

1952

# State of Utah et al v. Cooperative Security Corporation of Church of Jesus Christ of L.D.S. et al : Brief of Respondents

Utah Supreme Court

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L. C. Montgomery; Arthur Woolley; Attorneys for Defendants and Respondents;

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## Recommended Citation

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IN THE  
**SUPREME COURT**  
OF THE  
**State of Utah**

STATE OF UTAH by and through  
its ROAD COMMISSION, D. H.  
WHITTENBURG, Chairman, H. J.  
CORLEISSEN and LAYTON  
MAXFIELD, Members of the State  
Road Commission,

Plaintiff and Appellant,

vs.

COOPERATIVE SECURITY COR-  
PORATION OF CHURCH OF  
JESUS CHRIST OF L.D.S., a non-  
profit corporation of the State of  
Utah, and WASATCH STAKE OF  
CHURCH OF JESUS CHRIST OF  
L.D.S., H. CLAY CUMMINGS,  
Trustee, and President of Wasatch  
Stake, a corporation sole of the  
State of Utah,

Defendants and Respondents.

Case No. 7797

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**BRIEF OF RESPONDENTS**  
**FILED**

JUN 27 1952

L. C. MONTGOMERY  
Heber City, Utah

ARTHUR WOOLLEY  
Ogden, Utah

Clerk, Supreme Court, Utah

Attorneys for Defendants and Respondents

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Case No. 7797

---

**BRIEF OF RESPONDENTS**

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**STATEMENTS OF FACTS**

This action was commenced in Wasatch County to condemn for a state highway over lands owned by the defendants in that county. On motion of the plaintiff,

the cause was transferred to Utah County for trial. Defendants waived a jury, and the cause was tried without a jury before the Honorable Joseph E. Nelson, one of the judges of the Fourth Judicial District.

The Statement of Facts, so called in the Brief of Appellant, is so utterly misleading, inaccurate, and unfair, that we deem it necessary to state the record and the cause at length.

The premise of Appellant's ground for appeal, is the statement made in the brief that:

“The 7.89 acres taken by plaintiff was a portion of a larger tract of pasturage, containing, before the taking, 131.79 acres (Tr. 4). \* \* \* All the improvements constructed by defendants in connection with the creation and operation of the dairy farm are placed upon the tract lying to the north and west of U. S. Highway 40, no improvements were constructed on the tract, a part of which plaintiff took by this action.”

“Defendants over plaintiff's objection, presented their case on the theory that the plaintiffs, by the taking of 7.89 acres pasture land from the tract of 131.79 acres, damaged the entire dairy farm as a going business; that the entire farm, as an operating unit, had been severely damaged by the taking of less than eight acres pasture land (Tr. 20ff).”

The complaint of the plaintiff alleged:

“6. That each of the parcels sought to be condemned as hereinabove referred to and set forth, is only a part of an entire parcel or tract or piece

of property, or interest in or to property, owned by the aforesaid defendants.”

There were attached to the complaint as Exhibits “A”, “A-1” and “A-2”, maps showing the location, general route, and termini of the highway project, and showing the property which the plaintiff seeks.

“And showing the property of the defendants herein as affected by these condemnation proceedings.”

The maps attached as Exhibits to the complaint, do not describe the outside or any boundary lines of the property of the defendants, and do not specify the acreage of the property of the defendants.

The answer of defendants admits that part of paragraph 6, alleging that the parcels of land sought to be condemned are a part of a larger tract of land owned by the defendants, and that the taking of the said parcels of property described in the complaint

“Will destroy and greatly injure and damage the remaining property of said ranch owned by said defendants.”

It is further affirmatively alleged in the answer of defendants, that the lands through which the road is proposed to be constructed, were purchased and improved by modernizing and reconditioning the dwelling house located thereon, and by the construction of modern dairy barns and sheds and a grade A sanitary milking parlor, and other improvements thereon; new fences, cross fences, a deep well, etc., and that the property was improved and developed into a modern dairy ranch, suitable for the operation thereon of one hundred head of dairy



COWS.

It is further set out in the answer, that the plan of operation of the dairy ranch is a part of a general L.D.S. Church Welfare project of Wasatch County, and vicinity. That the plan of operation includes the furnishing of hay and grain from smaller farms in the Heber Valley, one by each Ward in the Stake, so that the milking barns and facilities would be used to the utmost capacity and the lands would be devoted to pasturage, and that the taking of the pasture land sought to be condemned would damage the whole set up and project substantially, and reduce the carrying capacity of the ranch in pasturage and that the value of the remainder would be lessened and the defendants greatly damaged by the severance.

It is further alleged in the answer, that there are no available lands adjacent to said ranch or in the vicinity thereof, that can be purchased to replace the lands sought to be condemned.

The case proceeded to trial, the plaintiffs lead off with a witness, Vernon Bridge (Tr. 3), who was the chief right of way design engineer of the State Road Commission, and he produced a map which was marked plaintiff's Exhibit "A" and placed upon the board (Tr. 4). THIS MAP IS NOT THE SAME AS EXHIBIT "A" ATTACHED TO THE COMPLAINT.

