

1955

State of Utah et al v. Fred Tedesco et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through
its ENGINEERING COMMIS-
SION, D. H. WHITTENBURG,
Chairman, H. J. CORLEISSEN
and LAYTON MAXFIELD, Mem-
bers of the Engineering Commission,
Plaintiff and Respondent,

— vs. —

FRED TEDESCO and KLEA B.
TEDESCO, his wife, et al.,

Defendants,

and

BIRD & EVANS, INC.,

*Counter-Claimants
and Appellants.*

Case No.
8270

FILED

6 1955

Clerk, Supreme Court, Utah

Brief of Respondent

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Brief of Respondent

STATEMENT OF FACTS

Generally, the respondent will be able to agree with the statement of facts as set forth in the appellant's brief; but in certain specific instances we disagree and we also feel that there are some facts of importance that are not included, particularly with respect to prior

proceedings. We feel that the Court should have a chronological picture of this matter and shall proceed accordingly.

The 1951 State Legislature passed an act, which is now Section 63-11-10, Utah Code Annotated 1953, which act granted the State Engineering Commission "power" to condemn certain therein described real property for a state park. The first special session of the 1951 State Legislature, in Section 1 of Chapter 13, Laws of Utah 1951, First Special Session, amended the act and "authorized and directed" the Commission to "forthwith condemn" the described property.

Accordingly, on July 10, 1951, the Engineering Commission adopted a resolution instructing the Attorney General to proceed and suit was filed and summonses were served on the various defendants, one of whom was Bird & Evans, Inc. as it was the record owner of Parcel 7 lying within the park boundaries established by the legislative enactment. (R. 18)

We deem it appropriate at this point to specifically call the Court's attention to the fact that a jury trial was had as to Parcel 7 and that a jury's verdict in the sum of \$66,000.00 was paid and a final order of condemnation as to Parcel 7 was entered by the Court on March 21, 1952. (R. 36 to 39) The land, which is the subject of this action, was not contiguous to Parcel 7, was across the canyon south from Parcel 7 and is an entirely separate tract and is wholly outside the park. (R. 87)

Thereafter, and on April 1, 1952, the trial court permitted the appellant, Bird & Evans, Inc., to file a cross-complaint and this came on for trial on December 1, 1952, and a jury was impaneled. (R. 30-32) However, following a ruling by the trial court that the case was to be tried upon the theory that Kennedy Drive was closed, this Court granted an intermediate appeal; and by its decision, now reported in *State v. Bird & Evans, Inc.*, 265 P. 2d 639, the trial court's ruling in this respect was reversed and the cause remanded to be tried in accord with that opinion.

Following remission to the District Court, a formal motion to dismiss was made by the respondent and denied by the trial court. (R. 61) Trial was thereupon had commencing on July 14, 1954, and, after a jury had been selected, the motion to dismiss was again renewed and urged upon the trial court and a ruling thereon was reserved by the trial court. (R. 67 and 68)

After the appellant had concluded his evidence, a motion to dismiss was again made and again taken under advisement (R. 134); and, following the conclusion of the trial, a motion for a directed verdict was made based upon the same grounds and this motion was also taken under advisement. (R. 177)

Following the verdict of the jury, a formal written motion was made for judgment notwithstanding the verdict and the grounds were the same as had been urged on the previous motions. (R. 198 and 199) This motion

was thereafter argued on July 20, 1954, and on September 28, 1954, an order was made granting the motion for judgment notwithstanding the verdict. (R. 200)

The foregoing is a brief history of the litigation and is, we believe, an important element to be considered in this case. And, in addition to this, we cannot agree with appellant as to the alleged agreement between it and the Wagener Improvement Company. In this connection, we do not believe that it is appropriate to pick out separate sentences from the record and claim proof or lack of proof of this supposed agreement. As an example, appellants on page 5 of its brief says: "It was further agreed that the costs of planning would be divided between the owners of the two tracts of land in proportion to their land holdings, and, in fact, the very considerable expense entailed in planning was so borne and was so paid." It is indicated that this statement is derived from the answer of the witness, Brayton, where he said, "That is to say Wagener would take care of all of the expenses incident to its much larger area and then Bird and Evans would take care of the expenses incident to its area and did so, so far as I know." (R. 72) But there is nothing in the record to show how much was expended and by whom, and for what.

