

1959

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

Utah Supreme Court

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Walter L. Budge; Franklyn B. Matheson; Attorneys for Respondents;

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SEP 14 1959

In the

Clerk, Supreme Court, Utah

# Supreme Court of the State of Utah

SPRINGVILLE BANKING COM-  
PANY, a corporation,  
*Plaintiff and Appellant,*

—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 COM-  
MISSION,  
*Defendants and Respondents.*

Case No.  
9066

## BRIEF OF RESPONDENTS

WALTER L. BUDGE  
Attorney General

FRANKLYN B. MATHESON  
Assistant Attorney General  
*Attorneys for Respondents*

# TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS .....	1
STATEMENT OF POINTS.....	4
ARGUMENT .....	4
POINT I. UNDER THE FACTS AS ALLEGED IN PLAINTIFF'S COMPLAINT THE DISTRICT COURT OF SALT LAKE COUNTY HAS NO JURISDICTION OVER THE DEFENDANTS INDIVIDUALLY OR AS MEMBERS OF THE UTAH STATE ROAD COMMISSION.....	4
POINT II. THE PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED.....	18
CONCLUSION .....	32

## AUTHORITIES CITED

24 Am. Jur., Public Highways.....	18
25 Am. Jur., Highways, Sec. 154.....	17
34 Am. Jur., Mandamus, Sec. 4.....	29
34 Am. Jur., Mandamus, Sec. 7.....	30
34 Am. Jur., Mandamus, Sec. 123.....	30
43 ALR 2d 1072 .....	17, 18
90 ALR 1482 .....	21
97 ALR 192 .....	21
100 ALR 491 .....	21
118 ALR 921 .....	21
55 C.J.S., Mandamus, Sec. 51 .....	29
2 Moores Fed. Prac., 2nd Ed. 2244.....	14

## CASES CITED

Blackham v. Snelgrove, 1955, 3 U. 2d 157, 280 P. 2d 453.....	14
Board of Education of Ogden v. Anderson, 93 Utah 522, 74 P. 2d 681, 1937 .....	29

# TABLE OF CONTENTS—(Continued)

	<i>Page</i>
Campbell Building Co. v. State Road Commission, 1937, 95 Utah 242, 70 P. 2d 857 .....	5
Carazella v. State, 269 Wisc. 608a, 71 N.W. 2d 276.....	22
City Service Oil Co. v. City of New York, 1958, N.Y., 154 N.E. 2d 814 .....	25
Dooly Block, et al. v. Salt Lake Rapid Transit Co., 33 P. 229....	25
Hjorth, et al. v. Whittenburg, et al., 1952, 241 P. 2d 907, 121 Utah 824 .....	5, 6, 7, 9, 10, 12, 18, 33, 34
Hoffman v. Lewis, Judge, 31 Utah 179, 87 P. 167, 170, 1906....	29
Langley Shopping Center v. State Roads Commission, 1957, Md., 131 A. 2d 690 .....	23
Miles v. Armstrong, C.A. 7th, 1953, 207 F. 2d 284, as ab- stracted at 2 Moores Fed. Prac., 2nd Ed., 1958 Supp., p. 200 .....	15
Muse v. Mississippi State Highway Commission, 103 S. 2d 852 .....	21
Oklahoma Turnpike Authority v. Chandler, 1957 Okla., 316 P. 2d 828 .....	24
Pennoyer v. McConnaughy, 140 U.S. 1, 11 S. Ct. 699, 35 L. Ed. 363 .....	30
Ramelli v. City of New Orleans, 1957 La., 96 S. 2d 572.....	23
Reardon v. Daly City, 1945 Cal., 163 P. 2d 462.....	29
Robinett v. Price (1929), 74 Utah 512, 280 Pac. 736.....	19, 20
Smick v. Commonwealth, 1954 Ky., 268 S.W. 2d 424.....	22
State v. District Court, Fourth Judicial District, 1937, 94 Utah 384, 78 P. 2d 502.....	5, 6, 7, 8, 9
State of Utah v. Fred Tedesco, et al., 1955, 286 P. 2d 785, 4 U. 2d 31 .....	12, 13
State Highway Department v. Strickland, 1958 Ga., 102 S.E. 2d 3 .....	24
Thomas and Warner, Inc. v. City of New Orleans, 1956 La., 89 S. 2d 885 .....	22
Zions Railroad and Light Corporation v. Lindsey, 211 Iowa 544, 231 N.W. 461 .....	17

## TABLE OF CONTENTS—(Continued)

STATUTES CITED	<i>Page</i>
Sec. 27-2-1, U.C.A. 1953, as amended.....	4
Sec. 27-2-13, U.C.A. 1953 .....	2
Sec. 27-2-7, U.C.A. 1953 .....	15
Sec. 27-9-3, U.C.A. 1953.....	16
Sec. 63-6-17, U.C.A. 1953 .....	11
Title 78, Ch. 33, U.C.A. 1953.....	2, 31
Title 78, Ch. 34, U.C.A. 1953.....	2, 30
Art. I, Sec. 22, Utah Const.....	2, 8
Art. VII, Sec. 13, Utah Const.....	9
Rule 65(b) (3), Utah Rules of Civil Procedure.....	2

In the  
Supreme Court of the State of Utah

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SPRINGVILLE BANKING COM-  
PANY, a corporation,  
*Plaintiff and Appellant,*

—vs.—

C. TAYLOR BURTON, ERNEST H.  
BALCH, WESTON E. HAMILTON,  
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SMIRL, individually and as members  
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MISSION,