The Exhibit "A" offered and received in evidence, is a large map which has printed upon it in large letters:

"Map Showing the Property of Cooperative Security Corp. in the NW $\frac{1}{4}$  and SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 32, T. 2S R.5E, SLM, and the portion required for

highway purposes. Wasatch County, September 1950. Proj. No. S240 (1). Scale: 1" = 100'."

crayon, put on by the engineer:

"Cooperative Security Corporation. Total acreage — 131.79 AC remaining = 123.90 AC."

The witness, Bridge, upon request, stepped down and explained the Exhibit and the various markings and colors thereof, and gave this answer (Tr. 4):

"The portion of the map shown outlined in red ink lines represents the property owned by the Cooperative Security Corporation before the taking by this condemnation, consisting of a total acreage of 131.79 acres."

This red line runs around the entire property, an unbroken line, and around the portion of the property of defendants lying on the North side of U.S. Highway 40, and it is upon this portion of the property that the map shows the frame house, pump, cinder block milk barn, frame barn, chicken coop and grainery as improvements, and the witness then also pointed out the portions and the colors of the part sought to be condemned.

This map and this tract, the whole area contained within the outside red lines and shown on the map, Exhibit "A", was referred to constantly and was before the eyes of the Court and witnesses and counsel at all times during the trial, was treated and considered as the map, layout, description, boundary and fact of the tract, parcel, piece, unit, ranch and property of the defendants affected by the condemnation.

We were surprised and astonished, therefore, to find

in the Statement of Facts in Appellant's Brief, as the very basis of this appeal and running throughout the Brief, both in the Statement of Facts, and in the Argument of Points, that 7.89 acres taken by plaintiff was a portion of a larger tract of pasturage, containing, before the taking, 131.79 acres, and that this 131.79 acres did not include the land North and West of Highway 40.

Throughout the trial and in all of the testimony and in the examination of witnesses, both by the defendants and the plaintiff, the piece, parcel or tract from which the portion condemned was taken, was treated and considered as the property of the defendants affected by the condemnation, that North and West of Highway 40, as well as that South and East of Highway 40. Highway 40 was described as an easement right of way. It was detailed how the cows after milking, were driven across Highway 40 and turned into the pasture on the South and East side; how they were brought home in the evening for milking across Highway 40, and to the milking barns. The matter of the new highway and its joining into Highway 40, and the effect upon the driving of the cows to and from the barns, was detailed by the witnesses and throughout, with every witness, it was assumed and taken for granted and not questioned but that this was a unified farm and farm operation and that the parcel which was damaged by the severance was all that remained and not just the meadows.

There was in the trial, the usual difficulty, in the examination of witnesses, to keep them from considering damage to the business carried on, as distinguished from damage to the market value of the remainder, but the evidence and testimony of the witnesses, lay and expert,

all went to the theory that the farm was a unit and one parcel or tract.

Perhaps the witness most experienced as an expert witness in condemnations, among all those who were called by both parties, was Thomas E. Gaddis, of Salt Lake City, who was called by the plaintiff on values (Tr. 404). On cross examination he gave the following testimony (Tr. 425):

“Q. So if you had a ranch that had a capacity of pasture precisely for the herd he ran, and he took a slice of that away from that use, wouldn't you figure that a buyer that wanted to use it for the same purpose would feel that he didn't have enough, and so he couldn't pay the full value for this plant that's there?

A. Well, —

Q. Do you think even a willing buyer would hesitate on that score?

A. Not for just three acres, I don't think.

Q. Well, cut off 10 acres out of 60. Wouldn't that hit him?

A. A little bit, yes.

Q. A little bit. How much, in your opinion, would it reduce in percentage of over-all value, that little bit, taking ten percent of his pasture away from a many (man) having a unit of that sort, sir?

A. What do you mean by over-all value?

Q. Just what I said.

A. I didn't assess that.

Q. I didn't ask you to, but I'll let you assume any over-all value you want to, sir, and answer my question. Don't spar with me.

A. The three acres.

Q. Percentage I said, sir, of all 10 acres off from 60.

A. The percentage of what now?

\* \* \*

Q. Percentage of difference in what a willing buyer would pay for a setup based upon 60 acres of pasture for a herd of dairy cows that equals the capacity of his dairy improvement unit, and you took off 10 acres of his pasture.

\* \* \*

A. You waiting for my answer?

Q. Yes, Percentage.

A. Six percent.

Q. Six percent?

A. Yes."

*H. Clay Cummings*, called as a witness for defendants (Tr. 20), resides at Heber, and is engaged in livestock and ranching, and is President of the Wasatch Stake, and has the total responsibility for the project of providing milk for the Church Welfare Program. The nature of the business on this property is the production of milk, dairying, and some beef production. It has been in ownership of defendants about six years. He described the structure and improvements upon the premises; there

was a modern six room home, culinary water piped from the spring about 1700 feet away, and a concrete head-house built over the spring; there was a modern milking parlor constructed and planned for the milking of 75 head of cows, with holding rooms and all the necessary equipment for milking of the cows; there was a hay barn, constructed for the containing of about 150 tons of hay; bull pens, calf sheds, feed racks, corral fences, concrete corral coverings, bridges and extensive fencing, ditching, headgates, leveling, removing of trees and brush, reseeding, fertilizing, a well, a deep well for house water supply, heating plant in the milk house, milking parlor. These improvements were all constructed after the year 1945, excepting the home, which was remodeled. There was about \$50,000.00 of cash put into these structures and this amount was about matched with labor (Tr. 26).