We must take issue with, and believe that this is the place to do so, the statement by appellant that appears on page 19 of its brief as follows: "The state does not deny the existence of the agreement between Bird & Evans and Wagener Improvement Company for the de-

velopment of the Oak Hills Subdivision.” We most certainly do deny the existence of any such agreement. We took specific exception to Instruction No. 1 to the jury where the jury was permitted to consider this agreement on the grounds that no agreement had been proved. (R. 184-185) And we fully believe that the evidence of the witness, Dean S. Brayton, when read as a whole negatives the existence of any agreement. The best that could be said for it is that there was an expectation and a hope.

And finally, for the purpose of clarity and to avoid repetition and because it is tied to both the facts and the law, we feel compelled to set forth the three points that were the basis for our motion for judgment notwithstanding the verdict and which are as follows:

1. That the State of Utah has not consented to be sued herein and this Court is and has been without jurisdiction to entertain this action against the State of Utah.

2. That it affirmatively and conclusively appears from all the proceedings herein that the subject matter of this cause is not actionable against the State of Utah and not compensable by the State of Utah; and that the said cross-complaint of Bird & Evans, Inc. does not state any facts upon which a claim against the State of Utah could be based and that all the evidence fails to show a claim against the State of Utah.

3. That Bird & Evans, Inc. has not sustained the burden of proof required of it and that all the evidence

affirmatively and conclusively shows that any injury or damage to it was contingent, remote and speculative. (R. 198-199)

STATEMENT OF POINTS

POINT I.

THE CLAIM OF APPELLANT WAS NOT PROPERLY COGNIZABLE BEFORE THE TRIAL COURT, BUT, ON THE CONTRARY, THE TRIAL COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THIS ACTION AGAINST THE STATE OF UTAH; AND THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WAS PROPERLY GRANTED.

POINT II.

THE APPELLANT IS NOT ENTITLED TO JUDGMENT FOR CONDEMNATION AND DESTRUCTION OF ANY ALLEGED OR CLAIMED RECIPROCAL COVENANTS; BUT, ON THE CONTRARY, ANY ALLEGED DAMAGE OR INJURY THAT APPELLANT CLAIMS TO HAVE SUFFERED IS NOT ACTIONABLE AGAINST AND NOT COMPENSABLE BY THE STATE OF UTAH.

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POINT IV.

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO THE EXISTENCE OF AN AGREEMENT BETWEEN THE APPELLANT

AND WAGENER IMPROVEMENT COMPANY, AND THE GRANTING OF THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WAS PROPER AS THERE WAS NO SUBSTANTIAL AND MATERIAL PROOF OF THE EXISTENCE OF ANY AGREEMENT.

ARGUMENT

POINT I.

THE CLAIM OF APPELLANT WAS NOT PROPERLY COGNIZABLE BEFORE THE TRIAL COURT, BUT, ON THE CONTRARY, THE TRIAL COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THIS ACTION AGAINST THE STATE OF UTAH; AND THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WAS PROPERLY GRANTED.

In respondent's motion to dismiss before the trial court, we urged upon that court the sovereign status of the State of Utah and its immunity from suit (R. 67). We again urged this point in our motion for nonsuit (R. 134) and for a directed verdict (R. 177); and in our formal written motion for judgment notwithstanding the verdict we spelled out in paragraph one of that motion the same grounds (R. 198). Appellant's statement at the bottom of page 12 of their brief that "it may be that the state has abandoned this position as counsel did not argue it strenuously", is contrary to the fact and not in accordance with the record. We have steadfastly maintained throughout the entire retrial of this proceeding that there was a complete lack of jurisdiction as to the State of Utah by reason of its sovereign immunity from suit

without specific legislative consent. And, contrary to appellant's statement, the cases of *Hjorth v. Whittenburg*, 241 P. 2d 907, and *State v. Fourth District Court*, 94 Utah 384, 78 P. 2d 502, are specifically applicable and are the two cases that we contend conclusively support the position we have taken.

