

1959

# Springville Banking Co. v. C. Taylor Burton et al : Brief of Appellant

Utah Supreme Court

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Bryce E. Roe; Fabian & Clendenin; Attorneys for Appellant;

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# In the Supreme Court of the State of Utah

SPRINGVILLE BANKING COMPANY,  
a corporation,

*Plaintiff,*

vs.

C. TAYLOR BURTON, ERNEST H.  
BALCH, WESTON E. HAMILTON,  
FRANCIS FELTCH and W. J. SMIRL,  
individually and as members of the  
UTAH STATE ROAD COMMISSION,

*Defendants.*

FILED

AUG 4 - 1959

Clerk, Supreme Court, Utah

Case No.

9066

## BRIEF OF APPELLANT

Bryce E. Roe  
FABIAN & CLENDENIN

800 Continental Bank Building  
Salt Lake City 1, Utah

*Attorneys for Appellant*

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# In the Supreme Court of the State of Utah

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vs.

C. TAYLOR BURTON, ERNEST H.  
BALCH, WESTON E. HAMILTON,  
FRANCIS FELTCH and W. J. SMIRL,  
individually and as members of the  
UTAH STATE ROAD COMMISSION,

*Defendants.*

Case No.  
9066

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This is an appeal from judgment of the District Court of Salt Lake County, by Hon. Stewart M. Hanson, dismissing plaintiff's action.

The complaint (R. 1) was filed on February 4, 1959, and personal service made upon C. Taylor Burton and Weston E. Hamilton, two of the named defendants, the following day.

Believing it appropriate under Section 27-2-13 Utah Code Annotated 1953, the Attorney General of Utah<sup>appeared and</sup> moved to dismiss on three grounds: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; and (3) failure to state a claim upon which relief might be granted. No affidavit or other proof was received by the Court either in support of or in opposition to the motion.

On April 22, 1959, the Court entered a judgment of dismissal of the action apparently basing its ruling solely upon the contents of the complaint. The complaint, except for the caption and signature, is set out below:

"1. The defendants, as members of the Utah State Road Commission, are charged with the duty of acquiring rights of way and instituting necessary actions to condemn private property for public highway use.

2. The plaintiff is now, and for the past three years has been continuously the owner of and in possession of a lot and building located on the northeast corner of Seventh South and Main Streets in Springville, Utah County, Utah.

3. The said two streets have been dedicated and set apart to the use of the public and to the special uses of the adjoining lot owners, as public streets and highways, and prior to the actions of the defendants as hereinafter alleged had been used as public streets continuously and constantly for many years.

4. In about April and May, 1958, defendants constructed concrete strips, or islands, within the boundaries of Main Street near the point at which Main and Seventh South Streets intersect.

5. The concrete islands are of such length and were constructed in such a manner that ingress and egress to and from the plaintiff's property has been greatly impeded, and the value of plaintiff's property has been greatly depreciated.

6. The impeding of plaintiff's ingress and egress was determined by defendants to be necessary for the proper and skillful construction of a highway for use of the public, and the highway was skillfully and properly constructed.

7. The concrete islands are of a permanent nature and will continue to impede ingress and egress in the manner heretofore alleged, and defendants have, for the use and benefit of the State of Utah, damaged the plaintiff's property for public use within the meaning of Article I, Section 22, Utah Constitution.

8. Plaintiff has never been paid or received any compensation whatever on account of its damages by reason of the construction as aforesaid; and the defendants have asserted that they have a right to construct and change the design of highways in front of the plaintiff's premises at will and that there is no obligation on the part of the State of Utah to compensate plaintiff for damages resulting from improvements upon or changes in the highway.

9. Plaintiff contends, on the other hand, that the defendants' impeding of ingress and egress to and from plaintiff's property is a damage of property within the meaning of Article I, Section 22 of the Utah Constitution, that the damage is compensable under the laws of the State of Utah, and that as the members of the Utah State Road Commission defendants

have an obligation to pay plaintiff for its damages or to commence a proceeding pursuant to Title 78, Chapter 34, Utah Code Annotated 1953, in which plaintiff's damages can be ascertained and assessed.

10. Although demands have been made upon them, the defendants have refused to take steps or initiate an action against the plaintiff pursuant to the provisions of Title 78, Chapter 34, Utah Code Annotated, 1953.