*Defendants and Respondents.*

Case No.  
9066

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BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

On or about February 4, 1959, complaint in the above entitled matter was filed and personal service made the following day upon two of the defendants, C. Taylor Burton and Weston E. Hamilton. In said complaint plaintiff alleges ownership and possession of a lot and

building located on the northeast corner of 7th South and Main Streets in Springville, Utah County, Utah, and that in about April and May, 1958, defendants constructed concrete strips or islands within the boundaries of Main Street in such a manner as to impede ingress and egress to and from plaintiff's property, and that plaintiff's property has been greatly depreciated thereby. Plaintiff admits that said strips or islands were constructed for the use of the public in a skillful and proper manner, but further alleges that by such construction the defendants have damaged plaintiff's property within the meaning of Article I, Section 22, Utah Constitution. Plaintiff therefore asks the Court for a declaration pursuant to Title 78, Chapter 33, U.C.A. 1953, that for such damages the plaintiff is entitled to compensation and further, 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 accordance with the provisions of Title 78, Chapter 34, U.C.A. 1953, for the purpose of ascertaining and assessing the amount of damages. (See Complaint, R. 1).

The defendants, by and through the Attorney General of the State of Utah, as provided in Section 27-2-13, U.C.A. 1953, moved to dismiss the complaint as follows: (R. 4).

"Come now the defendants by and through the Attorney General of the State of Utah, as provided in Section 27-2-13, Utah Code Annotated 1953, and move the court as follows:

1. To dismiss the action or, in lieu thereof, to quash the returns of service of summons on

the grounds of lack of jurisdiction over the subject matter, or if the court finds it does have jurisdiction over the subject matter,

2. To dismiss the action for :

(a) lack of jurisdiction over the persons of defendants, and

(b) failure to state a claim against defendants upon which relief can be granted."

On April 22, 1959, the Honorable Stewart M. Hanson, Judge, District Court of Salt Lake County, after oral argument and the presentation of briefs by the respective parties, dismissed plaintiff's action. Plaintiff now appeals from said dismissal.

For the purpose of clarification and to assist the Court in visualizing the situation involved, we enclose and attach hereto as Appendix A a schematic drawing, prepared by the Utah Road Commission, of the area involved in plaintiff's complaint. For purpose of identification the area shown in yellow is 7th South Street; the area shown in brown marked "L" line is Main Street; the area shown in brown marked "F" line is the north bound lanes of U. S. Highway 89-91; the area shown in red is the frame store allegedly belonging to the plaintiff; the areas shown in green are the median strips, or as designated in the complaint, concrete islands, claimed to interfere with ingress and egress to plaintiff's frame store. You will note that Main Street is now designated as a one-way street with traffic flowing northward. 7th



South remains a two-way street. U. S. Highway 89-91 is divided as to south-bound and north-bound traffic by the median strips shown.

## STATEMENT OF POINTS

### POINT I.

UNDER THE FACTS AS ALLEGED IN PLAINTIFF'S COMPLAINT THE DISTRICT COURT OF SALT LAKE COUNTY HAS NO JURISDICTION OVER THE DEFENDANTS INDIVIDUALLY OR AS MEMBERS OF THE UTAH STATE ROAD COMMISSION.

### POINT II.

THE PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED.

## ARGUMENT

### POINT I.

UNDER THE FACTS AS ALLEGED IN PLAINTIFF'S COMPLAINT THE DISTRICT COURT OF SALT LAKE COUNTY HAS NO JURISDICTION OVER THE DEFENDANTS INDIVIDUALLY OR AS MEMBERS OF THE UTAH STATE ROAD COMMISSION.

Section 27-2-1, U.C.A. 1953, as amended, reads in part as follows:

“\* \* \* By its name the commission may sue, and it may be sued only on written contracts made by it or under its authority. \* \* \*”

In the case of *Campbell Building Company v. State Road Commission*, 1937, 95 Utah 242, 70 P.2d 857, this Court held that the State Road Commission is an arm or agency of the state and that, therefore, the State Road Commission cannot be sued by nature of sovereign immunity unless the state, through legislative or constitutional action, has given its consent. This Court then states that the consent by the state to be sued on certain contracts of the Road Commission does not open the door to liability on account of the negligence or misconduct or wilful conduct or unauthorized acts of officers or agents of the state.

In the case of *State v. District Court, Fourth Judicial District*, 1937, 94 Utah 384, 78 P.2d 849, this Court held that an injunction suit to restrain the State Road Commission from constructing a viaduct along a portion of a street could not be maintained since such suit was one against the state and there was no consent to be sued or waiver of state's immunity from suit.

We submit, therefore, that the District Court of Salt Lake County has no jurisdiction over the defendants as members of the State Road Commission under the facts alleged in plaintiff's complaint. From page 25 of the brief of appellant in this appeal, we assume there is no argument on this point.

As to the jurisdiction of the District Court over the individual members of the State Road Commission, we cite the case of *Hjorth, et al. v. Whittenburg, et al.*, 1952,

241 P.2d 907, 121 Utah 324, wherein this Court stated that:

“We hold that where consequential injury to property arises out of the faithful and honest performance of duties imposed by law upon members of the Road Commission, such officials are not required to respond personally.” (241 P.2d, p. 909)

Faced with the decision of what we shall hereafter refer to as the Fourth District case (State v. District Court, Fourth Judicial District, *supra*), i.e., that the Road Commission can not be enjoined from consequential damage, and the decision of the Hjorth case (Hjorth, et al. v. Whittenburg, *supra*), i.e., that the individual members of the Road Commission may not be sued for consequential damages, the plaintiff now attempts to accomplish the end denied in both the Fourth District case and the Hjorth case by the skillful use of the procedural device of mandamus.