In order to present our position in this respect and to correct the erroneous conception as presented by appellant, it is necessary to briefly review the prior appeal of this case, the reasoning urged upon that appeal and the ruling this court now reported in *State v. Bird & Evans*, supra. Following a ruling by the trial court on December 1, 1952, that Kennedy Drive was closed and that appellant was entitled to go to trial on that theory, this court granted a petition for intermediate appeal. The State of Utah, as the appellant in that case, also raised the question as to whether the pleading, then entitled a cross-complaint, filed by Bird & Evans Inc. was not covered by Rule 13(a) of the Rules of Civil Procedure dealing with compulsory counterclaims.

This Court ruled that the cross-complaint of the then respondent, Bird & Evans, Inc., was not a compulsory counterclaim under the language of Rule 13(a) and also held that the trial court's ruling as to the closing of Kennedy Drive was in error; and the case was reversed and remanded for proceedings in accordance with the opinion of this Court. We desire to emphasize that we have not, and do not now, question this Court's ruling as to compulsory counterclaims; and we desire to further

emphasize that the present question as to the sovereign immunity of the State of Utah was not an issue in the former appeal and was not decided by this Court, either directly or by implication.

Whether the pleading filed by Bird & Evans, Inc. is termed a cross-complaint, as it was in the first appeal, or whether it is a counterclaim, as appellant now refers to it, is, we believe, immaterial; and under our view of the problem it makes little, if any, difference whether it was filed while the appellant was still a defendant in the main condemnation action or, as was done here, after its interest in that main action had been wholly terminated. No matter how it is viewed, it is an independent suit against the State of Utah having as its subject matter a completely new issue from that of the original condemnation action; and, as such, it is subject to the rules laid down in the Hjorth and Fourth District Court cases, *supra*, which we will discuss hereinafter at more length.

Appellant has cited Sections 78-34-7 and 10, Utah Code Annotated 1953. At the risk of repetition but in the interest of readability, we desire to also quote these sections in order to call the Court's attention to the specific language therein. Section 78-34-7 reads as follows:

“All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may ap-

pear, plead and defend, each in respect to his own property or interest, or that claimed by him, in the same manner as if named in the complaint.”

On page 11 of its brief appellant states that it filed its counterclaim under the provisions of this section. A careful examination of this section reveals that this counterclaim or cross-complaint does not fall within the permissive language of this section.

First, it should be noted that the property for which appellant claims damage is entirely outside the boundaries of This Is The Place Monument Park and is not described, nor is any part of it mentioned, in the complaint filed herein by the State of Utah (R. 11 to 32, incl.). The statute above quoted states “All persons in occupation of . . . any of the property described in the complaint.” Clearly, appellant does not fall within that language. The second grouping is “All persons . . . having or claiming an interest in any of the property described in the complaint.” Again it is clear and conclusive that appellant’s claim is not covered. And the final group is “having or claiming an interest . . . in the damages for the taking thereof,” i.e., the property described in the complaint. We urge that none of the language in this section gives to this appellant the right to “appear, plead and defend.” It specifically refers to the property described in the complaint for which condemnation is sought and admittedly the appellant here is not in occupation, claims and has no interest in it and claims and has no interest in the damages for the taking thereof. To attempt to read into this section a right to

appear and claim damage for property not sought to be condemned and lying wholly without the boundaries of the property described in the complaint appears to us to be fantastic. If this were to be the law, it would have infinite ramifications and there could be no possible conclusion of even the simplest of condemnation proceedings.

In its decision in *Hjorth v. Whittenburg*, supra, this Court said:

“If all the property to which any consequential harmful effects had to be considered, and the owners joined as condemnees by the Road Commission, it would be difficult if not impossible for the Commission to know whom they could safely omit from condemnation proceedings. The only safe way in which the Commissioners could operate would be to join every property owner abutting on or *near* the highway projects in order to avoid suits which would result in personal liability to them. *The impracticability of imposing such an obligation upon the public body in the construction and maintenance of our public highways is obvious.*” (The italics are ours.)

As a final comment on this phase, may we note that the rule sought for by appellant in this case would affect all public bodies clothed with the power of eminent domain and would require the joinder of an infinitely greater number of defendants than under the rule sought for by the plaintiffs in the *Hjorth* case. Under the language above quoted the utter “impracticability” is “obvious.”

