

1969

State of Utah, By And Through Its Road Commission v. (David Douglas Hooper) And South Slaterville Irrigation Company : Brief of Appellant

Utah Supreme Court

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

STATE OF UTAH, by and through
ITS ROAD COMMISSION,

Plaintiff-Respondent,

vs.

(DAVID DOUGLAS HOOPER)

and

SOUTH SLATERVILLE

IRRIGATION COMPANY,

Defendant-Appellant

Case No.
11580

BRIEF OF APPELLANT

Appeal from a judgment of the Second Judicial District,
For Weber County, State of Utah

Honorable Charles G. Cowley, Judge

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF CASE

The Respondent sued to condemn and acquire fee title to .25 of an acre of land for the north-south freeway west of Ogden City over Appellant's canal. The highway project was known as I-15-8(7)338 and the parcel of land is referred to as No. 15-8:77D:A.

DISPOSITION IN THE LOWER COURT

The case was tried on the 18th and 19th of December 1968; before the Honorable Charles G. Cowley, Judge of the Second Judicial District, in and for Weber County, Utah without a jury. The issues were the compensation due the appel-

lant by reason of the taking of the land and the severance damage to the remaining land.

The trial court gave the appellant \$450 for the actual value of the land taken and gave nothing for severance damage.

RELIEF SOUGHT ON APPEAL

The appellant asks that a new trial be granted on the question of severance damages.

STATEMENT OF FACTS

The Willard Canal runs north and south parallel to and about 300 feet east of where the freeway here involved was later built (T-102 & Exhibit P-1). Approximately one year before this condemnation suit was filed the appellant purchased a strip of land 1630 feet long east and west and 2 rods wide north and south and constructed a concrete canal 12 feet wide at the top by 2 feet at the bottom and 3 feet deep, with a 12 foot maintenance road along its south bank. (T-12, T-13, T-15, T-16). The road dead ended at the west side of the Willard Canal Right of Way on the east end of Appellant's canal (T-164, T-165, T-166). Appellant's water headgate was up in the Willard Canal—some 35 to 40 feet east across Willard Canal Property and up a steep 6 to 8 foot canal bank. (T-39, T-47, T-154-172-173). Before this freeway was built the appellant's irrigation co. was able to travel on its own land the entire 1630 feet along its cement canal for repair work and maintenance. To get to its Willard Canal headgate its people could drive along the canal road, park at the Willard Canal bank and walk 30 to 40 feet up the bank to the diversion. To get power machinery to the headgate it was always necessary to travel up 12th Street to Wall then over to 17th Street and down along the Willard Canal bank to the headgate.

The freeway was built at right angles over the canal with a high bridge. Approximately 270 feet of the appellant's canal and road were spanned by the freeway bridge. (T-270.) When the respondent built the bridge over appellant's canal they allowed the slope coming down toward the canal from the south end of the bridge to be built and concreted out into the middle of appellant's canal road. Respondent took some 7½ feet of the road and left the canal company some 4½ feet to travel on. (T-19, T-35, T-36, T-89). This means that the appellant can travel and maintain its canal from the west end by truck and power equipment east to the freeway—over its 12 foot road—then under the freeway for 270 feet it has nothing but a 4½ foot path. Then east of the freeway it still has its 12 foot maintenance road but can not get draglines or backhoes or other power equipment to it because of the freeway on the west and the Willard Canal property on the east. The appellant owns no right—by deed or use to bring its power equipment down off the Willard Canal bank to its 12 foot maintenance road. It has the right to come along the Willard Canal bank to get to its headgate but not the right to get to its maintenance road. (T-163 to T-173).

The appellant called Lou Wangsgard, a consultant civil engineer as a witness. (T-33). He testified that the respondents built its concrete slope out into appellant's canal road, thus preventing motor vehicle traffic along it. (T-35 to T-38). This has caused the appellant to travel an extra mile and one-half each way to check its headgate diversion on Wilalrd Canal. Each time they do this they have to back up four-tenths of a mile to 17th Street because the Willard Canal bank isn't wide enough to turn on. (T-38, T-39). Mr. Wangsgard testified that two means could be used to correct the State's error in the building of its slope. One way would be to cut the concrete slope back for 7½ feet and build a concrete retaining wall so that the present road could be used and the other would be to cover the canal and build a new road over it. (T-41).

