

1963

# State of Utah v. J. Herbert Hansen and Gertrude T. Hansen : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Ronald C. Barker; Attorney for Appellants;

Robert S. Campbell and Arthur A. Allen; Attorney for Respondents;

---

## Recommended Citation

Brief of Appellant, *State v. Hansen*, No. 9679 (Utah Supreme Court, 1963).

[https://digitalcommons.law.byu.edu/uofu\\_sc1/4059](https://digitalcommons.law.byu.edu/uofu_sc1/4059)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

-----  
-----  
IN THE SUPREME COURT OF THE

STATE OF UTAH

FILED  
JAN 30 1963

STATE OF UTAH, by and through <sup>Supreme Court, Utah</sup>  
its ROAD COMMISSION,  
Plaintiff and Respondent,  
vs. No.  
J. HERBERT HANSEN and GERTRUDE  
T. HANSEN, his wife,  
Defendants and Appellants.

APPELLANT'S BRIEF

Appeal from the Judgment of the Third  
District Court for Salt Lake County,  
Hon. Merrill C. Faux, Judge

-----  
RONALD C. BARKER  
2870 South State Street  
Salt Lake City, Utah  
Attorney for Appellants.

ROBERT S. CAMPBELL and  
ARTHUR A. ALLEN  
Office of the Attorney General  
State Capitol Building  
Salt Lake City, Utah  
Attorney for Respondents.

# TABLE OF CONTENTS

Page

## STATEMENT OF POINTS RELIED UPON:

POINT 1. THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE AS TO THE COST OF REMOVAL OF AND/OR DAMAGE TO THE AUTOMOBILES AND PARTS WHICH APPELLANTS WERE COMPELLED TO REMOVE FROM THE PROPERTY TAKEN.	5
POINT II. THE COURT ERRED IN INSTRUCTING THE JURY CONCERNING APPELLANTS' RIGHTS OF ACCESS AS ABUTTING PROPERTY OWNERS TO 21st SOUTH STREET.	12

## CASES CITED

Arkansas Valley & W. R. Co. v. With, 19 Okla. 262, 21 Pac. 897, 13 LRA (NS) 237	9
Basinger v. Standard Furniture Co. case, 118 U. 121, 220 P.2d 117, 119	21
Beidler v. Sanitary District, 211 Ill. 628, 71 N.E. 1118, 67 LRA 620 (1904)	16
Blincoe v. Choctaw, O. & W. R. Co., 16 Okla 286, 83 P. 903, 3 LRA (NS) 890, 8 Ann Cas. 689	10
Blount County v. McPhearson, 268 Ala. 133, 105 So. 2d 117 (1958)	18
Boxberger v. State Highway Comm'n 126 Colo 526, 251 P.2d 920	17
Braum v. Metropolitan West Side Elev. R. Co. 166 Ill. 434, 46 NE 974	10

Chicago v. Taylor, 125 U.S. 161, 8 S. Ct. 820 (1888)	15
Chicago B. & G. R.R. v. Chicago, 166 U. S. 226; 1 Orgel, Valua- tion under Eminent Domain Sec. 6(2d Ed. 1953)	6
Chicago, K. & N. Ry, v. Hazels, 26 Neb. 364, 42 N.W. 93 (1889)	16
City of Channelton v. Lewis, 123 Ind. App. 473, 111 N.E.2d 899 (1953)	16
Colorado Springs v. Stark, 57 Colo. 384, 140 P. 794 (1914)	15
Cucurullo v. City of New Orleans, 229 La. 463, 86 So. 2d 103 (1956)	16
Date County v. Grigham, 47 So. 2d 602;	9
Date Co. v. Houk, Pla. 1956, 89 So.2d 649	9
DeGeofray v..Merchants' Bridge Term. R.R , 179 Mo. 689, 79 S.W. 386, '64 LRA 959 (1903)	16
Dep't of Public Works & Buildings v. Finks, 10 Ill. 2d 20, 139 N.E.2d 242 (1956)	16
Dougherty County v. Hornsby, 213 Ga. 114, 97 S.E.2d 300 (1957) affirming 94 Ga. App. 689, 96 S.E.2d 326 (1956)	16
Edgcomb Steel of New England v. State 100 NH 480, 131 A. 2d 70	10
Florida State Turnpike Authority v. Anhoco Corp. (Fla.), 116 So. 2d 8 (1959)	18
Foster Lumber Co. v. Arkansas Valley & W. Ry.20 Okla. 583, 95 P. 224, 100 P.1110. 30 LRA (NS) 231 (1908)	16, 17

