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Jerry Sine and Dora A. Sine, His Wife v. Henry C. Helland, Director of Highways, et al. : Brief of Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

— FILED

JERRY SINE and DORA A. SINE,

his wife,

Plaintiffs-Respondents

vs.

HENRY C. HELLAND, Director
of Highways, et al.,

Defendants-Appellants.

JUN 7 - 1966

Court, Utah

Case No.
10540

BRIEF OF RESPONDENTS

Interlocutory Appeal from an Order of the
Third District Court for Salt Lake County
Honorable Marcellus K. Snow

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UNIVERSITY OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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his wife, *Plaintiffs-Respondents,*

vs.

HENRY C. HELLAND, Director
of Highways, et al.,
Defendants-Appellants.

Case No.
10540

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The Statement of Facts made by Appellants is incomplete.

The theory of these respondents in *State of Utah v. Joseph Parker, et al.*, 13 Utah 2d 56, 368 P.2d 585, was that the Statute, Section 78-34-10, U.C.A. 1953, permitted recovery to such as the Sines under Subsec-

tion (3) and that since the Sines were parties defendant to the action as brought, they had the right by counterclaim to recover their damages as to land not specifically involved in the condemnation action as filed because of the guarantee of the Utah Constitution, Article I, Section 22.

Following the decision by this Court, respondents presented their claim to the Board of Examiners which received no testimony, permitted no cross examination and listened to statements of the case by the Road Commission employees and representatives of respondents and then recommended allowance of the precise sum recommended by the Road Commission which had been arrived at by the Road Commission without any hearing of any kind and without the assistance of any impartial or judicial person of any kind whatsoever.

Thereafter respondents presented their claims to the 35th and then to the 36th Legislatures. The Claims Committee of the 36th Legislature held a so-called hearing which was recorded by a machine operated by one member of the Committee who allowed a presentation of 45 minutes after announcing that he was not conducting a hearing but giving claimants a chance to say what they wanted in the time allotted. The record was never played back to any member of the Legislature, which approved the precise amount recommended by the Road Commission and the Board of Examiners which amount is ridiculously low, wholly arbitrary and based upon inconsistencies.

Respondents have now exhausted the only other remedy indicated by this Court in *State v. Parker*, supra, and learned that they could obtain by that route no judicial hearing, no reasonable opportunity to prove damages, and no tribunal interested in affording compensation to respondents for the damage to and taking of their property for public use as guaranteed by the Constitution of the State of Utah, Article I, Section 22 and the Constitution of the United States of America under the Fifth and Fourteenth Amendments.

POINTS TO BE ARGUED

Respondents will answer the two points presented and argued by the appellants, although the first point will be broken into several parts, and submit a third point:

III. UNLESS THE WRIT OF MANDAMUS ISSUE SUBSTANTIALLY AS PRAYED, THE PROPERTY OF RESPONDENTS WILL BE TAKEN AND DAMAGED IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS OF RESPONDENTS.

ARGUMENT

I. THE STATE OF UTAH, ACTING THROUGH ITS ROAD COMMISSION, IS

IMMUNE FROM SUIT FOR CONSEQUENTIAL DAMAGE TO REAL PROPERTY, NO PART OF WHICH IS EXPROPRIATED FOR A PUBLIC IMPROVEMENT.

This point is divided into three parts: A. There is expropriation of respondents' property; B. A statutory remedy has been afforded by the Legislature; C. The Road Commission arbitrarily and capriciously circumvents the Constitution and the Statute by the institution of condemnation actions only when property owners such as respondents are completely deprived of a portion of land for a public improvement.

Respondents recognize here, as they did in *State v. Parker*, supra, that this Court has adhered to a doctrine of sovereign immunity in eminent domain cases. This has been in part for the reason that persons whose property was taken or damaged could go to the Legislature for relief where the State did not voluntarily initiate condemnation actions. *State v. Parker*, supra, does not interpret Subsection (3) of Section 78-34-10 and does not consider the problem involved where a procedure has been provided by the Legislature and ignored by the executive departments. Respondents hopefully submitted their claim to the Board of Examiners and the Legislature and have now learned, as was previously supposed and assumed, that no reasonable remedy was afforded—no due process of law or judicial determination of damage suffered by respondents. The Court indicated in *State v. Parker*, supra.

that when the Legislature provided a remedy, the Court would apply it. Since there is no other means of obtaining compensation which affords due process of law, the Court is invited to consider the statutory remedy afforded, knowing that unless this remedy is available to respondents, their property will have been taken and damaged without due process of law.

