 2d 628, 220 Pac. 2d 897; Williams vs. Pacific Coast Aggregates, 128 Cal. App. 2d 777, 276 Pac. 2d 28; McManus vs. Otis, 61 Cal. App. 2d 432, 143 Pac. 2d 380; Horton vs. Goodenough, 184 Cal. 451, 194 Pac. 34; Jones vs. California Development Co., 173 Cal. 565, 160 Pac. 823; Everett vs. Davis, 18 Cal. 2d 389, 107 Pac. 2d 650; Mogle vs. Moore, 16 Cal. App. 2d 1, 104 Pac. 2d 785; Lamb vs. Reclamation, 73 Cal. 125, 14 Pac. 625).

The Oregon court follows the principle that waters of an extraordinary flood constitute a "common enemy", and may be repelled by the owner of the land over which it flows. Since Oregon follows the civil rule which denies to the owner of one parcel of land the right to discharge the surface water accumulating on his premises over the contiguous par-

cels owned by another, the waters of an ordinary flood were held not to come within the common enemy doctrine. (Wellman vs. Kelly, 197 Oregon 553, 252 Pac. 2d 816).

The Arizona court follows the principle that one cannot obstruct the flow of surface waters in a natural water course onto his land, but may protect himself against flood waters by obstructing their flow onto his land, even though by such obstruction he causes the waters to flow onto another's land. (Southern Pacific Company vs. Proebstel, 61 Ariz. 412, 150 Pac. 2d 81). In the case of Southern Pacific Company vs. Proebstel, *supra*, on page 84, the Arizona court referred to the case of Horton vs. Goodenough, *supra*, and quoted with approval the rules set forth therein covering the right to obstruct the flow of "surface waters" and "flood waters" as follows:

"* * * First, one has no right to obstruct the flow onto his land of what are technically known as surface waters. Heier v. Krull, 160 Cal. 441, and authorities therein cited at page 444, 117 P. 530. But by 'surface waters' are not meant any waters which may be on or moving across the surface of the land without being collected into a natural watercourse. They are confined to waters falling on the land by precipitation or rising thereon in springs. Putting it conversely, they do not include waters flowing out of a natural watercourse, but which yet were once a part of a stream and have escaped from it, 'flood waters', in other words. (citing cases) Second, one has the right to protect himself against 'flood waters', that is, waters of the character last described, and for that purpose to obstruct their flow onto his land, and this even though such obstruction causes the water to flow onto the land of another. (citing cases) Third, one may not obstruct or divert the flow of a natural watercourse. But

by a 'watercourse' is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow. (Citing cases)."

In Kansas it has been held that since Kansas follows the common law rule whereby surface waters are considered to be a "common enemy" against which all may lawfully impose obstructions to protect his property, waters of ordinary floods are a common enemy against which any land owner affected may protect himself. (*Singleton vs. Atcheson, Topeka, & Santa Fe Ry. Co.*, 67 Kansas 284, 72 Pac. 786, and *Bryant vs. Merritt*, 71 Kansas 272, 80 Pac. 600).

The State of Washington follows the common law rule which permits the landowner to protect his property from surface waters flowing from adjacent land although injury to others may result. (*Cass vs. Dicks*, 14 Washington 75, 44 Pac. 113).

It is also the rule in Washington that flood waters not within the banks of a stream are surface waters and a common enemy against which each landowner is entitled to protect himself. (*DeRuew et ux vs. Morrison, et al*, 28 Washington 2d 797, 184 Pac. 2d 273).

The rule prevailing in most jurisdictions is that a riparian proprietor may, without liability for damages incidentally resulting to others, so long as he acts with due care, erect levees, dikes, or other embankments or barriers to protect his property from overflow destruction or encroachment by any change in the natural condition of the stream and to prevent its course from being altered, or to

protect such property from injury by extraordinary floods. (56 Am. Jur. 581-582, Waters, Section 99).

In the Utah case of *Lasson vs. Seeley*, 120 Utah 679, 238 Pac. 2d 418, this Court held that a property owner may take such flood control measures on his own land as he sees fit, and also remedy the effects of a flood, provided that he does not interfere with the water rights of others. Although the *Lasson* case, *supra*, did not involve damage to adjacent property, this Court suggests the basic principle of the common enemy doctrine, i. e., that the property owner may take such flood control measures on his own property as he sees fit.