Asked to describe the operation and use of these structures on this property in relation to the land, and particularly the land that is sought to be condemned, he answered: The home is used for the caretaker, the milk parlor for milking 55 head of cows, at the date of taking, February 17, 1950, the sheds for their convenience, weather protection, feed racks for feeding them; water supplies for washing the barn and equipment and providing the livestock with drinking water; fences were for containing them within pasture boundaries; calf sheds were used for caring for young calves; improvements are very conveniently located; there is a calf pasture of 3 acres up a little valley, or swale. The improvements are built on a slope which provides perfect feed ground in Winter, Spring and Fall, the corrals are located on a general slope which provides for a perfect location for

them, and immediately across Highway 40 is a pasture land which is used for grazing livestock. The crossing to the pasture was indicated as a point just South of the improvements and there was no obstruction or structures of any kind to prevent passing back and forth and using the two sides of it as a unit (Tr. 28). And he described the meadow and pasture land in detail. He valued the property with the improvements as well worth \$100,000.00 (Tr. 32), and testified that the losing of the ground being taken and the inconvenience being created by the construction of the road reduced the operations materially, without reducing the costs of operating.

Mr. Cummings was examined at great length concerning the various improvements and facilities and the uses to which the various portions of the farm were put, and as to the effect of the relation of the use of the milking establishment and the improvements and facilities thereof, to the pasture land in particular, and testified as to how the taking of the new right of way through the meadow land would affect the operation of the farm and plant as an operating unit. He testified in substance that the whole property, before the taking, was worth \$100,000.00, and that after the taking, the remainder of the property was worth \$80,000.00 in the market.

*Lyman Holmes Rich* was called as a witness by defendants. He is Extension Dairyman for the Utah State Agricultural College, with degrees of B.S. at U.S.A.C., and M.S. at University of Minnesota. From 1925 to 1929 he was employed by the Utah State Agricultural College as County Agent of Wasatch County, and has since become well acquainted with, and knows the dairy opera-



tions in that County. He has charge of the Dairy Herd Improvement Program, an association throughout the State of Utah, and has made regular visits to Wasatch County, sometimes two to six trips a year, and is well acquainted with the property involved in this case. When the land was first purchased by the Church, he advised concerning its management and assisted in purchasing livestock and meeting with groups in organizing the project. He gave testimony concerning the productivity of the land and particularly the meadows, and of the effect of the taking of the strip sought in condemnation upon the whole. He testified (Tr. 86) concerning the effect of driving heavy producing cows long distances, and particularly the effect it would have upon this herd if they were driven to the Berg property, and returned to the milking plant, and that this distance is too far to drive the cows.

*Dee A. Broadbent*, (Tr. 97), was a witness for defendants. He is a Professor of Agriculture and of Agricultural Economics and acts as Director of the Agricultural Experiment Station of the Utah State Agricultural College, has a B.S. degree from that institution, and a Master's degree from the University of Illinois, and additional scholastic training there. He has made a special study of the operation of dairy farms and knows the property in question. He came down with Mr. Rich and another, and advised the committee upon the establishment of this project as an operating unit, the size and the use of the land, and the practices that should be adopted for the more efficient operation of the farm; and, since, he has met with the committees and advised them upon the layout and operational problems.



He recognized that the limiting factor in that dairy unit was the proportion of summer pasture to the whole, to maintain a dairy herd. The type of buildings constructed were set up to handle towards 100 cows, to make the most efficient use of the capital resources, the buildings, improvements and at least as a minimum for economical operation, (Tr. 101).

He testified that about 60 acres of the land is fairly productive land, and a limiting factor in the efficient and economical operation of the farm. It was suggested that the productivity of the land be increased to where it would take care of a milking herd of exceeding 60 cows, and improvements by way of leveling and rotation of pasture were outlined, and he testified that the taking of the land in condemnation would reduce the herd below 50 milking cows, without permitting any reduction in the operating cost (Tr. 102), and so damage and depreciate the value of the entire set up and unit.

*L. J. Lowe*, a licensed real estate broker, gave testimony of values of the tract taken and the damage due to the severance (Tr. 111) (Tr. 237).

*Lowell Woodward*, (Tr. 119), a soil scientist with the Soil Conservation Service of the Federal Government, with a B.S. degree from U.S.A.C., with a major in Agronomy, testified concerning the depths of the soil in the various parts of the Church property and on the Berg property.

*Keith Holbrook*, (Tr. 128), who operates a 437 acre farm and is a real estate agent as well, and engaged mainly in the dairy business, who resides at Salt Lake City, qualified as an expert and gave opinion upon the

value of the land taken and the severance damage. His testimony would have justified a judgment of \$21,740.00 (Tr. 134).

*T. H. Heal*, (Tr. 162), lives at Provo and has owned ranches and sold many dairy ranches, engaged in the real estate business, qualified as an expert, gave his opinion as to value. His testimony would have justified a judgment of \$22,975.00, of which \$4,250.00 was for the land taken and the balance for severance damage (Tr. 171).

*Welby W. Young*, (Tr. 186), of Heber City, is a farmer in the dairy business. He was Advisor of the Farm Security Administration in Wasatch County, a government lending agency, a Director of the Heber Valley Dairymen's Association, Salt Lake Federated Milk Producers, Officer of the American Dairy Association of Utah, and of the National Association, and gave detailed testimony concerning this property from long acquaintance, and particular study and information. He testified that in his opinion, the severance of the property taken would decrease the value of the remainder, including the buildings, and without reference to the personal property, and that the whole amount of the depreciation would be twenty percent of the over-all value, prior to the taking, which he fixed at \$98,000.00 (Tr. 201).