The first method would cost \$10,500 and the second method \$9,000. (T-44).

POINTS ON APPEAL

POINT 1

THE LOWER COURT ERRORED IN APPLYING THE RULES OF LAW LAID DOWN IN THE CASE OF STATE ROAD COMMISSION VS. UTAH SUGAR COMPANY DBA—IDAHO SUGAR COMPANY TO THE CASE AT HAND.

A. IN THE SUGAR COMPANY CASE, PUBLIC POLICY, NECESSITY FOR PROGRESS AND SAFETY REQUIRED THAT THE FREEWAY BE BUILT IN THE APPROXIMATE LOCATION OF THE FORMER HIGHWAY. HERE NO SUCH REQUIREMENT EXISTED FOR THE TAKING OF APPELLANT'S ROAD. A DIFFERENT RULE OF LAW SHOULD APPLY WHERE THE CONDEMNING BODY EXERCISES ITS PRIVILEGE WITH A TOTAL DISREGARD FOR THE RIGHTS OF THE CITIZENS IT INCONVENIENCES AND WITH NO ATTENTION PAID TO PRIVATE INJURY. WHERE IN THE SUGAR COMPANY CASE THE STATE ACTED WITH PRUDENCE AND PLANNING AND IN THE BEST POSSIBLE AND SAFEST WAY FOR ALL CONCERNED. IN THIS CASE IT APPEARED TO BE TRYING TO INJURE THEM.

B. IN THE SUGAR COMPANY CASE THE CANAL COMPANY WAS NOT PREVENTED FROM GETTING TO ANY PART OF ITS CANAL. IN THE CASE AT HAND THE APPELLANT IS BLOCKED FROM GETTING POWER EQUIPMENT TO THE EAST POINT OF ITS CANAL UNLESS IT ACQUIRES FROM THE BUREAU OF RECLAMATION THE RIGHT TO TRAVEL ACROSS ITS LAND.

ARGUMENT

POINT II

The lower court decided this case strictly on the decision

in the State Road Commission vs. Utah Sugar Company, dba Utah-Idaho Sugar Company 22 Utah 2d77, 448P2d901. (Record on Appeal page 13). It erred in applying the rules of law laid down in the Utah Sugar Company case to the case at hand. The Sugar Company case cites and sets forth the pertinent statutes and cases governing general situations such as found there and in this case. To paraphrase or repeat them would be a waste.

It appears clear under Utah law "that if the State needs land for a freeway then public policy and the necessity for progress require that the land owner suffer any inconvenience and extra expense caused by "round about travel." This is a harsh law as it applies to the individual whose land is taken but is undoubtedly offset by the benefit to the public. The lower court in the case here being appealed failed to note the differences in situation between the two cases.

A. In the Sugar Company case its canals before the condemnation came up to the existing highway and the canal company men even then had to cross the fence and highway to get to their next segment of canal. The state had no choice but to widen the freeway and make it non-access. This did not alter the canal company's rights. It just caused them to travel a bit further on a safer road than they did before. No arbitrary, negligent, or rough shod attitude was apparent on the part of the Road Commission. This is not true in the case at hand. The bridging over the appellant's canal and road way does them no harm and if this had been done properly and with only a slight amount of consideration for the land owner there would have been no problem. There is no reason shown at the trial, nor is there any reason or logic apparent now why the Respondent decided to build their slope protection down into the middle of the appellant's maintenance road. For some 270 feet under the bridge the

State placed slope fill and concrete some 7½ feet onto the appellant's 12 foot road. (T-152). An engineer certainly would not be necessary to tell the State people that this would stop the canal people from properly working their canal and from getting from the west half of their canal to the east half of it. The State could have prevented the problem without damage or inconvenience to the State by making its concrete slope a little steeper. Where it was to be a concrete slope there could have been no sluffing problem caused by the slight increase. Mr. Wangsgard, an engineer, testified that the slope could have been so poured as to preserve the canal company's road. (T-36).