WHEREFORE, Plaintiff prays to the court:

1. For a declaration, pursuant to Title 78, Chapter 33, Utah Code Annotated 1953, that the impending of ingress and egress to and from plaintiff's property, for public use, is damage for which plaintiff is entitled to compensation under the provisions of Article I, Section 22 of the Utah Constitution, and that defendants have a duty to initiate an action pursuant to Title 78, Chapter 34, Utah Code Annotated 1953, in which plaintiff's damages can be ascertained and assessed.

2. For an order, pursuant to Rule 65(B)(3) of the Utah Rules of Civil Procedure, compelling the defendants to initiate an action against the plaintiff in the District Court of Utah County in accordance with the provisions of Title 78, Chapter 34, Utah Code Annotated 1953, in which the plaintiff may have the amount of its damages ascertained and assessed."

On May 19, 1959, the plaintiff filed its notice of appeal from the order of dismissal.



## STATEMENT OF POINTS

1. The Court had jurisdiction of the parties and the subject matter.

2. By the impeding of ingress and egress plaintiff's property has been "damaged for public use" within the meaning of Article I, Section 22, of the Utah Constitution.

3. An action in the nature of mandamus pursuant to Rule 65(B)(3) Utah Rules of Civil Procedure is appropriate to compel the defendants to initiate proceedings under which plaintiff's damages may be ascertained and assessed.

4. If mandamus will not lie, this is a proper case for a declaratory judgment action against the individual members of the Road Commission.

## ARGUMENT

### I

#### THE COURT HAD JURISDICTION OF THE PARTIES AND THE SUBJECT MATTER.

Although respondents' motion to dismiss questioned the Court's "jurisdiction over the subject matter" and "jurisdiction over the persons" we question that the question was meant to be serious. Process was served personally upon C. Taylor Burton and Weston E. Hamilton, giving the Court jurisdiction over those two defendants. If the motion filed by the Attorney General in behalf of the defendants does not constitute an appearance for the others, the Court nevertheless has jurisdiction to proceed, and under the provisions of Rule 4(b) of the

Utah Rules of Civil Procedure "the other or others may be served or appear at anytime before trial." The contention that there is no jurisdiction over the subject matter, is answered by the provision of Article VIII, Section 7 of the Utah Constitution, conferring upon District Courts original jurisdiction and power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs necessary to carry into effect their orders, judgments and decrees and to give them a general control over inferior courts and tribunals within their respective jurisdiction, also conferring upon them "original jurisdiction in all matters civil and criminal, not excepted in this Constitution and not prohibited by law." cf. *Brady v. McGonagle* (1921) 57 Utah 424, 195 Pac. 188, 191. The Court's jurisdiction over the subject matter is also recognized by the provisions of Rule 65B and 78-33-1 Utah Code Annotated 1953.

## II

BY THE IMPEDING OF INGRESS AND EGRESS PLAINTIFF'S PROPERTY HAS BEEN "DAMAGED FOR PUBLIC USE" WITHIN THE MEANING OF ARTICLE I, SECTION 22, CONSTITUTION OF UTAH.

This Court, consistent with decisions of federal courts under the Federal Rules of Civil Procedure, has approved the view that it is improper to dismiss a complaint for "failure to state a claim upon which relief can be granted" unless "it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim," recognizing that the purpose of a

complaint under our present rules of practice is to "give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." See *Blackham v. Snelgrove* (1955) 3 Utah 2d 157, 280 P.2d 453 and 2 *Moore's Federal Practice* (2nd Ed.) 2244.

The complaint leaves no doubt that the plaintiff is claiming a right to be compensated for a substantial interference, by the defendants acting in their roles as members of the Utah State Road Commission, with the plaintiff's right of access to its property. In a line of cases beginning in territorial days this Court has held that the right of access to real property is a valuable property right which may not be taken away without compensation.

One of the earliest cases is *Dooly Block et al v. Salt Lake Rapid Transit Company* (1893) 9 Utah 31, 33 Pac. 229, 224 L.R.A. 610, dealing with interference with and use of a city street resulting from construction of railroad tracks. Noting that the trial court had found the fee of Second South Street to be held by Salt Lake City in trust for street uses proper, the Court concluded:

"Therefore, under the law as applied to this class of cases, plaintiffs have property rights in the street in front of their lots, and the street is not subject to the absolute control of the legislature, nor can the legislature confer such control upon the city council."

The Court affirmed the judgment enjoining the Salt Lake Rapid Transit Company (claiming to operate under franchise from Salt Lake City) from laying a track in the street in front of plaintiff's property.