A. There is expropriation of respondents' property.

The Road Commission apparently assumes that unless a portion of the land of a property owner is completely taken so that he can no longer reach any portion of it, there is no taking of property. The best way to determine this question is to look at cases where the Constitution protects an owner against the taking of his property, and does not have a provision for damage to his property as does the Utah Constitution. *Colorado Springs v. Stark*, 57 Colo. 389, 140 P. 794; (Railroad embankment caused damage); *Little Rock and F.S.R. Co. v. Geer*, 77 Ark. 387, 96 SW 129; (damage, but not taking); *Horn v. City of Chicago*, 403 Ill. 549, 97 NE 2d 642. (Damage by road construction as to easements of light and air and of access).

B. A statutory remedy has been afforded by the Legislature.

It may be assumed that it is possible under the Utah Constitution to distinguish between taking and damaging and that therefore, the above decisions may

be placed on the "damage side" where the Constitution refers to both concepts. This being true, Subsection (3) of 78-34-10 contemplates that a person whose property is damaged may receive damages incident to the construction of an improvement even though there is no complete taking. *Kane v. City of Chicago*, 392 P.2d 172, 64 N.E. 2d 506 (1946) (Bridge construction caused structural damage to building); *U. S. v. Lujan*, 188 U.S. 445, 23 S. Ct. 349, 47 L. Ed 539; *Albers County of Los Angeles*, 42 Cal. Rep. 89, 398 P.2d 129 (1965) (Landslide caused by road construction); *Tanner v. Provo Bench Canal & Irrigation Co.*, 105 Utah 105, 121 P. 584 (1911) (Enlargement of canal); *Logan County v. Adler*, 69 Colo. 290, 194 P. 621 (Damage by overflow water caused by bridge construction); *Arkansas State Highway Commission v. Kincannon*, 193 Ark. 450, 100 S.W. 2d 969 (damage from construction to an overpass.)

C. The Road Commission arbitrarily and capriciously circumvents the Constitution and the Statute by the institution of condemnation actions only when property owners such as respondents are completely deprived of a portion of land for a public improvement.

The form of condemnation actions instituted by the Road Commission and the Attorney General's office is decided by those offices. The statute contemplates that all persons affected in any of the manner outlined in the subsection will be named defendants and be afforded an opportunity to prove their damage.

When officials of the State refuse to follow provisions of statutes, mandamus is an appropriate remedy. *Cope v. Toronto*, 8 Utah 2d 255, 332 P.2d 977 (1958); *Adams v. Bolin*, 77 Ariz. 316, 271 P.2d 472; *Morgan v. Fourth Judicial District Court of Wasatch County*, 105 Utah 140, 141 P. 2d 886; *Eggert v. Ford*, 150 P.2d 719, 21 Wash. 2d 152.

For these reasons, respondents submit that the doctrine of sovereign immunity is not a complete answer in a case such as this and that respondents are simply asking the Courts to direct the appellants to do that which the Constitution and the Legislature contemplate their doing when respondents have demonstrated, as has been done here, that there is no other adequate remedy in the Constitutional sense.

II. THE MATTERS PLEADED IN THE AMENDED COMPLAINT ARE RES JUDICATA.

The cases cited by the appellants are not in point. *Wheadon v. Pearson*, 14 Utah 2d 45, 376 P.2d 946, was an action to establish a right of way by implied easement which was held barred by a prior action for right of way by prescription—an action seeking the same relief, based upon the same facts, and held to be fairly embraced within the first action. This Court held “that the parties should litigate their entire claim, demand and cause of action, and every part, issue and ground thereof*.”

East Millcreek Water Company v. Salt Lake City, 108 Utah 315, 159 P. 2d 863 (1945) states that the doctrine of res judicata applies to issues "which are actually raised and decided therein, but also to such as could have been therein adjudicated, but it only applies where the claim, demand or cause of action is the same in both cases."

There are three reasons why the doctrine of res judicata does not apply in this case: A. The facts are different; B. The issues are different; C. The relief sought is different.

A. The facts are different.

Subsequent to the decision in *State v. Parker* supra, the respondents have presented their claims to the Board of Examiners and thence to the Legislature which awarded a pittance without a fair hearing and has precluded the suggestion of the Court that the remedy of respondents is through the Board of Examiners and through the Legislature. In *Sprague, et al. v. Boyles Brothers Drilling Company*, 4 Utah 2d 344 at 349, 294 P.2d 689, this Court said:

"The issue pleaded in the second suit—whether Boyles were directly liable to Sprague (and by subrogation to U.S.F. & G.)—was not litigated, nor was the same issue pleaded in the first suit. The complaint now supplies new and additional facts which were not before the Court originally; consequently the rule laid down in the *California Packing* case actually favors plaintiffs here."

See also *Corpus Juris Secundum* on Judgments, Section 650.