In our opinion the proper conclusion in this matter is predicated upon a correct understanding and reconciliation of the Fourth District and Hjorth cases. In the Fourth District case, the action was filed to enjoin the State Road Commission from proceeding with certain street improvements which would result in consequential damage to the plaintiff. As in the instant matter, there was no allegation of a taking, only that of a prospective damage. The plaintiff in the Fourth District case argued that an injunction suit against the State Road Commission

was not a suit against the State of Utah. The Court replied.

“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.” (78 P.2d, p. 504).

Then by way of dicta, the Court volunteered that “. . . if the individual members of the Road Commission are personally made parties defendant in the injunction suit, the case will be different than if prosecuted against the Road Commission as a body.” (78 P.2d pg. 505). This dicta to the effect that the individual members of the Road Commission could be enjoined from a consequential damage was argued by the plaintiff in the Hjorth case as authority for the proposition that the individual members of the Road Commission could be sued for consequential damages. In reviewing the findings of the trial court, this Court stated in the Hjorth case as follows:

“The trial court relied to a considerable extent upon the case *State by State Road Commission v. District Court, Fourth Judicial District* \* \* \* which involved an injunction against individual members of the Road Commission and some of the language therein which seems to indicate that the commissioners may be sued individually for damages. We think, however, that this dicta is not the true rule for reasons which will hereinafter appear. In fact, the dissenting opinion of Mr. Chief Justice Wolfe foreshadows and suggests the holding in this case.” (241 P.2d 908).

We could do nothing better in urging our position in the present matter than to quote verbatim the dissenting argument of Justice Wolfe in the Fourth District case. For brevity, however, we refer only to the following points argued by Chief Justice Wolfe and refer the Court to the authorities cited by him.

(1) There is a fundamental difference in the "taking" by a state agency and a damage consequent on the performance of the duty which does not involve a taking. (78 P.2d, p. 512).

(2) If the Road Commissioners are acting within their authority, then even a suit against them individually as defendants is a suit against the state. (78 P.2d, p. 512). It is fundamental that where those in charge of an agency representing the state are sued in their individual capacities, it is in effect a suit against the state if the act or authority under which they act is constitutional, and they are acting within that authority. The members of the State Road Commission, when acting within their authority in making changes in the highway for the safety of the public, cannot be coerced or delayed by injunction into bringing a condemnation suit to have such damages appraised. (78 P.2d, p. 517 and 519).

(3) The inclusion of the word "damaged" in Section 22, Article I, Utah Constitution, was intended to give a substantive right not theretofore enjoyed and did not contemplate the matter of remedy. That although the remedy to prevent a taking would be by injunction, the remedy for damages would be enforced as it is enforced in all other cases against the state where remedy is not

specifically given by statute, to-wit, by resort to the Board of Examiners. (78 P.2d, p. 513).

(4) Even though the Road Commission, or the Road Commissioners individually, if acting within their authority are immune from suit, the Board of Examiners is adequate remedy for a claim of consequential damages and meets the test of due process of law. The claim of consequential damages is in the same class with all other claims against the state and is governed by Section 13 of Article VII, Utah Constitution, regarding claims to the Board of Examiners. (78 P.2d, p. 521).

In the Fourth District case the defendant was the State Road Commission. The ruling of the Fourth District case allowing injunctive suits against individual commissioners was dicta. In the subsequent Hjorth case this Court said the dicta of the Fourth District case was not the true rule and proceeded to adopt the dissent of Mr. Chief Justice Wolfe, in the Fourth District case. We can only conclude, therefore, that the Hjorth case overruled the dicta of the Fourth District case.

In support of this conclusion we quote the concurring opinion of Chief Justice Wolfe in the Hjorth case:

"I concur. In my opinion this case overrules State, by State Road Comm. v. District Court, Fourth Judicial District, 94 Utah 384, 78 P.2d 502, at least in its spirit and reasoning. Whilst that case did not involve a prayer for money damages for alleged consequential injury but was an action to restrain the State Road Commission, the case proceeded on the theory that the Road Commission could not be restrained but the com-

missioners personally could be restrained if they threatened to damage a property owner consequentially and not by a direct taking, unless they first paid for the consequential damages which they would cause.

In a long and carefully considered dissent, I registered opposition to this view because it was my theory that neither the Road Commission nor the individual commissioners could be restrained from inflicting consequential damages, but only from a direct taking without condemnation and this on the theory that they would then be trespassing and acting as individuals and without legislative authority. In that opinion, the matter of compensation by the legislature on approval of a claim to the Board of Examiners as substantive due process in all its ramifications was also discussed at length. \* \* \* (241 P.2d p. 910).

On page 28 of appellant's brief in this matter, the plaintiff argues that there is no valid distinction between an injunctive suit and an action for mandamus or declaratory relief, and, therefore, since the Fourth District case authorizes an injunction against individual commissioners, mandamus or declaratory relief should be available against individual commissioners. Repeating that in our opinion the Hjorth case overruled the Fourth District case on this point, we now adopt the plaintiff's line of reasoning and argue that since the individual commissioners cannot be enjoined from consequential damages, they, therefore, cannot be mandamusd or sued for declaratory relief.

In applying the arguments of Justice Wolfe to the present situation, we reason as follows:

(1) The Road Commissioners, if acting within their authority are, as agents of the state, immune from suit and cannot be mandamusd.