In *Morris v. Oregon Short Line R. Company* (1909) 36 Utah 14, 102 Pac. 629, an abutting owner brought action to recover damages arising by reason of the construction and operation of a railroad in a public street. The complaint alleged that the tracks would be permanently used for the defendant's trains and also the trains of another railroad company and (as paraphrased by the Court) "that by reason of the foregoing facts respondent's property will be injuriously affected; that the ingress and egress to and from the same will be greatly impeded; and that by other means directly attributable to the laying of said tracks, and the operation of said trains over them, as stated, the value of said property has been greatly depreciated." The Supreme Court upheld a judgment for the property owner after noting that the trial court had adopted the theory that the impeding of ingress and egress to and from the property because of operation of the railroad comes within the provisions of Article I, Section 22 of the Utah Constitution that "private property shall not be taken or damaged for public use without just compensation." The Supreme Court stated:

"That an owner of property, which abuts on a public street, has such a property right in the street that he may, in a proper action, recover damages for an interference with such right, when such interference directly affects his property, is too well settled by the authorities to require a further discussion. \* \* \* In such an action everything which arises out of the proper construction and proper operation of the railroad which directly affects the salable value of the abutting property may ordinarily be considered as elements in assessing damages. \* \* \* 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."

*State v. District Court, Fourth Judicial District* (1937) 94 Utah 384, 78 P.2d 502, which will be discussed at greater length hereinafter, recognizes a right of access as a property right which may not be taken or damaged for public use without just compensation.

The right of an abutting owner to recover for "shutting off or interfering with his access, light, or air," was recognized by the Court again in *State by State Road Commission v. Rozzelle et ux.* (1941) 101 Utah 464, 120 P.2d 276, in which both the majority and concurring opinions accept the principle that abutting owners are entitled to compensation for "any losses resulting from unreasonably cutting off their own access to their property."

The right of abutters was recognized again in *Boskovich v. Midvale City Corporation* (1952) 121 Utah 445, 243 P.2d 435, in which the Court noted:

"We have held, in a case cited even by the defendants, that if the dedicated streets of a subdivision are laid out and right to the use thereof has arisen, a private easement arises therein, which constitutes a vested proprietary interest in the lot owners, which easement survives extinguishment of any co-existing public easement calling for just compensation. Hence, Mr. B cannot be cul-de-sacked by the city or the school board without due process of law, and a respect for any loss proven to have been enjoyed by him thereto-

fore,—though such loss may not be great. This is as it should be, since people customarily buy property in subdivisions, part of the consideration for which is paid on the representation and assumption that the platted streets, dedicated and duly accepted, shall continue as a means of travel until public exigency otherwise demands,—in which latter event due process and just compensation must enter the picture.”

We are aware of cases denying an abutting owner the right to compensation for damage to his right of access. Other courts have reached a variety of results, their decisions frequently depending upon particular provisions of a state constitution, e.g., prohibiting the “taking” of property without just compensation but not prohibiting the “damaging.” For a collection of cases touching upon this and related problems see annotated, “Right of Abutting Owner to Compensation for Interference with Access by Bridge or Other Structure in Public Street or Highway,” 45 A.L.R. 534 et seq.; and annotated, “Abutting Owner’s Right to Damages or Other Relief for Loss of Access Because of Limited-Access Highway or Street,” 43 A.L.R. 2d 1072, 1077. Regardless of what other courts have done, under the Utah constitutional provision, it should be clear that an abutting owner may not have his right of access taken or substantially impaired unless he is adequately compensated.

A reasonable construction of the complaint in this case makes it clear that the plaintiff is not seeking to recover merely because of the diversion of traffic, or circuity of travel necessitated by re-routing of a street not abutting its property, as in *Robinett v. Price* (1929) 74 Utah 512, 280 Pac. 736. It should be clear from the complaint that plaintiff is complaining of a

situation similar to that considered by the Supreme Court of Mississippi in *Hamilton et al. v. Mississippi State High Commission* (1954) 220 Miss. 340, 70<sup>So</sup>~~2d~~ 856, an action to enjoin the highway commission from maintaining a median strip in a highway intersecting a city street. There the Supreme Court of Mississippi held that the plaintiff, whose property lay along the street and the highway, was an "abutter" on the street and that the street could not be vacated without paying the plaintiff compensation. To the argument that the plaintiff had not shown that his damages were any different than other property owners the Court noted that this is the kind of thing which should be the subject of proof at a trial and should not be decided on a motion for dismissal of the complaint. At the trial in the instant case—on the pleading filed—plaintiff would be permitted to prove that the State Road Commission has virtually closed two city streets as means of access to plaintiff's property and created a kind of cul-de-sac.