In the Utah case of *Wilkinson vs. State, et al*, 42 Utah 483, 134 Pac. 626, it was claimed that defendants, including the State of Utah, diverted water which gathered and flowed from certain canals and washes during rain storms away from their natural course or channel, to plaintiff's damage. This Court, despite a recovery allowed by a lower court, ruled that since there was no pleading or proof of negligence, there was no liability, even though the floods were not unprecedented, and further held in any event the State or its instrumentalities could not be sued.

In the Utah case of *Charvoz vs. Bonneville Irrigation District*, 120 Utah 480, 235 Pac. 2d 780, this Court held that if a storm or act of God is of such magnitude and severity as to be beyond the realm of reasonable foreseeability, and therefore beyond the ken of the traditional reasonable, prudent man, the authorities establish that negligence is simply non-existent and no liability attaches.

Although the foregoing cases are not directly in point because they did not involve water which had completely escaped from natural channels, it appears therefrom that

the rule would be more clear against liability in the instant case.

In 5 A. L. R. 2d 57, "Damage by Flood Protection Measures", the theory underlying the common enemy doctrine and its application to a municipality is well pointed out on page 61 as follows:

" unless there is actual obstruction or diversion of the natural watercourse, the damage to his land which the riparian landowner suffers by reason of flood-control measures is *damnum absque injuria*, even if caused by a private riparian landowner, and a fortiori so if caused by a municipality or other governmental subdivision; since, while there is an injury to his land there is no corresponding right in him, for the reason that floodwaters are a common enemy against which any landowner or the public may take protective measures, without liability to another landowner who happens to be damaged thereby, in the absence of an obstruction or diversion of the natural watercourse.

"In other words, conceding that the landowner would, under the constitutional provision that private property shall not be damaged for public use without just compensation, be entitled to compensation had he suffered a legally cognizable damage, these cases deny recovery on the ground that the damage he has suffered was not legally cognizable—*damnum absque injuria*—even if caused by a private landowner, and much less if caused by a public authority. The view is expressed in this connection that the constitutional provision against damaging of private property for public use without compensation does not contemplate compensation for an injury to land which would have been otherwise non-compensable under the doctrine of *damnum absque injuria*, and that the application of that

constitutional provision presupposes an injury otherwise compensable." (See cases cited).

We submit that the evidence overwhelmingly shows that any part which Spanish Fork City played in raising the elevation of the county road was to protect public and private property against a common enemy, and if any injury resulted to plaintiff or anyone else thereby it is *damnum absque injuria*. The trial court was clearly of the same opinion, based upon pleadings as shown by the memorandum decision of Judge Dunford dated August 10, 1954 (R. 70 to 78 inclusive). Judge Dunford stated:

"... There can be no question that the waters which did plaintiff's damage were flood waters of such proportions that no one could have foreseen their extent or their destructive force. The peril to property and even to personal safety in the vicinity of not only the Spanish Fork River but Hobbie Creek, Provo River, American Fork River and other streams heading in the Wasatch Range of mountains was a matter of common knowledge. Every person threatened who had any opportunity to save himself was using all available means to protect his possessions against destruction. Clearly any person has a right to raise defenses against a common enemy such as floods, and so long as he merely turns wild flood waters away from his own property, he has no liability if as a result of his effort the danger to his neighbor is increased. **He has the right to protect himself but he has no duty to protect his neighbor.** The latter may himself erect barriers for his own protection. An individual has this right as a matter of law. It should be and is even clearer that the public through its organized bodies may do likewise and injury caused thereby is *damnum absque injuria*. *Jones vs. California Development Co.*, 160

P. 823. Jackson vs. United States, 33 Sup. Ct. 1011. Lamb vs. Reclamation Dist., 14 P 625. Short vs. Pierce County, 78 P2 610. Southern Pacific Co. vs. Proebstel, 150 P2 81." (R. 76-77) (Boldface ours).

POINT VI

THE INJURY COMPLAINED OF BY APPELLANT IS DAMNUM ABSQUE INJURIA EVEN IF CAUSED BY A PRIVATE LANDOWNER AND A FORTIORI SO IF CAUSED BY A MUNICIPALITY.