*Jay Swain*, (Tr. 246), is the operator of the property and detailed its use since November of 1949. The use of Highway 40 and the changes in arrangement of bridges, etc., were detailed by him.

*Nephi Probst*, (Tr. 261), is a dairyman from Wasatch County. He was County Ward Supervisor, Chairman of the Agricultural Adjustment Agency of the

U.S. Government, Water Master, Director of Irrigation companies, operates a farm at Midway, where he milks from 20 to 25 cows, and has some ranch cattle. He was especially familiar with the property in question, and is in the Stake Presidency. He was particularly interested in the noxious weed matter, having had much to do with such troubles, and gave his opinion upon values.

Every witness who gave an opinion on the matter, treated the farm as a unit and clearly pointed up the fact that these new and costly improvements that were placed upon the hillside North of Highway 40, were put there and maintained and constructed to be used and used in relation to all of the land belonging to the defendants on the other side of Highway 40.

They pointed out, and took into consideration the fact that the new highway joined into Highway 40 in the front yard of the defendants. That the new highway created a junction and greater use of the highway and put a greater burden and danger and rendered less safe and efficient the use of the property North of Highway 40, in connection with the use of the remaining property South of Highway 40.

It was not specifically proved where the fee of the strip occupied by Highway 40 rests. It is assumed and was assumed that the State has an easement under this ground and that the right of way easement is upon and across ground, the fee of which is vested in the defendants, the owners of the property on both sides of the right of way, just as they are still the owners of the fee of the land traversed by the new highway. The map, Exhibit "A", shows this to be the fact by the surveys

of the State.

There was testimony concerning the availability of lands to replace the land taken. This testimony went to two different situations.

The new highway runs through the bottom meadow land of the Provo River Valley and Eastward from the junction with Highway 40, and the milking barns, etc.

A Mr. Berg owned the property up the canyon from the Church property, and adjoining it. The new highway cut through his land also. (Tr. 323). He was permitted to testify that in the month of April 1950, he had a conversation with Mr. Cummings and "offered" to sell to the defendants part of his ground East of them and South of the new highway on over to the river (Tr. 324); but did not state at what price or upon what conditions; but on cross-examination (Tr. 335), this witness testified persistently that he would not sell his land, and he said under oath (Tr. 336):

"It is not for sale."

The testimony is, also, to the effect that the piece mentioned by him is not as good land as that taken from the defendants.

The other item of "replacement property" was developed from the cross examination of Mr. Cummings. He testified (Tr. 52), that since the property in condemnation was taken, the defendants have leased from the New Park Mining Company, some territory West and North of the barns, on an annual or yearly basis, and that the lease is subject to cancellation at any time the owner might desire to cancel it, and he further tes-

tified that this property was not for sale and that the mining company would not sell it.

As indicated, this case was tried to the Court without a jury. The fact of the tract was specifically found by the Court as a trier of facts as follows:

“6. That each of the parcels sought to be condemned as hereinabove referred to and set forth is only a part of an entire parcel or tract or piece of property, or interest in or to property, owned by the aforesaid defendants. The said map introduced by plaintiff, and received in evidence marked Exhibit “A” shows the description and location of the said entire parcel or tract of land owned by defendants and affected by these proceedings.

“Said property consisted of approximately 131.79 acres of land, all of which was used as a unit by defendants in the operation of a farm and as a dairy farm. Situate upon the lands are a dwelling house, modern dairy, barns, sheds, a grade A sanitary milking parlor, carrols, cement feeding platforms and mangers, and a deep well flowing pure water used in the home and in the dairy barn, with pipes and troughs for its control, as well as fences and canals and ditches for the use and control of the irrigation and cultivation of said lands. Said farm as so laid out and equipped was suitable for the operation thereon of a modern dairy and for the accommodation of one hundred head of dairy cows. Said dairy ranch, and farm was so used by defendants as part of a general L.D.S. Church Welfare project of Wasatch County and vicinity and in cooperation with the ten

Wards of the Wasatch Stake of said Church.”

“The severance of the portion sought to be taken and condemned by plaintiff in these proceedings, and the construction of the improvement in the manner proposed by the plaintiff will greatly damage the remainder of said parcel and premises of the plaintiff and greatly depreciate the market value of the said remainder.”

By these Findings, the Court also found the fact to be that the property remaining to the defendants after the condemnation was greatly damaged, and the market value of the remainder greatly depreciated.

*The Court, as trier of the facts, and in the formula of our statute, found the fair market value of the lands and improvements sought to be condemned to be the sum of \$2,564.25, and the damages that accrued to the parcel and premises of the defendants not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff to be \$10,919.57.*

There were no benefits pleaded, proved or claimed to the defendants from the taking.

## STATEMENT OF POINTS

### POINT I

**THE DAIRY FARM IS A UNIT OPERATION AND ONE “PARCEL” IN ONE OWNERSHIP.  
CONTIGUITY IS NOT AN ABSOLUTE.**

## POINT II

NO ADDITIONAL PASTURE LAND WAS AVAILABLE TO DEFENDANTS.