### III

AN ACTION IN THE NATURE OF MANDAMUS PURSUANT TO RULE 65B(b)(3) OF THE UTAH RULES OF CIVIL PROCEDURE IS APPROPRIATE TO COMPEL THE DEFENDANTS TO INITIATE PROCEEDINGS UNDER WHICH PLAINTIFF'S DAMAGES CAN BE ASCERTAINED AND ASSESSED.

The complaint having been so drawn that the plaintiffs would be able to prove the taking of or damage to a valuable property right without any compensation for it, the trial court erred in dismissing the complaint unless neither a proceeding

like mandamus under Rule 65B, nor a declaratory judgment action against the individual members of the road commission is an appropriate method of determining the plaintiff's rights or compelling the road commission members to do their duty. Many courts have considered the problem; and having concluded that it is meaningless to talk about a "right without a remedy," hold that where property is "taken or damaged" under constitutional provisions that prohibit "taking or damaging" without just compensation, the injured property owner may proceed to mandamus the proper public officers. Mandamus has been granted not only to require payment of an award but to compel initiation of appropriate proceedings established by statute for the ascertainment and assessment of damages. The following cases are representative, a great number holding mandamus to be proper.

In *Dawson v. McKinnon et al.* (1939) 226 Iowa 756, 285 N.W. 258, property owners sought mandamus compelling the defendants to initiate the proper statutory proceedings to assess damages sustained by the plaintiff because of the impairment of access, ingress and egress to her property. The condition had resulted from construction of a public highway. A judgment for the defendants was reversed on appeal to the Iowa Supreme Court, that court saying:

"It is our judgment that the defendant commissioners have taken the larger part of the drive, street, or way over which the appellant had an easement, and in doing so they have destroyed a property right which she had therein, and have very seriously interfered with and impaired the access which she had to and from her land, causing her damage which she is en-



titled to have established in the manner required by law."

The doctrine announced in *Dawson v. McKinnon* was affirmed in *Baird v. Johnson* (1941) 230 Iowa 161, N.W. 315 and in *Anderlik et al. v. State Highway Commission et al.* (1949) 240 Iowa 919, 38 N.W. 2d 605. The latter action was brought to compel the highway commission to institute condemnation proceedings for assessment of damages for construction of an approach to a viaduct in the highway in front of plaintiff's residences. After holding that the substantial impairment of or interference with rights of access, light, air or view is a "taking" within the meaning of the Iowa constitution the Court again held:

"Mandamus will lie to compel the institution of condemnation proceedings where there has been a taking of private property for public use without compensating the owner."

The Supreme Court of Illinois has approved the issuance of a writ of mandamus to compel institution of proceedings to ascertain compensation where damages to land has resulted from the separation of grades on a highway. In *People ex rel. First National Bank of Blue Island v. Kingery* (1938) 369 Ill. 289, 16 N.E. 2d 761, holding a writ of mandamus to be proper, the Court said:

"Our Bill of Rights \* \* \* provides that 'every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay.' All that the plaintiff

in this case seeks is the right to have the judgment of her peers as to the amount of damages, if any, she has suffered. This writ is guaranteed by Sect. 13 of Art. II of the Constitution of Illinois [providing that private property shall not be taken for public use without just compensation].

"It is vigorously urged that the provisions of Sect. 281k of the Second State Bond Issue Act of 1923 (Ill. Rev. Stat. 1937, Ch. 121, p. 2796) and the Eminent Domain Act, do not contemplate the ascertainment of damages which have already been inflicted, and, also, that damages resulting to an abutting proprietor, no part of whose land is physically taken, are likewise not within such contemplation. We cannot sustain these contentions. To do so would violate the letter and spirit of the Constitution. The right of a proprietor to damages because his property is taken or damaged for public use is absolute and it makes no difference whether the amount of damages is ascertained before the injury is inflicted or after it. Giving the statute and the Constitution any different construction would be to annul them."

The Supreme Court of West Virginia consistently has upheld the right to mandamus where property has been taken or damaged without compensation. In *Stewart v. State Road Commission of West Virginia* (1936) 117 W. Va. 352, 185 S.E. 567, the court refused to permit a mandamus action against the State Road Commission as such but noted that a property owner whose land was taken for road purposes is able to mandamus the commissioner in person to condemn his land. A property owner tried this in *Riggs et al. v. State Road Commissioner* (1938) 120 W. Va. 298, 197 S.E. 813, and was successful. The Court stated:

"In their petition and proof the relators took the positions that, though there had been no taking of any portion of their property, it has been seriously damaged by the new construction, and that, notwithstanding the work had been completed for five and one half months when the petition herein was filed, the respondent has declined to institute proceedings to ascertain the amount of the damages suffered by relators. They seek mandamus to compel respondent to proceed to have the damages settled. Respondent by answer and depositions, denies that the property of relators has been damaged.