In the California case of Clement vs. State Reclamation Board, 220 Pac. 2d 897, it was held that action that may be taken by one for his own protection without liability by an individual landowner; and more so may be taken by the State under Article 1, Section 14, for the protection of all the landowners in an area without liability for damages caused in defense of a common enemy (Cases cited). Article 1, Section 14, of the California Constitution is a comparable provision to Article 1, Section 22, of the Utah Constitution. On page 902 of the Clement case, *supra*, the Supreme Court of California made the following observation, which is directly in point:

"The liability of the State under Article 1, Section 14 of the California Constitution arises when the taking or damaging of private property is not so essential to the general welfare as to be sanctioned under the 'police power' (citations), and the injury is one that would give rise to a cause of action on the part of the owner independently of the constitutional provision. (Citations). The provision permits an action against the state, which cannot be sued without its consent. It is designed, not to create new causes of action, but to give a remedy for a cause of action that

would otherwise exist. The State is therefore not liable under this provision for an injury that is *damnum absque injuria*. If the property owner would have to inflict the damage, he can have no claim for compensation from the State. (Citations). In the present case, therefore, plaintiffs have no right to compensation under article 1, section 14 if the injury is one that a private party would have the right to inflict without incurring liability."

In the case of *American Print Works v. Lawrence*, 21 NJL 248, the Supreme Court of New Jersey clearly points out the difference between eminent domain and the doctrine involved in the right to prevent catastrophe. The first is an attribute of sovereignty and is founded on the same principles as the right of raising taxes.

"But the right to destroy property to prevent the spread of a conflagration rests upon other and very different grounds. It applies to individuals, not to the state. It has no necessary connection with or dependence upon the sovereign power. It is a natural right existing independently of civil government. It is both anterior and superior from the rights derived from the social compact. It springs not from the right of any property claimed or exercised by the agent of destruction in the property destroyed but from the law of necessity"

In the present case, therefore, plaintiff has no right to compensation under article 1, section 22 of the Utah Constitution, since the injury complained of is one that a private party would have the right to inflict without incurring liability.

POINT VII

THE DAMAGES FOUND BY THE JURY ARE NOT SUPPORTED BY THE EVIDENCE.

Counsel for plaintiff suggests in his brief that there may be some question as to damages, and as to whether or not, if the Court finds there should be liability, the damages are supported by the evidence.

We submit that the record does not support the damages as found by the jury. The only testimony as to the damage to the property other than the land, was that testimony of Mr. A. T. McKell, the original plaintiff, who died prior to the trial. We itemize this claimed damage:

Spreader	\$ 60.00
Hay Rake	50.00
Spring Tooth	25.00
Harrow	25.00
Corral	1,212.26
Feed Manger	408.75

As will be set forth hereinafter, the claimed amount of damage of \$800.15 for which defendant could in any way be responsible, is subsequently included in an estimate as to the loss to the land, and the claimed amount necessary for leveling of \$330.00, was and should be included in the estimate of the damage to the real property as set forth hereinafter. A. T. McKell testified that because land had been washed away, the remaining land had depreciated twenty-five per cent. Of course, his estimate was based upon the fact that the land adjacent to the channel itself had been washed away by the river adjacent to its natural channel. In fact, the evidence shows that all but 1.87 acres were washed away by the river next to the channel.

The only substantial evidence as to the damage to the land washed away in the cut through the Northern portion of plaintiff's land is the testimony of Mr. Atwood, former Utah County Assessor, who was called by the plaintiff. Mr. Atwood assumed that three to four acres of land had been washed away, and set the value of the land as \$600.00 per acre. His opinion as to the damage to the land in consideration was based upon his estimate that three to four acres of land at the rate of \$600.00 per acre were washed away. His judgment as to the maximum loss to the land by being washed away, including his estimate of the damage to that land remaining, without taking into consideration any claimed damage to the well, was \$3,300.00, which included his estimate of repairing the fences to the North (Tr. 44). That was all of the fence for which defendant could in any way be held responsible. The estimate of the damage to the land according to Mr. Atwood, would have been less if the land washed away on the Northern portion of the McKell property showed a measurement of less than three or four acres (Tr. 39). The estimate of damage would have been from \$600.00 to \$1200.00 less (Tr. 39). Assuming the damage was \$600.00 less, the maximum damage to the land would be \$2,700.00, which would have included an estimate of an amount necessary to repair that part of the fence for which defendant could in any way have been responsible. True, counsel for plaintiff, in addition to claiming damage for the land, maintained that recovery should be had for loss to crops occurring after the flood. We respectfully urge that any such claimed loss would be an improper element of damage, since no claim was made by plaintiff therefor in his amended complaint; there were no allegations to support such a claim, no claim

was filed against the City of Spanish Fork for such crop damage, and in fact counsel admitted at the trial that he did not make claim for damage to the crops, but that such evidence was merely submitted for the purpose of showing the damage to the land. We submit, therefore, that giving plaintiff the advantage of every bit of the doubt, the total amount of provable damages, based upon the figures of plaintiff, totals \$5,189.27. The court instructed the jury that from the total damages found, there should be deducted the sum of \$5,040.00 as amounts already paid to the plaintiff, or to A. T. McKell, her deceased husband. This leaves a total provable damage for which defendant in any way could be responsible of \$149.27, and that, we respectfully submit, is a maximum.