B. The issues are different.

The issue in the first case was whether a party to a condemnation action could counterclaim against the plaintiffs as to property in the same project but not described in the complaint.

The issue here is whether property owners who have been denied reasonable relief by the Board of Examiners and the Legislature being in the situation contemplated by Subsection (3) of 78-34-10 have a right to relief under the State and Federal Constitutional guarantees. *Morris v. Russell*, 120 Utah 545, 236 P.2d 451, 26 A.L.R. 2d 947; *Troxell v. Delaware, et al.*, 227 U.S. 434, 33 S. Ct. 274, 57 L. Ed. 568; *Virtue v. Creamery Package Manufacturing Company*, 123 Minn. 17, 142 N.W. 930, L.R.A. 1915 B. 1179; C.J.S., Judgments, §649.

C. The relief sought is different.

In the former action, respondents sought to stay in an action commenced by the State of Utah. In this action, the relief sought is mandamus to compel institution of a condemnation action of a kind different from the customary condemnation action which the State of Utah institutes. Difference in relief is sought also in that United States Constitution is invoked in the present action to determine whether, assuming that

the State Constitution and statutes as interpreted by this Court afford no relief, the United States Supreme Court may compel relief.

The institution of this action is encouraged by the language of this Court in *State v. Parker*, supra, wherein the Court said:

“Contention 2) relates to procedure and joinder of parties. It does not go to the question of whether Sine has a compensable claim against the State, and therefore, for the purposes of this case, need not be canvassed, but may be conceded as having merit.”

It, therefore, could well be that on the matter of joinder of parties and procedure, respondents were wrong in *State v. Parker*, but are right in their procedure and parties in this action.

III. UNLESS THE WRIT OF HABEAS CORPUS BE ISSUED SUBSTANTIALLY AS PRAYED, THE PROPERTY OF RESPONDENTS WILL BE TAKEN AND DAMAGED IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS OF RESPONDENTS.

Both the Utah State Constitution and the Constitution of the United States of America guarantee that property shall not be “taken” for public use without just compensation. The damaging of property is a taking compensable under the Statutes of Utah. Plaintiffs have exhausted all administrative remedies.

and bring action in reliance on these constitutional provisions. The Federal courts and the Supreme Court have on numerous opportunities applied the "due process of law" requirements to condemnation proceedings involving both the taking and the damaging of property. *Ahogian v. Mass. Turnpike Authority*, (D. C. Mass., 1962) 211 F. Supp. 668 *affirmed* 371 U.S. 186, 83 S. Ct. 265, 9 L. Ed. 2d 228; *Appleby v. Buffalo*, 221 U.S. 524, 31 S. Ct. 699, 55 L. Ed. 838 (1911) applies the 14th Amendment to the taking of property without just compensation; *Chicago Railroad Co. v. Illinois*, 200 U.S. 56, 26 S. Ct. 341, 50 L. Ed. 596 (1906). *U. S. ex rel. Tenn. Valley Authority v. Indian Creek Marble Co.*, (D. C. Tenn., 1941) 40 F. Supp 811; *Chicago, Burlington and Quincy Railroad Co. v. City of Chicago*, 166 U.S. 246, 17 S. Ct. 581, 41 L. Ed 979; *Fireweather v. Ritch*, 195 U.S. 276, 25 S. Ct. 58, 49 L. Ed. 193; *McGovern v. New York*, 229 U.S. 363, 33 S. Ct. 876, 57 L. Ed. 1228; *Baumann v. Ross*, 167 U. S. 548, 17 S. Ct. 966, 42 L. Ed. 270; *Panhandle Eastern Pipeline Co. v. Kansas State Highway Commission*, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090; *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 30 S. Ct. 459, 54 L. Ed. 725.

In these cases arbitrary legislative action or failure by judicial tribunals to achieve compensation by due process standards was sufficient to obtain relief.

CONCLUSION

The efforts to obtain relief through the Board of Examiners and the Legislature present to this Court squarely the issue whether property owners in Utah may be denied just compensation for the taking and damaging of their property where no part is completely taken by the arbitrary failure and refusal of the Road Commission and the Attorney General to institute an action naming the parties as defendants preventing them from showing the damages recovery of which is recognized by Subsection (3) of 78-34-10, U.C.A., 1953. The facts involved and the relief sought are different from *State v. Parker*, supra, although relief is sought against state officials. The Constitution of Utah and the Fifth and Fourteenth Amendments to the Constitution of the United States protect citizens such as respondents against arbitrary taking and damaging of their property. The relief sought and in effect ordered by the District Court is that the merits of the case be tried so that if substantiated a new action in condemnation will be filed for the purpose of determining the amount of damage. The order of the District Court should be affirmed. Respondents are entitled to their day in Court.

Respectfully submitted,

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