"Although there is sharp conflict between the parties in both allegation and proof respecting the alleged damage, we are of the opinion that the showing made by relators is sufficient to entitle them to have the controversy determined in a proceeding usual for such matters. Always, in some manner, there must be opportunity afforded property owners for judicial determination of their bona fide claims for damages to their property on account of public improvement. Any other conclusion would not be consonant with fundamental principles. \* \* \*

"In *Hardy v. Simpson, Road Commissioner*, 190 S.E. 680, 683, we stated: 'A duty rests on the State to take necessary steps under our condemnation statutes to ascertain damages to the owners of private property, whether the same is actually taken, or damaged only. \* \* \* We conclude that the Road Commissioner may be required to institute such proceedings as may be necessary to ascertain and pay proper damages to property owners where their property is either taken or damaged; the commissioner has a reasonable discretion as to the time when such proceedings shall be instituted, in cases of property damage only. \* \* \*

" 'Private property shall not be taken or damaged

for public use without just compensation \* \* \* ' W. Va. Const., Art. III, Sect. 9. 'It is imperative that this paramount provision of our organic law be given effect.' "

The holding in *Riggs et al v. State Road Commissioner* was affirmed and again applied to compel institution of proceedings in *Appalachian Electric Power Company v. Sawyers* (1956) 141 W. Va. 769, 93 S.E. 2d 25.

In *People ex rel. Doyle Green et al.* (1875) 3 Hun. (N. Y.) 755 the trial court granted a peremptory writ of mandamus requiring confirmation of an assessment of damages for injuries to the relator's property arising from the change of grade of a New York street. The appellate court affirmed the judgment, stating with reference to mandamus:

"The remedy by mandamus seems to be the appropriate and only one at this stage of the proceedings. The relator has no remedy by action at law for her damages. \* \* \* Her sole remedy is through the special proceedings authorized by statute, and unless those proceedings are regularly brought to complete consummation, she cannot enforce payment as permitted by the acts above referred to. Whatever official step is essential to that end, whenever it becomes a duty which an officer or board of officers is legally bound to perform, becomes also the appropriate subject of mandamus, if the officer refuses to perform the duty to the prejudice of public or private rights."

The judgment was affirmed by the Court of Appeals of New York on the basis of the opinion of the Appellate Division.

In *McDowell et ux. v. City of Asheville* (1983) 112 N.C. 747, 17 S.E. 537, the Supreme Court of North Carolina upheld

the action of the trial court in granting mandamus to compel the city to assess damages to plaintiff's land pursuant to a special statutory procedure. The Court said:

"Now, it may be true, as contended by counsel, that the defendant alone having the power to initiate statutory proceedings, and having failed to do so, may be treated as a trespasser, and sued in ejectment \* \* \* but it is clear that such a remedy would not be appropriate to the particular circumstances of this case. The defendant is still occupying the land as a street, claiming it under the right of eminent domain conferred by its charter, and the plaintiffs evidently prefer that the street should remain, and therefore do not elect to treat the defendant as a trespasser. Such being the case, the appropriate remedy is to compel the defendant to assess damages as provided by its charter. In accordance with this view it has often been held that mandamus is a proper remedy in cases of this character. Mr. High (Extr. Rem. 318) says 'the writ has frequently been granted to protect the rights of land-owners to compensation for their lands taken in the construction of works of public improvements; and where a railway or other corporation is vested with the right of eminent domain, it may be compelled to mandamus to take the necessary steps for summoning a jury to assess damages for the property taken or damaged.' [citing other authorities]. These authorities abundantly sustain the position that, where the statute does not provide that the owner may institute proceedings, the party condemning, on whom it is imposed the duty, may be compelled to do so by mandamus. Being clearly of this opinion, we have deemed it unnecessary to enter into an elaborate discussion of all the authorities presented by the intelligent counsel."

