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In The Supreme Court of the State of Utah

LT LAKE CITY, a
unicipal corporation,

Plaintiff and Appellant,

vs.

ITED PARK CITY MINES
COMPANY, a corporation,

Defendant and Respondent.

Respondent's Petition for R
and Brief in Support T

ppeal from the Judgment of the Third
Court for Salt Lake Co
Honorable Bryant H. Cro

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CASES CITED

In The Supreme Court of the State of Utah

SALT LAKE CITY, a municipal corporation,

Plaintiff and Appellant,

-vs-

UNITED PARK CITY MINES COMPANY, a corporation,

Defendant and Respondent.

Case No. 11948

Respondent's Petition for Rehearing and Brief in Support Thereof

PETITION FOR REHEARING

Respondent respectfully petitions the Court for a rehearing in the above-entitled case. The grounds for this petition are as follows:

Through its decision entered herein this Court has reversed the Judgment below due to the presence of error. The Court's opinion does not deal with whether or not the error was prejudicial. Under its prior decisions, this Court has an obligation to examine the entire record in order to determine the answer to that question. Such an examination reveals that in this case the error involved was harmless.

WHEREFORE, Respondent prays that a rehearing be granted and that the Judgment of the District Court be affirmed.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

In its opinion herein the Court observed that "neither a judge nor a jury is permitted to go outside the evidence to make a finding." The Court also noted that in the proceedings below the District Court had used a book not in evidence and had, unbeknownst to the parties, prepared various exhibits of its own. The Court then concluded that the Judgment below must be reversed because of the impropriety of the methods used by the trial judge.

The Defendant admits and has always admitted that the actions of the District Court were improper and constituted error. The presence of error, however, does not *ipso facto* call for a reversal of a Judgment being reviewed. This Court has often held that a reversal cannot be predicated upon error alone, but must be based upon error *the absence of which likely would have produced a different result*:

> Only when there is error both substantial and prejudicial, and *when there is a reasonable likelihood that the result would have been different without it,* should error be regarded as sufficient to upset a judgment or grant a new trial.

Bowden v. Denver & R.G.W.R.R. Co., 3 Utah2d 444, 286 P.2d 240, 244 (1955) (Emphasis added). To the same effect are the following cases: ***Startin v. Madsen,***

120 Utah 631, 237 P.2d 834, 836 (1951); *In re McCoy's Estate,* 91 Utah 212, 63 P.2d 620, 629 (1937); *Knowlton v. Thompson,* 62 Utah 142, 218 P. 117, 120-21 (1923); *Utah Banking Co. v. Newman,* 44 Utah 194, 138 P. 1146, 1148 (1914).

In its decision herein the Court failed to consider whether or not the error involved was *prejudicial.* Defendant respectfully submits that the above-cited cases make such an inquiry necessary. Defendant also submits that under the prior decisions of this Court the *record in its entirety* must be examined in order to determine whether or not an error is prejudicial. Such an examination in this case will reveal that the District Court's error was harmless.

As a general proposition, an error must be considered in the context of the entire record in determining whether or not it is *reversible* error. *See Thatcher v. Merriam,* 121 Utah 191, 240 P.2d 266, 268 (1952); *Knowlton v. Thompson,* 62 Utah 142, 218 P. 117, 120-21 (1923). This is particularly true in a case, such as the one now before the Court, in which equitable relief is sought. The law on the point is exemplified by *Stanley v. Stanley,* 97 Utah 520, 94 P.2d 465 (1939).

That case, as is the instant one, was an action to quiet title. The specific issue involved was whether or not a deed had been delivered. In his Concurring Opinion, Justice Wolfe summarized and clarified the law of Utah regarding the Supreme Court's functions and obligations in reviewing equity cases:

I concur in the results. It would perhaps be well if we fastened upon an accurate and consistent expression of the judicial policy of this court in the review of equity cases. *The Constitution of Utah, Art. VIII, Sec. 9, not only gives us authority but makes it our duty to review the facts.* This has been construed to mean that we review and weigh the evidence as it appears in the record. Lund v. Howell, 92 Utah 232, 67 P.2d 215 (followed in Id., 92 Utah 250, 67 P.2d 223); Christenson v. Nielsen, 88 Utah 336, 54 P.2d 430, 432 (where this court held that in an equity case the appellate court was "compelled to review the record and pass on the weight and sufficiency of the evidence"); Buzianis v. Buzianis, 81 Utah 1, 16 P.2d 413 (where the court held that where there was a conflict in the evidence it was the court's duty "to pass upon the relative weight thereof"). [97 Utah at 527].

. . . .