Section 78-34-10 contains five subparagraphs and the three quoted by appellant are the only ones applicable

here but we contend again that they affirmatively show that appellant cannot maintain this action against the State of Utah. This section reads as follows:

“The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

(1) The value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

(2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

(3) If the property, though no part thereof is taken, will be damaged by the *construction of the proposed improvement*, the amount of such damages . . .” (Italics added.)

We call the Court’s attention to the fact that the first paragraph deals with property actually taken and the second paragraph deals with what is commonly called severance damage and that neither paragraph is applicable to appellant’s property. It must, therefore, bring itself within the provisions of paragraph three and we most urgently contend that it does not and cannot qualify under the language of that section. We have italicized

the words "construction of the proposed improvement," and the only conclusion that can be drawn from these words is that the damages allowable must flow from this construction. In the present case, there is no construction, no proposed construction and in fact the legislative mandate for this condemnation specifically commands no construction but rather that the park shall remain in its natural state.

We have heretofore briefly alluded to the cases of *State v. Fourth District Court*, supra, and *Hjorth v. Whittenburg*, supra; and, as we contend that they are controlling of the issue here presented, it becomes necessary to thoroughly examine the facts and the decision of this court in each case.

In the Fourth District Court case certain residents of West Center Street in Provo sought an injunction against the State Road Commission and the contractor engaged by the Commission to construct the viaduct over the railroad tracks on this street. In this application for injunction the plaintiffs alleged that they would be deprived of access, that the viaduct would dampen and darken their homes, that they would be deprived of their easement to light, air and view, and that the grade of the street would be raised; and that, unless the injunction were granted, they would be deprived of their property rights without due process of law. The State Road Commission and the contractor applied to this Court for a writ of prohibition to prevent the District Court from proceeding with the injunction suit. By its decision, this

Court made the writ permanent as to the State Road Commission, denied it as to the contractor and indicated that injunction proceedings against the individual members of the State Road Commission would be proper if the plaintiffs in the injunction suit were to ask leave to amend so as to include those individuals personally as defendants. It should be noted that only three members of this Court joined in the majority decision and that a well written minority opinion was handed down by the other two members of the Court, who contended that the injunction suit against members of the Road Commission individually was not proper and that the remedy was before the Board of Examiners.

But all five members of the Court held that the injunction could not be maintained against the State of Utah and, on page 504 of the Pacific Reporter, the Court said:

“The State Road Commission is an agency of the State. It is clothed with certain powers in the nature of corporate powers, but cannot be considered to be a corporation. It may sue in its own name, and section (now 27-2-1, Utah Code Annotated, 1953) provides that it may be sued only on written contracts. Being an unincorporated agency of the State, a suit against it is a suit against the State. The State cannot be sued unless it has given its consent or has waived its immunity. *Wilkinson v. State*, 42 Utah 483, 134 Pac. 626; *Campbell Building Co. v. State Road Commission*, (Utah), 70 P. 2d 857. Defendants do not argue in their briefs that consent has been given by the State or that there has been any waiver of the State’s immunity from suit. Their

argument is that the injunction suit is not against the State. We cannot agree with this argument insofar as the Road Commission as such is concerned. It is an agency of the State and a suit against it is a suit against the State . . .”

And the final ruling, as reported on page 512 of the Pacific Reporter, is as follows:

“The alternative writ of prohibition heretofore issued herein is hereby modified, in accordance with the opinion herein expressed, so as to eliminate from said writ any prohibition against proceedings in the case therein referred to as against defendants other than the State Road Commission. Insofar as the writ prohibits proceedings in the district court as against the State Road Commission, the same is made permanent . . .”

In the *Hjorth v. Whittenburg* case, *supra*, the plaintiffs sought an injunction against the individual members of the Road Commission to prevent a threatened and alleged damage to their property, none of which was taken or used for the roadway, by a raising in the grade of the road as much as four feet above the level of the contiguous ground. At the time of the hearing the roadway was almost completely constructed and the district court permitted an amendment to the complaint to include damages and thereafter assessed damages against the individual members of the Road Commission upon the authority of the Fourth District Court case. Upon the appeal this Court held that the members of the Road Commission were not personally liable for damages where they acted in good faith to improve the highway.