In *Gibson v. City Council of Greenville* (1902) 64 S.C. 455, 42 S.E. 206, a property owner sought a writ of mandamus to compel the defendant City Council to appoint a commission to assess the amount of damages suffered by the plaintiff through the alteration of the grade of Main Street. On appeal the Supreme Court of South Carolina affirmed the action of the trial court in granting the writ, saying:

"In [an earlier case] the City Council of Greenville defeated an action for damages at common law on the ground that the statutory remedy is exclusive, and now attempts to defeat the remedy provided by statute on the ground that it has not been heretofore adjudged liable to make compensation, and that such liability is denied, and that such issues cannot be determined in the statutory remedy. This is no defense whatever against the performance of its plain ministerial duty under the statute; the undisputed facts being that W. C. Gibson is the owner of the lot abutting on Main Street, in said city; that the grade of said street has been altered by the City Council; that the lot owner claims to have been damaged thereby, and demands compensation; that the lot owner has requested the City Council to appoint a commissioner to assess compensation under Sect. 30 of the City Charter; and that the City Council has refused to make such appointment."

The Supreme Court of Minnesota regarded mandamus as a proper remedy in *State v. Anderson* (1945) 220 Minn. 139, 19 N.W. 2d 7. This was an action in which the issue was whether property owners not joined in a condemnation proceeding might intervene where they claimed that their property had been damaged by the improvement. In discussing the Minnesota condemnation statutes on the question of whether

intervention should be permitted or whether the property owner should be required to mandamus the commissioner to join them as parties in the condemnation proceeding, the Court said:

"Taking all the statutory provisions together, it seems not too great a strain on the judicial conscience to hold that it is the ministerial duty of the commissioner to start condemnation proceedings against land that he has already subjected to damage for highway purposes. If so, then mandamus will lie, and in the proceeding all issues may be determined.

"In this state, a writ of mandamus is a civil action, which gives the state officers an opportunity to answer and set up either that the land was not damaged or that the State proposes to remedy or has remedied the construction which causes the damage and therefore that it does not seek to acquire an easement or title. The issue so raised may thus be tried in the ordinary way by witnesses subject to cross-examination."

The Court went on to adopt mandamus as the ordinary procedure by which property owners may assure a hearing on the question of damages to their property. Although the Minnesota statute differs in substantial respects from that of Utah, the Court did recognize the need for and propriety of mandamus.

In *Clark v. City of Elizabeth et al.* (1898) 61 N.J.L. 565, 40 Atl. 616, 737, a property owner brought a mandamus to compel the city to take appropriate action to determine damages due relator for injuries to her property resulting from a change of street grade. A judgment for the defendant was reversed on appeal. In discussing the appropriateness of mandamus as a remedy the Court of Errors and Appeals of New Jersey

held that the Act of 1889 did more than confer simply a discretionary power notwithstanding it used the words "It shall be lawful for the municipal authorities in any such city to make or cause to be made a proper award for damages," the Court saying:

"This contention cannot be yielded to. Words which, in their ordinary acceptance, and when interpreted exclusive of the context and the subject matter, imply a discretion or power, such as 'it shall be lawful,' and the like, became in the construction of statutes mandatory where such is the legislative intent. The general rule is stated as follows: 'Where a statute confers authority to do a judicial, or, indeed, any other, act, which the public interest or even individual right may demand, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having a right to make the application.' \* \* \*

" \* \* \* The power [to assess damages] is one that exists for the benefit of the persons injured by such public improvements as the parties interested, and the authority to have an assessment of damages made is a power given for their benefit, and, although expressed in language in form discretionary, it is in reality upon settled legal principles imperative."

The view that mandamus is available as a remedy to compel initiation of condemnation proceedings was affirmed in *Empire Trust Company v. Board of Commerce and Navigation et al.* (1940) 124 N.J.L. 406, 11 A.2d 752, in which the Court refused declaratory relief on the ground that it was not maintainable, under New Jersey practice, if another adequate remedy was available, and mandamus "commanding the institution



of condemnation proceedings to fix compensation for lands taken" was available to petitioner.

The right to mandamus has been recognized, also, in a number of other cases. See *Folmar v. Brantley et al.* (1939) 238 Ala. 681, 193 So. 122, in which the Court denied mandamus because the right to relief was not shown but recognized that mandamus is a proper remedy where condemnation has not been brought; *People v. Sass* (1898) 179 Ill. 357, 49 N.E. 501, involving the power of a city to sell property for special assessments where the property upon which the improvement was placed had not been first acquired by the condemnation, and in which the Court held that whether the property has been acquired made no difference since the property owner has other remedies, among which is mandamus to compel the city to condemn the property; *Klaus v. Mayor of Jersey City* (1903) 69 N.J.L. 127, 54 Atl. 220, which was an action in mandamus to compel city authorities to have a proper award made and the mandamus was granted; *Mount Vernon Realty Corporation v. City of Mount Vernon* (1934) 241 App. Div. 882, 271 N.Y.S. 742, in which an action for damages was dismissed but it was held that an abutter whose property is damaged by a change of grade is limited to the statutory remedy of condemnation, "and in event such proceedings are not brought he may mandamus the municipality to institute them"; and *State v. Board of Supervisors, etc. of Town of Leon* (1896) 66 Wis. 199, 28 N.W. 140, in which a writ of mandamus was held to be a proper means of compelling initiation of proceedings to assess damages.