POINT VIII

THE VERDICT OF THE JURY IMPOSING LIABILITY UPON SPANISH FORK CITY AND EXONERATING THOSE THROUGH WHOM THE CITY OPERATES CANNOT BE ALLOWED TO STAND.

The jury in this case exonerated the defendant officers of Spanish Fork City, through whom the City operated, and found liability against Spanish Fork City alone.

The language in the recent case of Friedman, et al vs. Lundberg, et al, decided by Justice Crockett, _____ Utah _____, 294 Pac. 2d 705, fits very nearly the fact and law situation in this case. We quote from page 706 of the cited case:

“The principal claims of negligence against the Gas Co., both in the pleadings and the evidence, relate to the conduct of the other two defendants, Wheeler and Tempest, and Lundberg Plumbing Co., in connection

with the installation of the gas main and service facilities. The jury was obviously in error in imposing liability upon the Gas Co. and exonerating those through whom it operated. We do not know whether the jury believed that the agents and Gas Co. were in fact all negligent and rendered a verdict against the Gas Co., releasing the agents because of sympathy; or, believed the agents were non-negligent and because of prejudice rendered a verdict against the Gas Co., or whether they misunderstood the instructions.

“Where verdicts are inconsistent, courts have reacted variously. Some, assuming that the jury must have acted from prejudice against the master, order that judgment be entered in favor of the master notwithstanding the verdict. Others, assuming that the jury was motivated by sympathy for the servant, order that judgment be entered against the master despite the inconsistency in verdicts. Yet other courts assert that the proper remedy requires setting aside both verdicts and ordering a new trial against both master and servant. A reviewing court cannot ordinarily tell upon which basis the jury rendered its inconsistent verdicts, but in any event the verdicts exonerating the agents and holding the Gas Co. are inconsistent and cannot be permitted to stand.”

Thus, in the instant case, it cannot be determined whether or not the jury believed that the officers of Spanish Fork City and Spanish Fork City itself were all subject to liability and found against Spanish Fork City alone because of sympathy; or, believed that the officers and agents of Spanish Fork City were not negligent or not liable and because of sympathy rendered a verdict against the City; or whether or not they misunderstood the instructions.

Certainly this judgment cannot be allowed to stand.

Why it was given by the jury as it was, we do not know. We suspect that because evidence was allowed over objections that the State of Utah and Utah County had each voluntarily contributed \$2,000.00 that even though the jury could not under the evidence and the instructions find liability, they allowed a verdict in substantially the same amount against Spanish Fork City. We respectfully urge and submit that in addition to the other substantial reasons to support the trial court in granting judgment notwithstanding the verdict, the inconsistency of the verdict as described herein itself is sufficient to support the judgment of the trial court. For this Honorable Court to find otherwise, it would be required to do so in direct conflict with the holding of the Friedman case, *supra*.

CONCLUSION

The trial court did not err in allowing the amendments to the defendant's pleadings for the reasons fully discussed under Point I. The damages found by the jury are clearly not supported by the evidence. Resolving all doubts in favor of the plaintiff, \$149.27 is the maximum which could be supported by the evidence. In exonerating the officers and employees of defendant Spanish Fork City, the jury either misunderstood the instructions, or found against Spanish Fork City alone because of sympathy. Under the law of this State, such a verdict cannot be permitted to stand, as is fully discussed in Point VIII.

In following the outline set forth in appellant's brief, we have separately discussed the law as it applies to the facts that:

1. Respondent was acting in a governmental capacity.

2. A great emergency existed; and

3. Respondent had a right to do as it did to protect its property and inhabitants from a common enemy.

The evidence as discussed under each point shows that all of the above conditions were concurrent at the time of the claimed damage. The applicable law in the instant case should not be limited to that which the courts have applied in each separate case, but rather should be the law as it applies to a combination of all of the above facts.

The common law doctrine which permits a landowner to erect barriers to protect and defend his property against a common enemy such as a flood is and should be the law of this State. The doctrine is applicable to the facts of this case, and respondent cannot be held liable for the damages claimed, since such damages are *damnum absque injuria*.

Respondent respectfully submits that the trial court properly set aside the verdict of the jury and entered judgment of no cause of action for defendant Spanish Fork City. Not only was the action of the trial court proper, but it was necessary to prevent a great miscarriage of justice.

Respectfully submitted,

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