Both the plaintiffs in this case and the Court recognized that the doctrine of sovereign immunity was applicable as far as the State of Utah and the State Road Commission were concerned.

The only difference between the fact situation in these two decided cases and the present one is that the appellant here was fortunate enough to have a parcel of property that was included within the original condemnation action, although this parcel was a considerable distance away from the one for which it now seeks damage. That one rule of law should apply to appellant and another rule for those not so fortunately situated is, of course, unthinkable; and we respectfully submit that this is an attempted proceeding against the State of Utah wherein there has been no waiver of sovereign immunity and that no jurisdiction has been conferred on the trial court and that the granting of the motion for judgment notwithstanding the verdict was proper and should be affirmed.

The Supreme Court of the United States in the case of *Kennecott Copper Corp. v. State Tax Commission of Utah*, 327 U.S. 573, 90 L.Ed. 862, states the rule applicable that statutes waiving sovereign immunity are subject to a strict and literal interpretation in favor of the state and against the waiver of immunity. In that case the plaintiff sought to recover taxes claimed to be wrongfully exacted by suit in the federal courts under a statute providing that the action could be brought in any court of competent jurisdiction. The Court held that this

language would be construed to apply only to courts of the State of Utah and used this language "that clear declaration of a state's consent to suit against itself in the federal court on fiscal claims is required."

The annotation following the above case at 90 L.Ed. 869 generally covers the subject and emphasizes the general rule that statutes waiving sovereign immunity are to be strictly construed.

The following three points of the brief of respondent are written without regard to this question of sovereign immunity; but their consideration and a ruling thereon would become unnecessary if this Honorable Court sustains the position we have taken here.

POINT II.

THE APPELLANT IS NOT ENTITLED TO JUDGMENT FOR CONDEMNATION AND DESTRUCTION OF ANY ALLEGED OR CLAIMED RECIPROCAL COVENANTS; BUT, ON THE CONTRARY, ANY ALLEGED DAMAGE OR INJURY THAT APPELLANT CLAIMS TO HAVE SUFFERED IS NOT ACTIONABLE AGAINST AND NOT COMPENSABLE BY THE STATE OF UTAH.

In its argument as to its point two, appellant assumes the existence of an agreement between itself and the Wagener Improvement Company. As we have declared in our statement of facts and as we will explore more fully later in this brief, we contend that there was no material proof as to the existence of any agreement, but rather that the proof showed that appellant was relying

upon an expectation and a hope as to the future development by the Wagener Improvement Company.

However, even if this agreement were sufficiently shown by the evidence so as to make it proper to submit it to a jury, we contend that it still does not provide a basis upon which compensable damage could be allowed the appellant; and we believe that appellant has misapplied the law to the facts of the instant case and that it fails to distinguish between restrictive covenants that apply to the land and create a negative easement therein and on the other hand a purely personal agreement between two parties that has nothing to do with the land involved.

Appellant secured the admission of Exhibit 8 over respondent's objection. (R. 81). This exhibit constituted the restrictive covenants that had been recorded with respect to Oak Hills Plat A, which was a small area some distance across the canyon from the property involved in the present action. The evidence also showed a hope and an expectation that at some future date and, depending on a number of conditional factors, restrictive covenants of a similar nature but with changes to meet other conditions, which conditions are not named or described, would be drawn up and filed for the property on the south side of the canyon and also for the property of the appellant.

At this juncture, we desire to emphasize that there is not a scintilla of evidence that the condemnation of the property by the State of Utah had any effect whatsoever

upon these restrictive covenants or in any way violated their terms; but, on the contrary, it can be just as well imagined that the condemnation proceeding enhanced the value of appellant's property.

The cases that appellant cites under Point Two of his brief are collected and discussed at considerable length in the case cited by appellant, namely, *Johnstone v. Detroit, G. H. & M. R. Co.*, 245 Mich. 65, 222 N.W. 325, 67 A.L.R. 373, and in the annotation at 67 A.L.R. 385, which supplements a prior annotation in 17 A.L.R. 554. A still later annotation at 122 A.L.R. 1464 reviews these same cases and some later ones and comes to this conclusion:

“But in determining whether the right thus created is one of property for which compensation must be made when land subject to such right is taken by eminent domain or is voluntarily deeded to be used for public purposes, the courts remain in irreconcilable conflict.”