This Court has never directly decided the question of

whether mandamus is available to compel the individual members of the State Road Commission to initiate condemnation proceedings. It has held that they may be enjoined from proceeding with construction of a project if the construction will damage property of an abutting owner and no proceedings for condemnation have been initiated. *State, by State Road Commission et al, v. District Court, Fourth Judicial District* (1937) 94 Utah 384, 78 P.2d 502. In the above cited case, the Court went a long way toward clarifying the rights of the individual as against the rights of the State in the construction of public improvements. It held, in making permanent a writ prohibiting the District Court from proceeding directly against the State Road Commission as such, that a suit against the Commission is a suit against the State and that the State's cloak of immunity fits the State Road Commission as well. The Court was not confronted directly with the question of whether mandamus will lie. However, at page 509 of the Pacific Reporter the Court quoted with approval language of the Supreme Court of West Virginia in which it was stated that mandamus against the commissioner would lie to compel condemnation of a property owner's land.

Our Rule 65B(b) provides that if there is no other plain, speedy and adequate remedy relief may be obtained:

"Where the relief sought is to compel any inferior tribunal, or any corporation, board or person to perform an act which the law specially enjoins as a duty resulting from an office, trust or action; \* \* \* "

The plaintiff cannot bring its action against the State because the State has not consented to be sued; under the

decision in the *Fourth District Court* case, neither will an action lie directly against the State Road Commission; under the decision in *Hjorth v. Whittenburg* (1952) 121 Utah 324, 241 P.2d 907, damages cannot be recovered from individual members of the State Road Commission for injury to property without condemnation. Accordingly, if the plaintiff is not able to compel the defendants, through issuance of mandamus pursuant to Rule 65B(b) (3) the plaintiff is left with only the diffuse aroma of a "remediless right." Where injunction is available to protect the quick and the clairvoyant, mandamus ought to be available to protect the rest of us. As this Court said in the *Fourth District Court* case:

"We are of the opinion that where private property is taken or damaged for public use, as is alleged in the complaint in the injunction suit, without any agreement with the owner for compensation, and without any proceedings for assessment in the manner provided by the statute relating to eminent domain, a court of equity may properly take jurisdiction where the only remedy remaining to the land owner is to present a claim to the Board of Examiners."

It is inconceivable that the Court's consoling statement to the losing plaintiffs in *Hjorth v. Whittenburg*—that relief might be obtained from the Board of Examiners—was meant as a renunciation of the point of view so carefully spelled out in the *Fourth District Court* case:

" \* \* \* Under the statutes of Utah relating to eminent domain, and under the constitutional provisions of Utah herein referred to, the plaintiffs in the injunction suit cannot be compelled to submit to the legislature or the Board of Examiners the question whether their property has been damaged by the construction

complained of nor the question of what amount will compensate them for such damage."

In the above holding the Court recognized that the courts, not the legislature or the Board of Examiners, were established by the Constitution for the protection of minority rights. The political arm of the government protects the rights of the majority; it is the majority. Its decisions can be based on whim or political expediency. But our Constitution protects the individual by providing that just compensation shall be paid for damage to property for public use (Art. I, Sec. 22); that the constitutional provisions are mandatory and prohibitory (Art. I, Sec. 26); and that the *Courts* shall be open to every person so that he may "have remedy by due course of law" for injury to him or his property (Art. I, Sec. 11). These provisions are met not by permitting supplicants to ask for compensation but by permitting plaintiffs to demand it.

#### IV

IF MANDAMUS WILL NOT LIE, THIS IS A PROPER CASE FOR A DECLARATORY JUDGMENT ACTION AGAINST THE INDIVIDUAL MEMBERS OF THE ROAD COMMISSION.