(2) That there is a fundamental difference between a taking and a consequential damage, and that the Constitution guarantees only a substantive right and not a procedural remedy as far as a consequential damage is concerned.

(3) That the Board of Examiners is an adequate remedy and meets the requirements of due process of law insofar as the claim of plaintiff in the instant situation. (And we note that by statute appeal can be made from an unfavorable ruling of the Board of Examiners to the Legislature. Sec. 63-6-17, U.C.A. 1953).

We cite as an overruling practical consideration the problem which, in our opinion, was the primary concern of this Court in the Hjorth case; that is, the problem in granting relief through judicial proceedings to all persons who might be affected by road improvements. In arriving at its conclusion in the Hjorth case that individual road commissioners need not respond personally in consequential damage suits, the Court reasoned as follows:

(1) To hold otherwise, public officials would be fearful to act at the risk of finding themselves personally



liable for acts in good faith in performance of their duties. (241 P.2d pg. 909).

(2) 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 project 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. (241 P.2d pg. 909).

And to these arguments may we add that if the plaintiff should be successful in this matter, the Road Commissioners and the State of Utah would be subject to mandamus by every property owner adjoining a divided highway in the State of Utah. This could, for example, mean suits by every property owner from Brigham City to Springville.

As a more recent authority for our position in this matter, we cite the case of *State of Utah v. Fred Tedesco, et al.*, 1955, 286 P.2d 785, 4 Utah 2d 31. In this case intervening defendants, Bird and Evans, Inc. filed a claim in a condemnation proceeding against property adjoining its property, alleging that its land would suffer if the adjoining land was condemned. This Court held that loss of an advantageous business relationship be-

cause of the condemnation of adjoining property would not support intervention in a condemnation suit, and that the defense of sovereign immunity was well taken to this type of claim for consequential damage. This Court then went on to say that:

“Any claim defendant may deem it has because of damage growing out of the condemnation which is not assertible because of such sovereign immunity more properly may be asserted by application to the Board of Examiners under the provisions of Title 63-6-11 and 63-6-13, U.C.A. 1953, for hearing and decision as to the merit of the claim.” (286 P.2d pg. 790).

Applying this case to the instant situation it seems clear to us that though the plaintiff might present a claim for consequential damages to the Board of Examiners, it cannot sue for consequential damages nor force a condemnation suit for the purpose of ascertaining and awarding such damages.

As to Point I, we submit, therefore, that the individual Road Commissioners, when acting within the scope of their authority in a skillful and proper manner, are immune from suit and cannot be coerced by mandamus or otherwise into bringing a condemnation suit to ascertain consequential damages.

## POINT II.

THE PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED.

We argue first that the District Court did not err procedurally in granting defendants' Motion to Dismiss.

We recognize and adopt the rule cited by plaintiff in his appeal brief to the effect that a complaint should not be dismissed for insufficiency unless it appears for a certainty that plaintiff is entitled to no relief under any state of facts which can be proved in support of the claim. (Brief of Appellant, p. 9; *Blackham v. Snelgrove*, 1955, 3 U.2d 157, 280 P.2d 453). In ascertaining with "certainty" that plaintiff's complaint has no merit, the Court may consider the absence of *law* as well as facts to substantiate the claim. (2 Moores Fed. Prac. 2nd Ed. 2244). The motion to dismiss under Rule 12(b)(6) performs substantially the same function as the old common law general demurrer. Though the well pleaded material allegations of plaintiff's complaint are admitted by defendants' Motion to Dismiss, conclusions of law or unwarranted deductions of facts are not admitted. (2 Moores Fed. Prac., supra). Therefore, if as a matter of law the District Court felt that plaintiff had no cause of action, no matter what the plaintiff might later prove in support of the factual allegations of his complaint, then the District Court was justified in dismissing the complaint on defendants' Motion to Dismiss for failure to state a claim. The record does not disclose the basis upon which the Trial Court did dismiss plaintiff's complaint. However, on the basis of defendants' Motion to Dismiss (See R. 4) we may assume the complaint was dismissed either on the general ground of lack of jurisdiction or the general ground of failure to state a claim, or on both. If dismissed for failure to state a claim this could have been because the facts alleged were without merit or

because as a matter of law the plaintiff was entitled to no relief; and in deciding as a matter of law that plaintiff had failed to state a claim, the District Court could have based this decision on a preliminary decision of lack of jurisdiction. (*Miles v. Armstrong*, C.A. 7th, 1953, 207 F.2d 284, as abstracted at 2 Moores Fed. Prac., 2nd Ed., 1958 Supp., p. 200).

We submit that even admitting the well pleaded material allegations of plaintiff's complaint, (1) plaintiff has failed to state a claim by reason of the Court's lack of jurisdiction over the defendants, (2) plaintiff has failed to state a claim by reason that the damage claimed is not compensable in a court of law. It is a "certainty" that plaintiff is entitled to no judicial relief no matter what state of facts he might be able to prove in support of his claim.

Having treated the jurisdiction problem under Point I above, we now argue that the damage claimed by plaintiff is not compensable in a court of law and that for this reason the plaintiff has failed to state a claim upon which relief can be granted.

It is the position of defendants that by nature of the police powers of the Road Commission as exercised by the individual members thereof, it may construct the strips or islands of which plaintiff complains without compensation for any resultant inconvenience or damage to adjacent property owners. By Section 27-2-7, U.C.A.