Here then is a different situation than the Sugar Company case. Here the State Road Commission by its arbitrary judgment and for no reason shown in the record elects to destroy the canal road and access to the east part of appellant's canal. When the condemning body acts without need and without observing proper consideration for the land owner it should no longer be protected by the "Public Policy" rule. Utah statutes, Utah Code Annotated 78-34-3(5) and 78-34-2 provide that private land can be taken by the State but it must be "compatible with the greatest public good and the least private injury." Here neither one was shown to exist by the respondent. Little attention was paid to private injury.

B. In the Sugar Company case the canal workers could still get to any point of their canal with their equipment. After the condemnation, they had to use the safer route along the freeway and couldn't cross the highway directly. In this case the appellant's workmen can drive up their canal road to the freeway, then they must leave all tractors, backhoes, draglines, and trucks and walk 270 feet under the bridge to get to the remainder of their canal and then the rest of

the way on foot. They can follow the same route to get to the headgate or diversion they have always used by going around and down 17th Street but this means they have to back out each time along the Willard Canal bank for some four-tenths of a mile. (T-39). In addition the appellant has no road or right-of-way to get from the Willard Canal down to their maintenance road some 40 feet to the west. (T-163 to T-168, T-170, T-172, T-173, T-176). Their maintenance road is also lower in elevation than the Willard Canal bank road. The State witness testified that rights of way could be obtained by appellant to get onto their maintenance road east of the freeway but the witnesses were speaking without personal knowledge and from hearsay. (T-91, T-93, T-94, T-145, T-148, T-153, T-158 to 159).

Where the appellants can no longer get onto and use their canal and road east of the freeway without acquiring an access from some 3rd party then there is an actual taking of some of their property rights. It was error for the lower court to find that there was no damage to appellant's land caused by the severance.

In *Southern Pacific Company vs. Arthur* 10 Utah 2d 306, 352 P2d 693 the land owners owned land on each end of Promontory Point and had sheep grazing, watering and trailing rights in and across Little Valley. The railroad condemned land in the valley to extract dirt and fill material and made it impossible for the sheep to cross naturally and drink where customary. To get them around the pits would take extra moving and driving. The court held there had been a damage to the land owners on each side of the valley. "The pits affected all of the owner's lands for grazing purposes and not just the operation of the particular acreages from which the sand and gravel was taken." (page 697).

POINT II

If the appellant in part were cut off from the east 300 to 400 feet of its canal by the freeway and had no access to it for its maintenance by power equipment then the appellant suffered damages. (T-152 and Exhibit D1). The appellant gave testimony that it had no access from the east over the Willard Canal property. (T-163 to 168, T-170, to 172, T-173, T-176). The lower court erred in allowing Respondent to use hearsay testimony to refute appellant's witnesses and exhibits. No Witness for Respondent testified of his own knowledge that appellant had a right-of-way from the S-P Roadway on the north or down over the Willard Canal property from the east or that they had ever used such a way. (T-91, T-93, T-94, T-112 to 114, T-148, T-153, T-158, T-159). Except for the hearsay testimony improperly admitted, the evidence shows that the freeway blocked appellants from the use of their land east of the freeway.

CONCLUSION

The State's carelessness or inattention to details caused the appellant's roadway under the freeway bridge to be reduced from 12 feet to 4½ feet—for a span of 270 feet—the State placed a 16-foot gate on each side of the bridge so that the canal company could have access to its 4½ foot wide road, indicating an engineering error in either the fence design or the concrete slope protection. Mr. Cook testified that the appellant would lose in damage because of the narrowing of its road the sum of \$8,000 over the next 32 years. T-60). Mr. Wangsgard testified that it would cost the appellant \$9,000 to pipe the canal under the freeway bridge and \$10,500 to cut back the concrete slope protection and build a retaining wall to correct the State's narrowing of this canal maintenance road. (T-44). The total injury and loss of use of appellant's property was caused in the Respondent's failure to

use care and minimize private injury. Without the Respondent's needless and autocratic act in electing to use the appellant's canal road when it did not need to, there would have been no injury or continuing damage of the appellant. In this case an actual taking of appellant's ground, a segment of its road right in the middle of its canal property, has caused damage to its total canal property and has partially severed the canal property east of the bridge.

Therefore, appellant asks that a new trial be awarded or, in the alternative, that appellant be awarded the cost of repairing the damage caused to its canal road.