Fowler v. Norfolk & W. Ry., 68 W. Va. 274, 69 S.E. 811 (1910)	17
Grand Rapid & I.R. Co. v. Weiden, 70 Mich. 390, 38 NW 294	9
Hague v. Jaub County Mill & Ele- vator Co., 37 U. 290, 107 P. 249	21
Hedrick v. Graham, 245 N.C. 249, 96 S.E. 2d 129 (1957)	19
Hempstead v. Salt Lake City, 32 U. 261, 90 Pac. 397	21
Holloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665 (1950)	18
Holman v. State, 97 C. A. 2d 237 P.2d 448 (1950)	18
Hot Springs R.R. v. Williamson 45 Ark. 429 (1889), aff'd 136 U. S. 121, 10 Ct. 955 (1890)	15
Houston v. Kleinecke, 26 S.W. 250 (Tex. Civ. App., 1894)	17
Hunter v. Chesapeak & O. R. Co. 107 Va. 158 59 SE 415, 17 LRA (NS) 124	10
In re. Appropriation of Easement for Highway Purposes, 93 Ohio App. 179, 112 N.E.2d 411 (1952)	19
Jacksonville Expressway Authority v. Henry G. Dupree Co. 1958 Fla. 108 So. 2d 289, 69 ALR 2d 1445	9
Kimball v. Salt Lake City, 32 U. 253, 90 Pac. 395	21
Leavenworth N. & S. Ry v. Curtan 51 Kan. 432, 33 P. 297 (1893)	16
Louisville & N.R.R. v. West End Heights Land Co., 135 Ca. 419, 69 S.E. 546 (1910)	16

Lund v. Idaho W. & N. R.R., 50 Wash. 574. 97 P. 665 (1908)	17
Martin v. United States, 270 F. 2d 65 (4th Cir., 1959)	15
Matter of Zerick, (Ohio), 129 N. E.2d 661 (1955)	16
McMoran v. State, 55 Wash. 2d 37 345 P.2d 598	18
Mississippi State Highway Comm'n v. Finch, 237 Miss. 314, 114 So. 2d 673 (1959)	18
Mississippi State Highway Comm'n v. Spencer, 231 Miss. 865, 101 So. 2d 499 (1958)	16
Morris v. Oregon S.L.R.R., 36 Utah 14, 102 P. 629 (1909)	17
Neuweiller v. Kauer, 62 Ohio L. Abs. 536, 107 N.E.2d 779 (1954)	18
Nichols v. Commonwealth, 331 Mass. 581, 121 N.E.2d 56 (1954)	18
Oklahoma Turnpike Authority v. Chandler, Okla., 316 P. 2d	14
Parrotta v. Commonwealth, 339 Mass. 402, 159 N.E.2d 342 (1959)	18
Pennsylvania S. V. R.R. v. Walsh 124 Pa. 544, 17 A. 186 (1889)	17
People v. Ricciardi, 23 Cal. App. 2d 308, 194 P.2d 750	17
People v. Sayig, 101 Cal. App. 2d 890, 226 P. 2d, 702, (1951)	18
Pima County v. Bilby, 87 Ariz. 366 351 P.2d 647 (1960)	15
Richards v. Salt Lake City, 49 U. 161 Pac. 680	21
Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959)	18
Sowadski v. Salt Lake County, 36 U. 127, 104 Pac. 111	21
State v. Calkins, 50 Wash. 2d 716 314 P.2d 449 (1957)	19