1953, the Road Commission is granted the following powers:

“\* \* \*

(2) To formulate and adopt rules and regulations for the expenditure of public funds for the construction, improvement and maintenance of state highways, and other purposes authorized by law, and for letting contracts for any work which the commission is authorized by law to do.

\* \* \*

(6) To make such rules and regulations governing the use by the public of state roads as may be necessary to provide for public safety and against undue use of the state roads.

\* \* \*

(10) To adopt regulations in regard to traffic on state roads, not in conflict with law, and to close state roads under construction. \* \* \*

Further authority is granted as follows:

27-9-3, U.C.A. 1953.

The highway authorities of the state, counties, cities and towns are authorized to so design any limited-access facility and to so regulate, restrict, or prohibit access as to best serve the traffic for which such facility is intended; \* \* \* In this connection such highway authorities are authorized to divide and separate any limited-access facility into separate roadways by the construction of raised curbings, central dividing sections, or other physical separations, or by designating such separate roadways by signs, markers, stripes, and the proper lane for such traffic by appropriate signs, markers, stripes, and other devices. \* \* \*

In the case of *Zions Railroad and Light Corporation v. Lindsey*, 211 Iowa 544, 231 N.W. 461, it was held:

“Primarily the right to establish, regulate and control highways rests in the state and it may delegate such powers to boards, commissions, public or municipal corporations.”

We are dealing here with the general problem of the right of adjoining property owners to access to public highways. (See general discussion 25 Am. Jur., Highways, Sec. 154). We agree with plaintiff that this “right of access” has been recognized in Utah and would stipulate that the Utah cases cited by plaintiff in his appeal brief under Point II are authority for this position. However, with the modern advent of the “limited access” highway, it is necessary that we carefully scrutinize the correct proportions of this right. It has been stated:

“The limited access highway has provided one of the most effective and popular means of at least alleviating traffic problems. However, the general recognition of the right of abutting property owners to an easement of ingress or egress in highways bounding their property, commonly called a ‘right of access,’ has placed severe obstacles in the way of the growth of such highway systems, since the existence of such a right gives a high commercial value to property adjoining heavily travelled roadways, and the expense of condemning such rights greatly increases the already high cost of roadbuilding.” (Annotation, “Abutting Owners Right To Damages or their Relief for Loss of Access Because of Limited Access Highway or Street,” 43 ALR 2d. 1072).

This right of access is obviously not unlimited. It must be reconciled with the police powers of the state to regulate and control public highways for the general peace, safety and welfare. And it is subordinate to the public convenience, of which the public authorities having control of the streets are the judges, and is subject to such reasonable use of the street, not inconsistent with its maintenance as a public highway, as may be necessary for the public good and convenience and does not seriously impair it. (24 Am. Jur., Pub. Highways, *supra*).

It is obvious that the courts are at wide divergence as to when and to what extent compensation should be made for interference with this right of access. (See Annotation 43 ALR 2d, *supra*, and cases supplemental thereto and note discussion, "Just Compensation," Henry J. Kaltenbach, 3-402, pg. 34). To bring all interference no matter of what shade or degree, within the orbit of condemnation and compensation, would create the impossible liability feared by this Court as expressed in Hjorth case. (Hjorth v. Whittenburg, *supra*.) On the other hand, as long as the courts continue to recognize the right of access as a valuable property right, compensation within proper limits and in the proper action or proceeding must be made. As long as the law in this matter remains unsettled, each case whether viewed by the Court in a proper proceeding or by the Board of Examiners in a proper proceeding, must be considered separately.

However, it is our opinion that this Court has established a rule and test that must guide us in the instant

situation. In the case of *Robinett v. Price* (1929), 74 Utah 512, 280 Pac. 736, the fact situation was almost identical to the fact situation in our present case. The plaintiff owned a piece of property on the southwest corner of the intersection of 10th Street and an unnamed highway in Price, Utah. Because of certain railway tracks running between the highway and Main Street beyond (which tracks as to interference correspond exactly with the concrete strips complained of in the instant case) Tenth Street was closed as an access street to Main St. (This in effect is what has happened to 7th South Street in our instant case; i.e., by nature of the concrete islands it is no longer possible to gain access to U. S. Highway 89-91 from 7th So. St.). Tenth Street running south from the highway along the east line of plaintiff's property was not closed or discontinued. (7th South Street running east from Main Street along the south line of plaintiff's property in the instant case has not been closed or discontinued). The highway on which plaintiff's property abutted on the south was not closed or discontinued. (Main Street on which plaintiff's property abutts to the east is not closed or discontinued in the instant case — although traffic has been rerouted in one direction thereon). The highway on which plaintiff's property abutted to the south afforded him ready ingress or egress to and from the north boundary of his property. (Main Street on which plaintiff's property abutts to the east affords plaintiff in the instant case ready ingress or egress to and from Main Street, so long as travelling in a northward direction). The Court stated that what,



on the evidence, was claimed by plaintiff was not that ingress or egress to his property was cut off by closing Tenth Street, but that he was thereby deprived of the direct route which he theretofore had and enjoyed in travelling from his property to the principal or main portion of the city, which depreciated the value of his property and greatly decreased the rental value of his building maintained thereon. (280 P. pg 737). (What, by the complaint, plaintiff in the instant case claims is not that ingress or egress to his property has been cut off by the concrete strips but that now though travel northward from his property has been unchanged, travel southward must take a somewhat more circuitous route, and direct access from Main Street to U. S. Highway 89-91, 30 feet away, has been impeded).