I opine that what was really meant was that *on review we would go over the record to determine what our conclusions of fact were from the transcript of the evidence,* and if at the end of that investigation we were in doubt or even if there might be a slight preponderance in our minds against the trial court's conclusions, we would affirm. [97 Utah at 529-30].

. . . .

I think hardly accurate the expression in Chapman v. Troy Laundry Co., supra, that the Supreme Court has the burden of determin-

ing "whether the findings of fact are supported by a fair preponderance of the evidence." *Our duty is to make an independent examination of the record.* If after that we find (1) the preponderance of the evidence supports the trial court's findings of fact, or (2) if there is doubt in our minds as to where the preponderance lies, or (3) we think the evidence as revealed by the record may slightly preponderate against its conclusions but such preponderance may well be offset in favor of his conclusions by having seen the witnesses and been able to judge by their demeanor as to their credibility, then we will not reverse. The expressions that there must be a "clear" or "fair" preponderance of the evidence against the findings of the trial judge, seek to allow for his advantaged position in having seen the behavior of the witnesses on the stand.

In short, as held in Wilcox v. Cloward, 88 *Utah* 503, 56 *P.2d* 1, *if after we review the record we cannot say that the court came to a wrong conclusion, we should affirm.* [97 Utah at 531]. (Emphasis added).

The views of Justice Wolfe in *Stanley v. Stanley* have been adopted by this Court. *See Boccalero v. Bee,* 102 Utah 12, 126 P.2d 1063, 1067 (1942).

The majority opinion in *Stanley v. Stanley* dealt with whether the Judgment below should be disturbed due to the trial court's allegedly erroneous exclusion and admission of various evidence. All of that evidence was directly related to the principal issue in the case—

whether or not delivery of a deed had occurred. The Court concluded that the Judgment below should not be disturbed. The majority opinion makes clear that, in so concluding, *the Court reviewed the entire record and drew its own factual conclusions*:

> *Let it be here observed that it is not contended that there is not a substantial conflict in the evidence.* The defendant, however, assigns as error the ruling of the court in excluding the defendant's testimony of the delivery of the deed to her by the testator shortly after its execution, and upon the same principle that the court erred in not permitting her to identify the signature of the testator to a document which, it is claimed, would tend to support her claim of ownership. It is further contended by the defendant that the court should have excluded statements made by the testator to third persons to the effect that he owned the property. *Had the court adopted the defendant's theory and admitted the evidence offered by the defendant and had excluded evidence offered by the plaintiff over defendant's objection, that would not, however, dispose of the conflict, but it is insisted that except for the errors complained of the evidence would have so preponderated in favor of the defendant as to lead to a different conclusion.*

The testimony upon which the plaintiff relies and which it is contended is inconsistent with the defendant's claim that the deed was

delivered to her, may be briefly summarized, as follows . . . . [97 Utah at 523].

This testimony would undoubtedly justify an inference that the deed was delivered and should be considered prima facie sufficient for that purpose. The inference is not conclusive, nor would the presumption arising from the possession of the deed by the defendant be conclusive. . . . [97 Utah at 525].

As we view the evidence in this case the findings of the trial court are amply supported by the evidence, and this would be true even though the defendant had been permitted to testify as to the manual delivery of the deed, and quite as effectually disposes of all presumptions in the defendant's favor which would cast the burden of proving non-delivery upon the plaintiff.

There being no *reversible* error, the judgment is affirmed . . . . [97 Utah at 527] (Emphasis supplied).

Thus, in *Stanley v. Stanley* the appellant was able to point to error the absence of which would have resulted in her being able to establish *a prima facie case.* The Court did not automatically reverse because of that error. Rather, it examined the entire record and, on the basis of that examination, concluded that *even absent the error the trial court's Judgment was amply supported by the evidence.* This Court has felt compelled to similarly approach other equity cases before it for

review. In *Nokes v. Continental Mining & Milling Co.*, 6 Utah2d 177, 308 P.2d 954 (1957), the Court stated:

> This being a case in equity, *it is our responsibility to review the evidence.* In doing so it is well to have in mind the general pattern as to the scope of such review as set out in prior adjudications in this court. Where there is a conflict in the evidence, the finding of the trial court will not be disturbed if the evidence preponderates in favor of the finding; *nor, if the evidence thereon is evenly balanced or it is doubtful where the preponderance lies; nor, even if its weight is slightly against the finding of the trial court, but it will be overturned and another finding made only if the evidence clearly preponderates against his finding.* (Emphasis added) (Footnotes omitted).

To the same effect are *Randall v. Tracy Collins Trust Co.*, 6 Utah2d 18, 305 P.2d 480, 483 (1956); *Reimann v. Baum*, 115 Utah 147, 203 P.2d 387, 389 (1949); *Prowitt v. Lunt*, 103 Utah 574, 137 P.2d 361, 362 (1943).