Appellant recognizes that one of the conditions for granting the extraordinary remedies provided by Rule 65B, Utah Rules of Civil Procedure, is that "no other plain, adequate and speedy remedy exists." Some courts have held mandamus to be improper where relief could be obtained through a declara-

tory judgment action; appellants therefore included in the complaint allegations of a controversy with the members of the Road Commission concerning the appellant's rights and the commission members' duties under the constitution and statutes of Utah. The prayer of the complaint asked, alternately, for an order pursuant to Rule 65B(b) (3) and a declaration, pursuant to Title 78, Chapter 33, Utah Code Annotated 1953.

It is provided in 78-33-2 Utah Code Annotated 1953 that:

"Any person interested under a deed, will or written contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

An action against a public official is not a "suit against the State", where it is brought to compel the performance of a ministerial duty. This has long been accepted. In *Houston v. Ormes* (1920) 252 U.S. 469, 40 S. Ct. 369, 64 L. Ed. 667, it was contended that because the object of the suit and the effect of the decree were to compel action by government officers in the performance of their official duties the suit was in effect one against the United States. But the Supreme Court of the United States said:

"But \* \* \* it is clear that the officials of the Treasury are charged with the ministerial duty to make payment on demand to the person designated. It is settled that in such a suit a case brought by the person entitled to the performance of the duty against the official

charged with its performance is not not a suit against the government. So it has been declared by this Court in many cases relating to state officers."

In *Minnesota v. Hitchcock* (1901) 185 U.S. 373, 22 S. Ct. 650, 46 L. Ed. 954, the Court held that although a suit against officers of the United States might be in effect a suit against the United States, whether it was or not depended upon what was sought to be accomplished.

"Of course, this statement [that the State, though not named, may be the real party in interest] had no reference to and did not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. Such suits would not be deemed suits against the United States within the rule that the government cannot be sued except by its consent nor within the rule established within the Ayers case."

So it doesn't seem to make much difference whether the action is for mandamus or for a declaratory judgment. Each of the appellants' claims for relief seeks to compel administrative officers to perform their ministerial duty. A mandatory order to the defendants might be issued under 78-33-8 Utah Code Annotated 1953.

The court in *State v. District Court, Fourth Judicial District* (1937) 94 Utah 384, 78 P.2d 502, supra, held that a suit against the individual members of the Utah State Road Commission to enjoin them from proceeding with construction of a highway was not a suit against the State. There is no valid distinction between that case and an action for mandamus

or declaratory relief. This court has decided cases on the merits although brought against state officers or boards. See, for example, *University of Utah v. Board of Examiners of State of Utah et al.* (1956) 4 Utah 2d 408, 295 P.2d 348; and *Bateman v. Board of Examiners of the State of Utah* (1958) 7 Utah 2d 221, 332 P.2d 381.

## CONCLUSION

Under the complaint in this case the appellant would have been entitled to prove that it was an abutter on both Main and Seventh South Streets in Springville; and that the defendants, acting as members of the Utah State Road Commission, had constructed certain barriers within Main Street. Appellant would be entitled to show that access to and from its property by way of either Seventh South Street or Main Street was substantially affected and that the property might not be usable by anyone except folks coming from Thistle. Appellant would also be entitled to show that it has not been compensated for the damage to its property; that the defendants have refused to compensate it, disclaiming any obligation to do so, and asserting that even if there is such an obligation, there is no way for the appellant to enforce it. This represents the kind of "due process" problem that the United States Supreme Court turned away from in *Martin v. Creasy* (1959), U.S. 79 S. Ct. 3 L. Ed. 2d 1186, but will probably have to look in the face before asphalt completely replaces turf.

The trial court should not have dismissed the action. The complaint stated a claim upon which relief (one type or the

other) can be granted. If injunction is a proper remedy against individual members of the Road Commission, mandamus and declaratory judgment are just as proper. To deny the appellants the relief sought in this action would be to make two distinctions, by the making of which relief of parties would depend not so much upon the merits of their causes, but upon a happenstance. A party could protect himself or not, depending upon whether he was able to act quickly enough to enjoin construction, or could foresee the kind of damages that might result from it. Another party's rights might depend upon whether the Road Commission were able to reach a settlement with all of the property owners along the route being constructed or repaired, for if the Commission were not able to arrive at a settlement and had to condemn property owners might, under the provisions of 78-34-7 Utah Code Annotated 1953, intervene in an action as parties and have their damages determined.

The trial court erred in dismissing the action. The judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Bryce E. Roe

FABIAN & CLENDENIN

800 Continental Bank Building  
Salt Lake City 1, Utah

*Attorneys for Appellant*