## POINT III

THE CONDEEMNEE HAS THE RIGHT TO INSIST UPON BEING PAID IN CASH, BOTH FOR THE LAND TAKEN AND FOR HIS DAMAGES TO THE REMAINDER.

## POINT IV

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT ARE CONCLUSIVE UPON THE FACTS OF VALUE OF THE PROPERTY TAKEN, UNITY OF THE PARCEL AND OF DAMAGE THERETO AND THE AMOUNT THEREOF RESULTING FROM THE SEVERENCE.

## POINT V

THERE ARE NO ERRORS OF LAW REVIEWABLE BY THE SUPREME COURT CITED AS GROUNDS FOR REVERSAL OF THE JUDGMENT OR NEW TRIAL.

## POINT VI

CONCLUSION: THE JUDGMENT SHOULD BE AFFIRMED.

## ARGUMENT

### POINT I

THE DAIRY FARM IS A UNIT OPERATION AND ONE "PARCEL" IN ONE OWNERSHIP.

CONTIGUITY IS NOT AN ABSOLUTE.

Upon the facts pertaining to the use of the farm improvements in relation to the pasture land, there is



no dispute. The milking barns, sheds and other facilities were placed upon the south slope north of Highway 40 because, despite the hazards of Highway 40, it was the best place and situation, and they were built to a capacity to match the excellent pasture owned by the same entity. The inconvenience of crossing 40 was not a sufficient objection, in the eyes of the experts from the College and the practical dairy men, to deter the layout as the condemnor found it.

The easement for the right of way over the fee under Highway 40 was shown upon the map (Exhibit A) of the condemnor, but did not break the red line outlining the parcel from which the part sought was carved.

The existence of the highway does not divide the farm into separate parcels.

That contiguity is not an absolute, is abundantly established by the decisions.

There is an annotation on the question of the relation of unity of use and contiguity of properties essential to the allowance of damages in Eminent Domain proceedings found in 6 ALR (2d), commencing at page 1197. The general rules on the question are summarized in the following paragraphs, on page 1200:

“Whatever the theory of compensation for injury to the remaining land, it contemplates primarily a single piece or tract of land of which part is taken. The courts have extended the rule, however, to embrace situations in which a tract is crossed by something lineally imposed upon it—whether by nature, by man, or by legal description—which viewed ob-



jectively divides it into sections, but which, within the intent of the rule, does not destroy its unity as a single property. In certain unusual cases, they have even departed entirely from the basis of the rule, namely, the virtual contiguity of the holdings, and applied the concept of unity to properties separated from one another by the lands of other owners or by navigable waters.”

The principle applied to lands used for farming and similar enterprises which are separated by a highway are treated at page 1220:

“12. TRACTS SEPARATED BY HIGHWAY.

“The same general principle applies in the case of rural tracts separated by a highway. The effect of the highway in separating them may be countered by proof that they are being held or employed together for the general purposes of the property, whether farming, stock-raising, logging, or other productive enterprise. It is not always that this proof is necessary, for occasionally a court will recognize an actual contiguity in the tracts if the fee is in the owner. A resort to this alternative may support the owner’s claim where no present use of the land is shown. See Par. 2, *supra*. Between the two principles *it is seldom that the crossing by a public easement, of a piece of rural property which is otherwise a unit in use or value, is allowed to interfere with an award of damages with reference to the whole property when part is taken.*”

In support of the quoted statement, the following decisions are cited to the general proposition that a high-

way or street cutting the property of the condemnee is insufficient to destroy the unity of a farm, ranch, or other agricultural property which is used as a whole.

ALABAMA — Pryor v. Limestone County (1931) 222 Ala. 621, 134 So. 17 (widening of highway across ranch of 3,200 acres).

INDIANA — Cleveland, C. C. & St. L. R. Co. v. Smith (1912) 177 Ind. 524, 97 NE 164 (fee in landowner).

IOWA — Ham v. Wisconsin, I. & N. R. Co. (1883) 61 Iowa 716, 17 NW 157.

KANSAS — Kansas City, E. & S. R. Co. v. Merrill (1881) 25 Kan. 421 (large ranch, taking of strip for railroad.)

MARYLAND — Cf. Marchant v. Baltimore (1924) 146 Md. 513, 126 A 884.

MASSACHUSETTS — Tucker v. Massachusetts C. R. Co. (1875) 118 Mass. 546.

MINNESOTA — Cf. Colvill v. St. Paul & C. R. Co. (1872) 19 Minn. 283, Gil 240; St. Paul & S.C.R. Co. v. Murphy (1873) 19 Minn. 500, Gil 433.

MISSOURI — St. Louis, M. & S.E.R. Co. v. Drummond Realty & Invest Co. (1907) 205 Mo. 167, 103 SW 977, 120 Am. St. Rep. 724; Kansas City & G.R. Co. v. Haake (1932) 331 Mo. 429, 53 SW2d 891, 84 ALR 1477.

NEW YORK — New York, W.S. & B.R. Co. v. LeFevre (1882) 27 Hun. 537.

PENNSYLVANIA — Watson v. Pittsburgh & C.R. Co. (1860) 37 Pa. 469; Baker v. Pennsylvania R. Co.

(1912) 236 Pa. 479, 84 A 959.

WISCONSIN — Welch v. Milwaukee & St. P.R. Co.  
(1870) 27 Wis. 108.