The case now before the Court presents a situation analogous to that involved in *Stanley v. Stanley*. Here, the evidence with respect to which error occurred consisted of several City graphs dealing with Big Cottonwood Canyon "computed runoff" and "effective precipitation." On their face, those graphs tended to support the City's assertion that an "unnatural decrease" in Big Cottonwood Creek had occurred. The District

Court concluded that the graphs had no probative value. In arriving at that conclusion the District Court used procedures which, as the Court has held, were improper. Clearly, therefore, error occurred below. Under *Stanley v. Stanley* and the other decisions discussed above, however, the mere presence of error does not justify reversal of an equity case. Rather, the Court has an obligation to examine the record in order to determine whether the error was prejudicial. *Only when the record indicates that a different result probably would have obtained absent the error is reversal proper.* Defendant submits that the record establishes that the *same result* would have come about even if the trial court had not improperly analyzed a portion of the City's evidence. Respondent's Brief originally filed herein discusses in detail the basis for this assertion. It rests upon the two grounds summarized below.

1. The City exhibits to which the District Court applied an improper method of analysis comprised but a *fragment* of the City's evidence bearing on the "unnatural decrease" issue. Under the authorities discussed above, those exhibits must be considered in the context of *all* the evidence and cannot be segregated from the rest of the record. So considered, the few City graphs which were improperly analyzed are of no particular significance—*whether or not* they are accepted at face value. Because of the minimal role the City's "computed runoff"—"effective precipitation" exhibits played in the entire case, it appears highly unlikely that the trial court's acceptance of the graphs would have caused a

different result in this case. Accordingly, under the decisions of this Court the error associated therewith does not warrant a reversal. *See Bowden v. Denver & R.G.W.R.R.Co.*, 3 Utah2d 444, 286 P.2d 240, 244 (1955) (quoted *supra*).

2. The result of the trial court's error was the conclusion that the City's effective precipitation-computed runoff exhibits had no probative value. The reason given by the lower court for this conclusion was admittedly erroneous. Under prior decisions of this Court, however, the impropriety of a reason is irrelevant if the *conclusion is correct*:

> We are of the opinion the trial court reached the correct result. There may be some inconsistencies and troubles to harmonize the findings and conclusions reached. In an equity case, *a correct result will be supported even though erroneous reasons were given therefor.* (Emphasis added).

Federal Land Bank v. Salt Lake Valley Sand & Gravel Co., 96 Utah 359, 85 P.2d 791, 793 (1939); *see Tree v. White*, 110 Utah 233, 171 P.2d 398, 399 (1946). For reasons completely independent of the District Court's error, its conclusion that the graphs lacked probative value was correct. The record establishes the following regarding the exhibits involved:

(a) *All* of the City's effective precipitation-computed runoff exhibits were based upon the use of an

11% "carry-over coefficient" for Big Cottonwood Canyon. That coefficient was pure hearsay and the exhibits dependent upon it were thus *not even properly in evidence.*

(b) Accuracy requires that in computing "effective precipitation" one employ as many actual precipitation stations as possible. The 11% carry-over coefficient for Big Cottonwood Canyon had itself been derived through the use of nine or ten stations. However, the precipitation data which underlay its graphs and against which the City applied the 11% coefficient *was based on only one station.* That one station is located high in the Canyon and receives *twice as much* precipitation as falls in the lower reaches of Big Cottonwood. Thus, in its "effective precipitation" exhibits the City utilized precipitation records which greatly distorted—in its own favor—the amount of precipitation which falls on the Canyon as a whole.

(c) The location of the "mean" line of the City's Exhibit P-50 (the line *used to determine "computed runoff"*) was shown to be wholly unreliable statistically.

(d) The City's exhibits relating to computed runoff totally ignored changes in Canyon vegetation, notwithstanding that such changes have a tremendous effect on runoff.

(e) The City's graphs completely failed to take into account the fact that the early 1930's was a transitory period with respect to the relationship between precipitation and runoff in the entire Great Basin.

(f) In arriving at the "actual runoff" figures against which it compared "computed runoff," the City totally overlooked all water discharged from the Wasatch Drain Tunnel, even though it is connected with the Cardiff Mine *in Big Cottonwood Canyon.*

The record therefore establishes that the District Court's conclusion regarding the City's effective precipitation-computed runoff exhibits was dictated by evidence and *considerations entirely unrelated to the improper means used in analyzing those exhibits.* Consequently, under the decisions of this Court the error was not prejudicial.

For the foregoing reasons Defendant respectfully submits that the Court should grant a rehearing in this case, that the entire record should be examined so as to determine whether or not the error involved was prejudicial, and that such an examination reveals that the error in fact does not justify a reversal.

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