State v. Clevenger, 365 Mo. 970 291 S. W. 2d 57 (1956)	18,
State v. Thelbert, 87 Ariz. 318 350 P.2d 988 (1960)	18
State ex rel. Merritt v. Linzell, 163 Ohio St. 97, 126 N.E. 2d 53 (1955)	16
State ex rel. Morrison v. Thelbert 87 Ariz. 318, 350 P.2d 988	18
State Highway Comm. v. Drake, 375 Mich 20, 97 NW 2d 748	8
Webber v. Salt Lake City, 40 U. 221, 120 Pac. 503	21
Williams v. North Carolina State Highway Comm'n, 252 N.C. 772, 114 S.E.2d 782 (1960)	19
Yates v. Big Sandy Ry., 28 Ky. L. 206, 89 S.W. 108 (1950)	16

#### STATUTES AND CONSTITUTIONS CITED

78-34-2, UCA, 1953	7
Utah Constitution <sup>s</sup> Art. 1, Sec. 7	6
Utah Constitution <sup>s</sup> Art. 1, Sec. 22	7,
U. S. Constitution, Sec. 1, Amend- ment XIV	6

#### TEXTS CITED

43 ALR 2d 1074	21
69 ALR 2d 1453	9
Vol. 8, Utah Law Review, No. 1 as P. 14	22
42 Min L. Rev. 106, 112 - 1957 Institute on Eminent Domain Southwestern Legal Foundation 1962 Matthew Bender & Co. Pages 7-13	15

**IN THE SUPREME COURT**

**of the**

**STATE OF UTAH**

---

**STATE OF UTAH, by and through  
it's ROAD COMMISSION,  
Plaintiff and Respondent,  
vs.  
J. HERBERT HANSEN and GERTRUDE  
T. HANSEN, his wife,  
Defendants and Appellants.**

**No. 9679**

---

**BRIEF OF DEFENDANTS AND APPELLANTS**

---

**STATEMENT OF THE KIND OF CASE**

---

**This is an action by the Utah State Road Commission to condemn and purchase a portion of Appellants' property for highway improvement purposes.**

---

**DISPOSITION IN LOWER COURT**

---

**This matter was tried before a jury which awarded judgment in favor of defendants and against plaintiff for \$21,500.00 value of land and improvements taken and for \$3,400.00 damages to remaining property, (R. 83).**



The Court refused Appellants' offer of proof as to the cost of removal of and/or damage to the value of automobiles and parts which the Appellants were required to remove from the land condemned (R. 305-307).

Appellants claim that they are entitled to be compensated for damages sustained by them by reason of being required to remove said personal property, or that in the alternative, the cost of removal should be considered in determining the price for which a seller would be willing to sell said property if he were required to first remove said personal property therefrom and what a willing buyer would pay for said property if he had to remove said personal property therefrom after purchase thereof.

The Court in effect instructed the jury that the appellants, as abutting property owners, have only the right to reasonable access to the general system of highways and that so long as the denial of access to Appellants' property was reasonable with regard to the safety and well being of the public in general, that Appellants were not entitled to com-

compensation for the consequential damages to the remainder of their property resulting from denial of access to 21st South Street. (R. 68-70)

The jury found, in response to a special interrogatory (R. 80), that the denial of access to 21st South Street was not unreasonable under the test established by the Court, and accordingly denied compensation to Appellants therefor.

---

#### RELIEF SOUGHT ON APPEAL

---

Appellants seek a new trial with instructions to the Court requiring admission of evidence as to damages resulting from removal of personal property and requiring an instruction to the jury which considers the damage to the remaining property resulting from a denial of access to 21st South Street, and which considers the reasonableness of the denial of access with regard to its effect upon Appellants' land.