*Corpus Juris Secundum* (29 C.J.S. 982), has also stated the rule and coallated the cases, and stated the law as we believe it to be, measured by the standard of justice and authority:

“Ordinarily contiguity or physical connection between the separate parcels is essential to the requisite unity. If, however, there be no such physical connection, the separate parcels may be considered as one if they are so inseparably connected in the use to which they are applied that injury or destruction of one must necessarily and permanently affect the other. Hence, although the several tracts do not actually adjoin, they may be regarded as one if the owner has a connecting right of way over the intervening lands. *So the fact that several tracts used as one are separated by a street or highway, a water-course, a railroad right of way, or a county line does not necessarily preclude them from being considered as one in determining the damages.* It has even been held that, where two or more parcels of land are used as one enterprise and constitute such dependent elements thereof that the taking of one necessarily injures the other, they may be taken as one, even though separated by an intervening fee.”

Included in the citations to this statement are some of the cases cited in the *A.L.R.* (2d) coallation. Of significance in the group is the case of *State vs. Hoblitt*, from Montana, 288 P. 181.

The Hoblitt ranch consisted of 147 acres, lying East of the railway right of way and a 10-acre tract lying West thereof, and used as a cow pasture. The land taken consisted of 2½ acres of the 10-acre tract lying adjacent to the railway right of way.

The ranch was crossed by a highway which paralleled the railway and between the two was the dwelling house. The barns and corrals were across the road from the house. Hoblitt was engaged in farming, dairying and raising cattle, horses and hogs for market, and his arrangement was very convenient, and his milk was taken up and the can returned practically at the milking place. The question for determination was as to what items of damage should be considered, and after stating the rule in practically the identical language of the *Corpus Juris* citation, with specific application to the 10-acre tract, the Court said:

“Here the 10-acre tract is isolated from the ranch proper and forms but an inconsiderable portion thereof; but, as it is used for the pasturing of dairy cows, milked upon the ranch, the additional inconvenience and danger in the use of the pasture after the highway is constructed would furnish an item of damages to be considered. *Gaddis v. Cherokee County*, 195 N. C. 107, S. E. 358; *Texas Electric Service Co. v. Perkins* (Tex. Com. App. 1930) 23 S. W. (2d) 320.”

In that case the jury awarded \$400.00 for the land taken and \$400.00 consequential damages, and the Court said: “The jury considered and made an award for all such damaged proved”, which included the damages to

the whole farm on both sides of the highway due to the severance of the right of way from the 10-acre tract.

In a Federal case,  
Boetjer v. United States  
143 F (2d) 391  
Cert. denied  
324 US 772  
89 L. ed. 618  
65 S Ct 131

It is said:

“The first question before us here, therefore, and the basic one in all severance damage cases, is what constitutes a ‘single’ tract as distinguished from ‘separate’ ones. The answer does not depend upon artificial things like boundaries between tracts as established in deeds in the owner’s chain of title . . . , nor does it depend necessarily upon whether the owner acquired his land in one transaction or even at one time . . . Neither does it wholly depend upon whether holdings are physically contiguous. Contiguous tracts may be ‘separate’ ones if used separately . . . *and tracts physically separated from one another may constitute a ‘single’ tract if put to an integrated unitary use* or even if the possibility of their being so combined in use in the reasonably near future . . . is reasonably sufficient to affect market value.”

### THE CARLSON CASE

Appellant relies upon the *Carlson case* for a reversal of the judgment in this case upon both points of his argument: (1) The damage to the property North of

Highway 40, and (2) the availability of lands in the vicinity to replace the lands taken, in place of all severance damages.

PROVO RIVER WATER USERS ASSN. v. CARLSON  
103 Utah 93 :133 P. (2d) 777

The Carlson case does not decide the question whether or not lands must be contiguous or whether lands must be physically impaired by the construction of the project, in order to establish a case for severance damages or for damages to lands not condemned but impaired by the improvement. Mr. Justice McDonough, in the majority opinion, was careful to state that it was not necessary in that case to decide that question.

*“(1) In this case, for reasons presently stated, it is not necessary to decide whether or not lands must be contiguous or whether lands must be physically impaired by the construction project, in order to establish a case of severance damages or for damages to lands not condemned but impaired by the improvement.”*

The point which ruled the Carlson case was the fact, assumed by the Court on the appeal, that the proof in the case showed that the pasture land inundated by the reservoir, which was located a mile and a half from the home properties of the owner, could have been replaced by the purchase of similar lands to those taken and actually located nearer to the base property than those already owned by Carlson.

Although this was disputed in the evidence, the appellate court assumed it to be a proven fact, and made it the basis of the decision reversing the case and grant-



ing a new trial.

The case was not re-tried, nor was a motion for rehearing made. At about the time the matter was ruled, an intensive campaign in the papers and on the radio had been carried on by the interests promoting the Echo Reservoir protesting the high verdicts of the juries in Wasatch County in those cases, and including the verdict in the Carlson case, and settlements were effected, obviating the necessity of re-trials.