In the Robinett case the court held that where closing and discontinuance of a portion of the street did not interfere with property owners' means of egress and ingress, but merely deprived him of direct route to the main business portion of the city, depreciating property values and rendering rental more difficult, the property owner had not sustained such a special loss entitling him to compensation.

The Robinett case suggests two tests: (1) the party aggrieved must suffer some injury special in kind or degree from the rest of the public, more than mere depreciation or loss of rental value, (2) Egress or ingress must be prevented or materially affected. (280 P. pg.

737). The inconvenience and resultant loss of rental value in the instant case meets neither of these tests.

In support of defendants' position on this Point and consistent with the tests of the Robinett case (*supra*), we cite the following authority.

First, we refer the Court to certain related and general rules:

Highways officials are not personally liable for acts done honestly in the exercise of the discretion which the law gives them in constructing or maintaining a highway, although their acts result in a trespass or damage to an abutting property owner. (90 ALR 1482). In the absence of fraud it is generally held that citizens or taxpayers who fail to show any such injury to them not sustained by the general public, are not entitled to complain of the rerouting or change of route or change or removal of directional signs. (97 ALR 192). Traffic regulations which interfere with or restrict access to and from abutting property are valid if they are reasonable and necessary for public convenience. (100 ALR 491) It generally has been held that a property owner has no right to compensation for diversion of traffic by the relocation or rerouting of highways. (118 ALR 921).

Since there are innumerable cases in this general area, we cite hereafter only more recent authority.

In the case of *Muse v. Mississippi State Highway Commission*, 103 S. 2d 852, it was held that a highway commission has the right to construct median strips in

four lane highway without the payment of compensation to an abutting owner for damages resulting therefrom even though construction restricts condemnor's right of access to east or north-bound traffic lanes \* \* \*. The owner's inconvenience is one shared by general public as incident to the proper exercise of police power. (Note that the Constitution of the State of Mississippi provides that private property shall not be taken or *damaged* for public use unless due compensation is first made.)

In the case of *Carazella v. State*, 269 Wisc. 608a, 71 N.W. 2d 276, it was held that where an existing highway is converted into a limited access highway but abutting landowner's access to ordinary highway is merely made more circuitous, there is no taking of pre-existing easement of access and no compensation will be paid under eminent domain.

In the case of *Smick v. Commonwealth*, 1954, Ky. 268 S.W.2d 424, it was held that where a side street upon which plaintiff's property fronted was closed at one end by the construction of a throughway, thus creating a cul-de-sac situation, there was no right of compensation.

In the case of *Thomas and Warner Inc. v. City of New Orleans*, 1956, La., 89 S.2d 885, access to plaintiff's property was impaired by the closing of one street and the lowering of the grade of another street. It was held that plaintiff was not entitled to compensation since traffic could still reach the plaintiff's property by a more circuitous route, and that this inconvenience was

suffered by the public in general. (Louisiana, incidentally, is both "a taking and damage state.")

In the case of *Langley Shopping Center v. State Roads Commission*, 1957, Md. 131 A.2d 690, a highway was reconstructed making it a divided four lane dual highway. A median strip divided north-bound and south-bound lanes of traffic so that left turns could not be made directly into plaintiff's property and opposite shopping centers. Motorists would have to turn at a traffic light or take a more circuitous route to reach the shopping centers. Property owners sued to enjoin the State Road Commission from installing the median strip, maintaining that it amounted to a substantial denial of their rights of ingress and egress and a taking of property without compensation. The court found that there was no such denial of access as to constitute a taking. It felt that the facts alleged made the case more nearly akin to a diversion of traffic than to a blocking of access to the highway, and since the state could, if it desired, divert traffic entirely away from the shopping centers without being liable in damages, it could certainly and in the interest of safety, interpose an obstacle making access less easy, but which would not actually destroy the access, and likewise not be liable for damages.

In the case of *Ramelli v. City of New Orleans*, 1957, La. 96 S.2d 572, a railroad overpass was constructed to the east of plaintiff's property which completely blocked his access to an adjoining street. In order to reach said street he had to travel an extra 3000 feet. The Supreme Court approved the action of the Trial Court in refusing

to allow any damages whatsoever, and stated that it had repeatedly held that under the police power a city may divert traffic without subjecting itself to liability, and that any damages suffered were general rather than special.

In the case of *Oklahoma Turnpike Authority v. Chandler*, 1957, Okla. 316 P.2d 828, it was held that as a general proposition a property owner may recover compensation for loss of access only if he can show that the closing of the road has especially damaged him as distinguished from general damages to the community. The damages must be different in kind, not merely in degree. The landowner must suffer more than mere inconvenience. (Oklahoma, incidentally, is both "a taking and damage state.")

In the case of *State Highway Department v. Strickland*, 1958, Ga. 102 S.E.2d 3, Strickland and others sought an injunction against the State Highway Department to restrain it from the constructing a curb 16 feet from their property and 22 feet from the center of U. S. Highway 341. Strickland operated a wholesale meat packing plant on his tract which abutted the highway, and for many years large trucks had been in the habit of backing up to a loading and unloading platform connected with this plant. The proposed curbing made this operation impossible although there were two 30 foot driveways which Strickland could use after the curbing was installed. The Supreme Court held that the installation was a proper traffic control device and did not involve an appropriation of any of the property or

a trespass thereon. In the course of its holding, it said that abutting property owners are not entitled as against the public to access to their land at all points in the boundary between it and the highway so long as they are still afforded a convenient access to their property.