In connection with this point, we feel compelled to cite three cases because the language used seems particularly applicable. In each case, the court held that building restrictions had no basis for value in condemnation proceedings.

In *Doan v. Cleveland Short Line R. Co.*, 92 Ohio St. 461, 112 N.E. 505, the Court said:

“If such restriction is not to be construed as preventing the use of the property for public purposes, then of course there is no violation on the part of the defendant, and it follows that no

recovery can be had. If, on the other hand, it is to be construed as prohibiting the use of the property for any purpose other than that of residences, it would prevent a public use of the lots and thereby defeat the right of eminent domain. No covenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to prevent the state, or any body politic or corporate having the authority to exercise the right of eminent domain, from devoting such property to a public use. The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void. Plaintiff's right to compensation, if it exists, must be based upon the restrictive covenant in the deeds and the general plan adopted. To give to plaintiff this right we would be compelled to recognize a right existing under what we hold to be an invalid restriction."

And in *United States v. Certain Lands*, 112 Fed. 622, the Court said:

"While the owners may so contract as to control private business, and thereby increase the values of their estates, they are not entitled so to contract as to control the action of the government, or to increase the values of their lands by any expectation or belief that the government will not carry on public works in their vicinity, or that in case it does it will compensate them for the loss due to the defeat of their expectation that it would not. . . . Each landowner holds his estate subject to the public necessity for the exercise of the right of eminent domain for public purposes. He cannot evade this by any agreement with his neighbor, nor can his neighbor acquire a right from a

private individual which imposes a new burden upon the public in the exercise of the right of eminent domain.”

And in *Moses v. Hazen*, 63 App. D.C. 104, 69 F. 2d 842, 98 A.L.R. 386, the Court said:

“As against the sovereign in discharge of a governmental function, rights such as are here claimed are not enforceable to restrict or burden the exercise of eminent domain; for the claims of these appellants are not for damage to what are sometimes called true easements, as right of passage or rights to light and air, which are land and subject to condemnation as other interests in land, but the restrictions on which appellants rely are not truly property rights, but contractual rights, which the government in the exercise of its sovereign power may take without payment of compensation.”

And the further statement was also made that

“It is the rule in such cases that covenants limiting the use of property must be strictly construed and not extended by implication.”

A holding to the same effect was reached in the cases of *Anderson v. Lynch*, (Ga.), 3 S.E. 2d 85, 122 A.L.R. 1456, *Friesen v. City of Glendale*, 209 Cal. 524, 288 Pac. 1080, and *Sackett v. Los Angeles City School District*, 118 Cal. App. 254, 5 P. 2d 23.

The statement of the Court in the case of *Moses v. Hazen*, supra, foreshadows and supplements the statement of this Court in *United States v. Fourth District Court*, supra, where it was stated:

“We believe that the line of demarcation should be drawn at the point of “actionable damage.” The Constitution clearly does not require compensation for damages not recognized as actionable at common law, but for a damaging of property “to the actionable degree” the Constitution makers intended the landowner to have just compensation equally with the landowner whose property was physically taken.”

We have now discussed and, we believe, fairly analyzed those cases dealing with restrictive covenants applicable to real property subject to condemnation, and it should be noted that in each case the use to be made of the property by the condemnor is conceded to be a violation of the restrictive covenant. We again allude to the statement that we heretofore made to the effect that appellant has presented no evidence of any kind that would show that the proposed use by the State of Utah would in any manner effect a breach of those covenants.

However, we believe that appellant is not relying upon these restrictive covenants even though its statement of points specifically refers to them, but rather that it basis its damage upon the alleged oral agreement with Wagener Improvement Company as to future development. It is our contention that there was no material evidence of the existence of any agreement and that is the subject of our next point in this brief; and, at this point, we are assuming that the agreement was proved and we shall demonstrate that this fact does not entitle the appellant to any damage as against the condemnor, State of Utah.