The dissenting opinion by Mr. Justice Larson in the Carlson case is a very clear statement of the whole matter, and numerous cases are cited to support his statement:

*“If several tracts are used together as a farm, in determining the compensation to be paid the owner on condemnation of only part of the land, the tract constitutes a unity and the injury to the whole farm should be considered. Grand River Dam Authority v. Thompson, 10 Cir., 118 F. 2d 242. See also U.S. ex rel, T.V.A. v. Powelson, 4 Cir.. 118 F.2d 79, 87, modifying U.S. ex rel T.V.A. v. Southern St. Power Co., D.C., 33 F. Supp. 519; U.S. v. Crary, D.C., 2 F. Supp. 870; City of Stockton v. Marengo, 137 Cal. App. 760, 31 P.2d 467, 470; State v. Hoblitt, 87 Mont. 403, 288 P. 181; Dean v. County Bd. of Education, 210 Ala. 256, 97 So. 741; Duggan v. State, 214 Iowa 230, 242 N.W. 98; City of Middleboro v. Chasteen, 285 Ky. 427, 148 S.W. 2d 295; Darlington v. Pennsylvania R. Co. 278 Pa. 307, 123 A. 284; Atchiston T. & S.F.R. Co. v. Southern Pac. Co., 13 Cal. App. 2d 505, 57 P.2d 575; City of Stockton v. Ellingwood, 96 Cal.*

App. 708, 275 P. 228; 20 C.J., p. 737, note 66; 29 C.J.S., Eminent Domain, Sec. 140, note 19; Texas Empire Pipe Line v. Stewart, 331 Mo. 525, 55 S.W. 2d 283; reversing Id., Mo. App., 35 S.W. 2d 627; City of St. Louis v. St. Louis I.M. & S.R. Co., 272 Mo. 80, 197 S.W. 107.”

It may be that we stretched the rule of unity of use to the breaking point in the Carlson case; but, manifestly, the factual difference in this case from that case, and the reservation of the Court, in the majority opinion, destroys any potency of that decision as authority against the position of the respondents in this case.

And there are cases that would sustain the allowance of severance damage to tracts separated by land of other private owners, if a permissive right of way existed across the intervening land, or the two parts were connected by a highway, as was the case in *Carlson's Case*.

Westbrook v. Muscatvie U. & S.R. Co.

115 Iowa 106

88 W.W. 202

In the majority opinion in the *Carlson Case*, there is the following statement:

“All of the cases in this Court, which we have been able to find, have predicated *both severance damages and damages to lands not taken*, on some physical injury to lands not condemned \* \* \* *or some other condition which would operate to depreciate the market value of the property remaining*,”

and cites the following cases from the Supreme Court of



the State of Utah:

State v. District Court

94 U 384

78 P (2d) 502

This was an original proceeding in the Supreme Court for a writ of prohibition against the lower court in a action brought to enjoin the defendants, State Road Commission and others from constructing a viaduct over a street crossing. The case involved matter of procedure.

The opinion of the majority by Judge Hoyt and the dissenting minority opinion by Justice Wolfe together take 23 printed pages in the Pacific Report, *but not one word about what is a “parcel” or what is “contiguity”*.

Bamberger Electric R. Co. v. Public Utilities Com.

59 Utah 351

204 Pac. 314

An original proceeding for a writ of review against the Public Utilities Commission from an order to the railroad to discontinue a private crossing. Procedural matters were determined.

Morris v. Oregon S.L.R. Co.

36 Utah 14

102 P. 629

Action by an abutting owner for damages from the construction of a railroad in the street. Here is a reference to “condemnation.”

“Such an action is no different in principle from an action for damages to the remaining property where a part only is condemned. The easement the

abutting owner has in the street is a property right, and an interference with this right is, to the extent of the interference, deemed a taking of property for which, if such taking directly injures the abutting property, as aforesaid, the owner may recover damages.”

San Pedro F.A. & L.R.R. Co. v. Board of Education

32 Utah 305

90 Pac. 565

A condemnation case, for right of way across a parcel of land occupied in part by a school house.

“Severance” not involved or mentioned.

Dooly Block v. Salt Lake Rapid Transit Co.

9 Utah 31

33 Pac. 229

Abutting owners enjoined an additional track on the street.

“In such a case an abutting owner need not stand by and see his property injured without having any means of redress.”

Stockdale v. Rio Grande Western R. Co.

28 Utah 207

77 Pac. 849

Action to restrain a switch track.

Injunction sustained against track located on private property.

“Before the appellant railway company can sub-

ject the property in question, or any part thereof, to the burdens to which it would be subjected by the running of cars and engines over the switch referred to, it must proceed under the law of eminent domain, as contemplated by the foregoing provision of the Constitution, and as required by the statutes of this state.”

Contrast the worth of the cases cited in the majority opinion, with those cited by Mr. Justice Larson, in the minority opinion in the Carlson case!

In fact, we find no better exposition anywhere of the rule as applied generally throughout the several states than that stated in the minority opinion which we quote:

Provo River Water Users Association v. Carlson  
133 P (2d) at page 782

“The right of eminent domain exists only upon the condition that full payment be made to the owner of the property taken for all damages he sustains by or as a result of the taking of the property. This contemplates not only payment for the property actually taken for use of the condemnor but for damages resulting to the condemnee by the loss of the property so taken. Normally we say the condemnee is entitled to recover the value of the land actually taken, plus the damages to the land not taken. This expression too often leads to misapplication of the true rule of recovery of damages. We should think of it in terms of property, not in terms of land. The condemnee is entitled to recover the full value of the loss he sustains by the infringe-

ment of and interference with his legal rights—the right to use his physical holdings in any legitimate way or business he may choose. The old rule was inclined to be rigid and confine the damages recoverable to the particular tract of land from which the taken part was severed. It was then extended to permit consideration of damages, if any, to contiguous tracts. Later the vision of the law became clearer. Instead of seeing through a glass darkly, the courts realized that damage to property rights were not always identical with damage to land as such, and the rule of unity of use was recognized and applied. This is sometimes spoken of as unity of property. If various tracts of land not contiguous are owned by the condemnee, and are so used, and operated that the uses to which the owner is putting the tracts none of which is taken, is substantially interfered with that constitutes a damage due to the taking which is cognizable in the action. The rule is thus laid down in 29 C.J.S., Eminent Domain, Sec. 140, page 982: ‘To constitute a unity of property within the rule, there must be such a connection or relation of adaption, convenience, and actual and permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left, in the most advantageous and profitable manner in the business for which they are used. \* \* \* The separate parcels may be considered as one if they are so inseparably connected in the use to which they are applied that injury or destruction of one must necessarily and permanently affect the other’.”

The writer has examined again every decision in every condemnation case from the Supreme Court of Utah which he can locate, and has not found a single decision which defies "parcel" or "tract", or "piece of property", or "interest in or to property", or fixes a rule limiting severance damage to lands contiguous to the land taken, except the foregoing quotation from the minority opinion of Mr. Justice Larson in the *Carlson Case*.

It is, therefore, suggested that recourse be had to the annotators and definitions and decisions from other jurisdictions. Those hereinbefore cited abundantly sustain his opinion and statement of the law and the rule, and justify the judgment for severance damages made in this case by Judge Nelson.

## POINT II

**NO ADDITIONAL PASTURE LAND WAS AVAILABLE TO DEFENDANTS.**

## POINT III

**THE CONDEEMNEE HAS THE RIGHT TO INSIST UPON BEING PAID IN CASH, BOTH FOR THE LAND TAKEN AND FOR HIS DAMAGES TO THE REMAINDER.**

The facts of the case do not warrant a finding by the appellant court, not made by the trier of the facts, that there was additional land in the vicinity that the condemnee could acquire with the price paid for the land taken from them.

It needs no argument that a year to year lease revocable at will of the lessor, is not a lawful substitute

for cash money due as the just compensation which the Constitution requires shall be paid before land is taken or damaged by the power of the State.

Mr. Berg testified under oath that his adjacent property was not for sale!

A negotiation as nebulous as the "offer" hinted at by the Attorney General in the Brief, is not a lawful substitute for the coin of the realm.

The defendant is entitled to money and may not be compelled to accept substitute land elsewhere.

The trial Court heard the evidence pertaining to the leased land and the Berg land, including matters touching its quality, location and value, as well as "availability," and heard the owner himself, Mr. Berg, swear under oath that his land *was not for sale*.

In the matter of replacement lands, the majority opinion in the *Carlson Case* is relied upon by appellant for reversal of this case.

The writer has examined again every decision in every condemnation case from the Supreme Court of the State of Utah which he can locate, and has not found a single decision requiring a condemnee to prove he cannot find lands equal in value and use in the immediate vicinity for sale at the price fixed for the land taken, before he can recover severance damages!

## POINT IV

**THE FINDINGS AND JUDGMENT OF THE TRIAL COURT ARE CONCLUSIVE UPON THE FACTS OF VALUE OF THE PROPERTY TAKEN, UNITY OF THE PAR-**



**CEL AND OF DAMAGE THERETO AND THE AMOUNT THEREOF RESULTING FROM THE SEVERENCE.**

Throughout the cases cited in this brief, reference is frequently made to the question of the relation of the Judge and the Jury in the matter of facts to be found. Here Judge Nelson was both Judge and Jury.

Every question raised by the appellant is upon a question of fact.

The unity of the parcel is a proved fact and a fact found.

May this Court “weigh” the evidence?

**POINT V**

**THERE ARE NO ERRORS OF LAW REVIEWABLE BY THE SUPREME COURT CITED AS GROUNDS FOR REVERSAL OF THE JUDGMENT OR NEW TRIAL.**

There are no errors in the reception of evidence, or other rulings in the course of the trial, cited by Appellant and relied upon for reversal of the judgment, and no motion for new trial was made.

The Attorney General would have the Court reverse this judgment upon his ipsi dixit that “the defendants’ *dairy* simply was not diminished in value to that extent (\$10,919.57) by the taking of approximately 6% of its pasturage.”

**POINT VI**

**CONCLUSION: THE JUDGMENT SHOULD BE AFFIRMED.**

The award of damages in this case is in a sum sub-

stantially less than the evidence would have justified.

There was a severance damage to the small tracts of pasture land that were isolated by the location of the new highway, and to the entire area of the pasture land, as well as to the sale value of the dairy layout and improvements on the North side of Highway 40.

There was a considerable diversity of opinion among the witnesses, but all would give some to each of those parts.

The testimony of the witness, Bridge, called by the plaintiff, would justify severance damage of 6 percent of the entire farm, including the barns and other improvements on the North side of the highway.

The trial judge was duly considerate of the welfare on both sides of the issue.

*No one in this case had a personal interest of any kind.*

There was a fair trial and a just decision, which we submit ought to be affirmed.

Respectfully submitted

L. C. MONTGOMERY  
ARTHUR WOOLLEY

Attorneys for Respondents