In the case of *City Service Oil Company v. City of New York*, 1958, N.Y. 154 N.E.2d 814, City Service Oil Company sought injunctive relief and damages because of the establishment of bus stops on a corner where one of its gasoline stations was located. The New York Court of Appeals ruled that the company's claim that the right of ingress and egress is a paramount property right was erroneous. It said that on the contrary, it is the right of the public to the use of the streets, which is absolute and paramount. It affirmed the action of the Trial Court in denying the claim, stating that a municipality may regulate and control traffic, and unless such regulation is arbitrary and capricious, it will not be restrained although the abutting owners may be inconvenienced by such regulation.

To distinguish the cases cited by plaintiff we first point out that the defendant in the case of *Dooly Block et al v. Salt Lake Rapid Transit Company* (Appellant's brief, pg. 9) case was a private corporation and not the State of Utah, its agents, or an agency thereof. The interesting thing about the Dooly case, however, which apparently plaintiff failed to note, is that although the court recognized the right of access, light and air, it holds that a municipal corporation when empowered by the Legislature, may devote a reasonable portion of a street

to the use of a street railway without compensation to abutting owners; only when the entire width of the street, or at least so much as to render ordinary traffic impossible, is devoted to railroad purposes is the interference unlawful. The court indicated that another railroad track along 2nd So. St., in addition to tracks already in place, would be unnecessary. This case stands for nothing more than that when interference with egress or ingress is unnecessary, and total or material, such interference is unlawful. The court also stated, incidentally, that an abutting owner may make any and all proper use of the street, *subject* to proper and reasonable municipal control and police regulations. It is also interesting to note the following language of the court:

“ \* \* \* The right of municipalities to grant franchises to private corporations for the construction and operation of street railways, when empowered by the legislature so to do, is not now, it seems, an open question, although streets were originally not designed for that purpose, but were mostly confined to the right of public travel in the ordinary modes. Enlightened public policy, advanced civilization, and a desire to subserve public interest, have induced courts to become more lax in the enforcement of strict technical rules and principles in this regard, and it appears now to be well settled by judicial authority that a reasonable portion of a street may be devoted for the purposes of a street railway, and that such is a proper use of the street.” (33 P. pg. 232)

It would seem that enlightened public policy, advanced civilization and a desire to subserve public interest

should now recognize the reasonable and skillful use of divided highways.

The case of *Morris v. Oregon Short Line R. Company* (Appellant's brief, p. 10) also may be distinguished by the nature of the parties involved. It should also be noted that the Morris case was commenced when the defendant commenced construction of two additional tracks in front of the plaintiff's property. The court stated:

"No damages are claimed by reason of the laying and the operation of trains over the first two tracks. Neither is there any claim made that the appellant did not have the legal right to lay said tracks, or to operate its trains over them in the street aforesaid." (102 P., p. 630).

The evidence was that the additional tracks would greatly impede egress and ingress. (Two, three or more dividing strips might be unreasonable and greatly impede plaintiff's ingress or egress. The concrete strips as presently existing would appear only a reasonable exercise of the police power of the state.) The court was also careful to stipulate that an owner of property, which abutts on a public street, has such a property right that he may recover from interference with such right, only in a *proper* action.

Without going into detail we note that in the case of *State by State Road Commission v. Rozzelle, et ux.*, (Appellant's brief, p. 11) the Court talks about unreasonably *cutting off* access. No unreasonable cutting off is alleged by plaintiff in the present case.



In the case of *Boskovich v. Midvale City Corporation*, (Appellant's brief, p. 11) the court itself distinguished said case from the Robinett case (*supra*) on the grounds that the Boskovich case involves a duly platted subdivision containing streets and alleys. This circumstance, of course, suggests new and different legal concepts and makes the case, we believe, inapplicable to the present situation.

After distinguishing the Utah cases cited by plaintiff and under the test of the Robinett case as supported by the other authorities cited above, we submit that the instant situation is not one of either a taking or an interference sufficient to warrant compensation. The plaintiff has suffered no injury special in kind or degree from the rest of the public more than mere depreciation or loss of rental value, and from the facts as alleged, egress or ingress has not been prevented or materially affected. The instant situation falls simply within the reasonable, skillful and competent exercise of the police power of the state in regulating highways and the traffic thereon for the public welfare.

As to the propriety of the use of mandamus in this type of situation, we are satisfied to repeat plaintiff's argument that there is no valid distinction between an injunctive suit, as brought in the Fourth District case, and an action for mandamus or declaratory relief. This being true, it follows that if an injunction will not lie, then mandamus will not lie. However, we further argue that there are three mandatory elements of a mandamus action: (1) a clear, unquestionable right to mandamus in

the parties seeking same; (2) a clear legal duty to act on the part of the party to whom the writ is directed; (3) absence of any other remedy at law. (See 55 C.J.S., Mandamus, Sec. 51). None of these elements are met in the instant situation. In connection with (3) it has been held that where an administrative remedy is available, it must be exhausted before mandamus will lie. (*Reardon v. Daly City*, 1945 Cal., 163 P. 2d 462).

In the case of *Hoffman v. Lewis, Judge*, 31 Utah 179, 87 P. 167, 170, 1906, this Court stated:

“But even in the case of mandate the legal right to require the person or court to proceed, and the legal duty to do so must be free from doubt; otherwise even this remedy must be denied.” (87 P., p. 170).

In the case of *Board of Education of Ogden v. Anderson*, 93 Utah 522, 74 P. 2d 681, 1937, this Court held that:

“Where the writ [of mandamus] is sought to compel action on the part of the court [officer or tribunal] the legal right to the particular action which is sought to be compelled by the writ must be clear and the legal duty to do the act or thing demanded \* \* \* must be equally clear.” (74 P. 2d, p. 683).