It should be first noted that this alleged agreement is purely a personal contract between the appellant and Wagener Improvement Company and that by no stretch of the imagination could it be called a restrictive covenant as to the land involved. On page 9 of its brief, appellant refers to it as "reciprocal agreements" and it could be nothing more as it has none of the required elements that go to make a negative easement or an equitable servitude, as these restrictive covenants are called.

2 Nichols on Eminent Domain, 3rd Edition, Section 5.76(2) at page 115, contains a statement that we contend is controlling and we have found no cases contrary to the ones there cited. The section above mentioned reads as follows:

"The mere fact that a business has assumed the form of existing profitable contracts with respect to the use of the land does not, under ordinary circumstances, warrant the award of damages in excess of the value of the land. The strongest examples of such contracts are leases of the premises or agreements to lease the same to solvent tenants at a greater rent than the present fair rental value of the premises, and contracts to sell the produce of the soil at a profitable price. The taking of the land terminates all contracts in respect to its use and the owner is under no liability for his failure to carry out such agreements, but it is well settled that he is not entitled to compensation for the loss of his contracts. No distinction has been drawn between a damage to business caused by making impossible the performance of existing contracts and a damage consisting of the loss of expected contracts.

If an owner of land taken by eminent domain is not entitled to compensation for the loss of profits on his contracts, existing and expected, taken as a whole—that is, injury to his business—a fortiori he is not entitled to compensation for the loss of expected profits on a single contract.

“It is true that the constitution of the United States prohibits a state from enacting any law impairing the obligation of contracts, but a statute authorizing the taking of land with respect to the use of which a valid contract is in existence is not obnoxious to this provision, even if no compensation is awarded for the annulment of the contract, since all contracts for the use of land are entered into in view of the possible taking of the land for public use, and the sovereign power of eminent domain cannot be impaired by contracts of private parties. It is only when “property” is created by contract, as in the case of a franchise or a lease, that the protection of the constitution can be invoked.”

Orgel on Valuation under Eminent Domain, Section 75, contains a similar statement; and finally we desire to cite the case of *Knight v. Southern Pacific Co.*, 52 Utah 42, 172 Pac. 689, and the statement by the Court on page 694 of the Pacific Reporter as follows:

“Indeed we know of no case which holds that a parol agreement to maintain fences runs with the land.”

It is, therefore, respectfully contended by the respondent that the authorities above cited show conclusively that the motion for judgment notwithstanding the verdict was properly granted by the trial court on all of

the following grounds and is sustainable on any one of them:

1. That under the law and the decisions of the State of Utah, restrictive covenants do not constitute actionable damage in eminent domain proceedings and are not compensable by the State of Utah.

2. That there is a complete failure of proof as to any injury or damage to any land subject to those restrictive covenants and a complete lack of any evidence as to the effect of the condemnation proceeding in relation to those restrictive covenants.

3. That it has been universally held that private contracts may not impair the sovereign right of eminent domain.

POINT III.

THE APPELLANT HAS NOT SUSTAINED THE BURDEN OF PROOF REQUIRED OF IT AND THE EVIDENCE AFFIRMATIVELY SHOWS THAT ANY ALLEGED INJURY OR DAMAGE TO IT WAS CONTINGENT, REMOTE AND SPECULATIVE.

POINT IV.

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO THE EXISTENCE OF AN AGREEMENT BETWEEN THE APPELLANT AND WAGENER IMPROVEMENT COMPANY, AND THE GRANTING OF THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WAS PROPER AS THERE WAS NO SUBSTANTIAL AND MATERIAL PROOF OF THE EXISTENCE OF ANY AGREEMENT.

We are combining for argument points three and four in order to avoid repetition and because the argument in favor of one point of necessity is applicable to the other; and, generally, we are here concerned with the failure of proof. And, at this point, may we state that we are not taking issue with appellant's point three, not necessarily because we agree with its argument but because, as we have demonstrated, the statute of frauds is not applicable and is immaterial. We do, however, very strenuously take issue with appellant's first statement under his point three and we do most emphatically deny the existence of any agreement between Bird & Evans, Inc., and Wagener Improvement Company and the creation of any interest in land by reason thereof.

First, we desire to discuss the evidence presented and to compare it with the required elements of a contract. A contract must have parties, a subject matter, an offer and acceptance, a consideration and a time of performance, among other things. In the present case the subject matter is at best an indefinite and tenuous thing; there is, as far as we can ascertain from the record, no consideration of any kind passing to the Wagener Improvement Company; and the time of performance was absolutely missing. The only evidence offered with respect to this claimed agreement was through the witness, Dean Brayton, who in effect stated that he felt that he was an agent of both parties, but his statements as to an agreement fell far short of proving its existence. If this present action were one instituted

by Bird & Evans, Inc. against the Wagener Improvement Company for breach of this alleged agreement and to recover from them the cost of bringing the utilities to the very doorstep of appellant, Bird & Evans, Inc., we do not feel that anyone would seriously contend that an agreement had been proved upon which a recovery of that sort could be had. The State of Utah, by reason of this condemnation proceeding, should certainly be in no worse a position in this respect than would their condemnees.

With respect to the restrictive covenants themselves that were actually filed with relation to one part of the property condemned, there is some evidence of an agreement that they would be generally applicable to all of the property in the area, including that of appellant, although when they might have become applicable was most speculative. However, the existence of this agreement need be of no concern inasmuch as there is not a scintilla of evidence in the record to indicate, even by inference, that the exercise of the right of eminent domain by the respondent here violated or constituted a breach of those covenants.

The proof offered as to the damage suffered by appellant based upon the cost of bringing utilities to his property and of building sidewalks and streets is so far removed from the injury and damage that might have resulted from a breach of the restrictive covenants that it appears ridiculous.

The rule applicable is well stated in *Rose v. State*, 19 Cal. 2d 713, 123 P. 2d 505, where the Court at page 520 of the Pacific Reporter stated:

“In states such as California, where the recovery of damages depends upon the infringement of some right which the owner of land possesses in connection with his property, decisions have clearly indicated that, although the measure of damages is generally the diminution in market value, the evidence relied upon to establish such diminution must be based upon the depreciation flowing from the actionable injury which is the basis for the right to recover damages. Thus, in *People v. Gianni*, 130 Cal. App. 584, 20 P. 2d 87, a small portion of land was taken for public highway purposes. It was contended on behalf of the landowner that because a small portion of land had been taken and because he was entitled to recover for that injury, the damages to his remaining land should be based upon the total depreciation in the value of his remaining property even though that depreciation was caused primarily by an admittedly noncompensable element of damage, that is, diversion of traffic. The court said, however, that while diminution in market value was ordinarily the test of damage to real property, the damages must be limited to those which accrue *by reason of* the legal injury for which compensation was due.”

And in *City of Los Angeles v. Geiger*, 94 Cal. App. 2d 180, 210 P. 2d 717, at page 723, the Court said:

“The award of \$40,000 for the alleged excess cost of an overpass is indefensible even if the evidence admitted with reference thereto was unobjectionable. While the recovery of damages is not limited to instances of actual invasion of the

land itself, yet damages can be justified only by evidence of direct physical disturbance of *an existing right*, either public or private, which the owner possesses in connection with his property and which gives an additional value to it and by evidence that through such disturbance he has sustained a special damage with respect to his property or to a right appurtenant thereto different from or in excess of that suffered by the public in general.”

And, on page 724, the Court said:

“There can be no detriment to a right which never existed and no compensation for a loss not sustained. . . . Manifestly plaintiff cannot be required to pay damages for injury to a non-existent right or for a mere hope, surmise, conjecture or expectancy that a right might possibly be obtained in the future, . . . or for remote, speculative, imaginary, uncertain or conjectural possibilities.”

We respectfully submit that the language above quoted is particularly applicable to the claims of the appellants here and that the motion for judgment notwithstanding the verdict was proper.

CONCLUSION

The trial court granted the respondent's written motion for judgment notwithstanding the verdict, which motion was based upon three specified grounds, namely, the sovereign immunity of the State of Utah, the non-compensable nature of the alleged damage of the appellant and the complete failure of the appellant to sustain the burden of proof. We submit that the foregoing

argument and authorities demonstrate conclusively that the trial court's granting of this motion is sustainable on all three of the grounds presented although it is only necessary that it be sustained on any one. We respectfully urge upon this Court that the ruling of the trial court should be affirmed.

Respectfully submitted,

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