In general, as to mandamus, it has been stated:

“Mandamus is a remedy at law employed to compel the performance, when refused, of a ministerial duty, this being its chief use.”

(34 Am. Jur., Mandamus, Sec. 4, and cases cited).

‘Remedy is in personam to enforce the obligation of the individual to whom addressed — it does not reach the office nor can it be directed to the office.’

(34 Am. Jur., Mandamus, Sec. 7, and cases cited).

“The immunity of a state prevents mandamus against a public officer, board or commission where it is in reality a proceeding against the sovereign.”

(34 Am. Jur., Mandamus, Sec. 123, and cases cited).

An instructive discussion of when and when not an action against a public official is a suit against the state is had in *Pennoyer v. McConnaughy*, 140 U.S. 1, 11 S. Ct. 699, 35 L. Ed. 363. It is there said:

“The first class is where the suit is brought against the officers of the state, as representing the state’s action and liability, thus making it, though not a party to the record, the real party, against which the judgment will so operate as to compel it to specifically perform its contracts.”

In our opinion the legal right of the plaintiff to compel a condemnation suit is not clear and unquestionable, nor is there any clear legal duty under the facts as alleged on the part of the Road Commissioners to commence a condemnation suit. We find nothing in our Eminent Domain statute (Title 78, Chapter 34, U.C.A. 1953) that clearly compels a condemnation suit for consequential damage. Nothing in the mandatory complaint form seems to contemplate such a situation. (Sec. 78-34-6, U.C.A. 1953). In fact, as argued above, no such duty

does exist in the case of a consequential damage resulting from legitimate use of the police power in regulating and maintaining public highways. That the defendant has an adequate remedy through the Board of Examiners has been convincingly argued by Chief Justice Wolfe, and seems to be the rule of the Hjorth case, notwithstanding plaintiff's argument to the contrary. And it is obvious that a mandamus action against the individual Road Commissioners for the purpose of compelling a condemnation suit is in reality a proceeding against the sovereign.

For these reasons it seems to us that mandamus is not a proper proceeding.

We repeat that we do not know on what grounds the District Court dismissed plaintiff's complaint. By virtue of the grounds for dismissal set out in defendants' motion to dismiss, we can assume the complaint was dismissed for either lack of jurisdiction or for failure to state a claim. Assuming the District Court decision was based on either ground, we feel plaintiff's arguments regarding mandamus and declaratory judgment are premature, unnecessary and immaterial to a ruling on this appeal. But in answer to plaintiff's argument regarding declaratory judgments, we refer the Court to Section 78-33-6, U.C.A. 1953, which provides as follows:

"The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

Even assuming the District Court decided as prayed for by plaintiff that the impeding of egress and ingress is a damage to which plaintiff is constitutionally entitled to compensation, and that defendants have a duty to initiate eminent domain proceedings for that purpose, would such a finding terminate the uncertainty or controversy giving rise to the proceeding? What about the problem of jurisdiction over the individual commissioners? Even assuming the conclusion of law argued by plaintiff, has plaintiff stated a claim in his complaint four-square within such conclusion?

Certainly, we feel that the District Court could have felt, with strong reason, that a declaratory statement regarding egress and ingress would not terminate the "uncertainty or controversy giving rise to the proceeding." It was well within the discretion of the Court to refuse a declaratory judgment.

## CONCLUSION

Either on the ground of lack of jurisdiction over the person or on the ground of failure to state a claim upon which relief can be granted it was proper for the District Court to dismiss plaintiff's complaint.

As to lack of jurisdiction, defendants submit:

1. By virtue of the prime authority of the Fourth District case, the District Court has no jurisdiction over the defendants collectively as members of the State Road Commission.

2. By virtue of the dissenting opinion of Chief Justice Wolfe in the Fourth District case as adopted by this Court in the subsequent Hjorth case, and other authority, the District Court has no jurisdiction over the defendants as individual commissioners.

As to the plaintiff's failure to state a claim upon which relief can be granted, defendants submit:

1. The District Court did not err in dismissing the complaint for as a matter of law the plaintiff failed to state a claim regardless of what facts plaintiff might prove in support of his claim.

2. The erection of median strips on a public highway in a skillful and reasonable manner for the regulation of traffic and to provide for public safety is a legitimate exercise of the police power of the state.

3. Plaintiff has alleged no injury special in kind or degree from the rest of the public, nor that egress or ingress has been prevented or materially affected.

We also submit that neither mandamus nor declaratory judgment are proper remedies in this case, though, in our opinion, a decision as to these matters is unnecessary to a ruling on this appeal.

We finish by asking: if the commissioners "condemn" the plaintiff's right of access, a consequential damage is found and an award made, how many others having an alleged right of access should be joined in eminent domain proceedings? In the words of this Court in the Hjorth case:

"We hold that where consequential injury to property arises out of the faithful and honest per-

formance of duties imposed by law upon members of the Road Commission, such officials are not required to respond personally. The argument of plaintiffs' counsel against the injustice to his clients of sovereign immunity is eloquent and persuasive. The remedy is not to be found in imposing an unreasonable and arbitrary burden upon these public officials. This phase of our law is well established and of long standing. If it is to be changed, that must come through the sovereign power of this commonwealth, the people, speaking through the legislature."

Respectfully submitted,

WALTER L. BUDGE  
Attorney General

FRANKLYN B. MATHESON  
Assistant Attorney General

*Attorneys for Respondents*