---

#### STATEMENT OF FACTS

---

**This is an action by the Utah State Road Com-**

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services

Library Services and Technology Act, administered by the Utah State Library.

Machine-generated OCR, may contain errors.

mission to condemn and purchase certain property of Appellants, situated on the North side of 21st South Street between 6th and 7th West, for purposes of changing 21st South from a two lane unlimited access highway into a six lane non-access highway, and for purposes of widening a frontage road which crosses in front of the East one-half of Appellants property and connects 21st South Street with 6th West Street. Certain improvements situated upon the property were taken and/or damaged for which severance damage was allowed. No damages were allowed for denial of access to the West half of Appellants' property from 21st South Street which abuts that portion of Appellants' property.

A large number of salvage automobiles and automobile parts were situated upon the land which was condemned by the Respondent and Appellants were ordered by the Court to remove said automobiles and parts from the land taken by the Respondents. (R. 6, 7, 13, 14 & 15)

Appellants' land consisted of over 18 acres of

land in a single tract, all of which was devoted to the business of storage and salvage of automobile parts and scrap metal. The West portion of Appellants' property abutting 21st South Street was suitable for commercial development before the taking but this value was destroyed by the denial of access from said property to 21st South Street. (R. 196-198)

---

## ARGUMENT

---

### POINT I

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE AS TO THE COST OF REMOVAL OF AND/OR DAMAGE TO THE AUTOMOBILES AND PARTS WHICH APPELLANTS WERE COMPELLED TO REMOVE FROM THE PROPERTY TAKEN.

The Court rejected Appellants' offer to prove that they were damaged in the sum of \$4,500.00, lost by reason of scrapping approximately 180 automobiles, and parts to mitigate damages which automobiles and parts were situated on said premises and that the cost of removal of the balance of the automobiles and parts

situated thereon was the sum of \$7,495.00, or that said removal damaged Appellants in the total sum of \$11,959.00. (R. 305-307)

The Constitution of the United States provides in part as follows: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of Law; . . ." (Sec. 1, Amendment XIV). (Chicago B. & G. R.R. v. Chicago, 166 U.S. 226; 1 Oregel, Valuation under Eminent Domain Sec. 2(2d Ed. 1953) Certainly if the value of Appellants' personal property is to be damaged or destroyed by the acts of the Respondent without compensation we are permitting the State of Utah to do precisely what is forbidden by the provision of the Constitution of the United States quoted above.

The Constitution of the State of Utah provides in part as follows: "No person shall be deprived of life, liberty or property, without due process of law." (Art. 1, Sec. 7) If the Courts deny recovery to Appellants for damages caused by being required to remove said personal property as aforesaid, certainly they have been deprived of property without due process

of law in violation of the above quoted sections of the Constitutions of the State of Utah and of the United States of America.

The Utah Constitution also provides in part as follows: "Private property shall not be taken or damaged for public use without just compensation." (Art. I. Sec. 22 - Emphasis added) It should be noted that this constitutional provision is far broader than is found in most constitutions since it requires compensation for damage to private property.

The legislature has defined the kinds of private property which may be taken by Eminent Domain process in 78-34-2, UCA, 1953. It should be observed that real property is only one of the six types of property enumerated therein which may be taken and that subsection (6) thereof states that: "All classes of private property not enumerated. . ." in that statute may be taken. Any argument that the State has no authority to condemn personal property is clearly not



supported by the foregoing statute and constitutional provisions, and in fact the taking of personal property is expressly authorized therein and the Appellants are entitled to be compensated for all property taken or damaged. In any event, any limitation of authority to "take" property, which may be read into said statute, certainly does not in any manner limit the aforesaid constitutional provisions which require payment for personal property "taken or damaged" by actions of the State, whether said "taken or damaged" is done in compliance with an official action of the State done for the express purpose of taking or damaging any class of property or results necessarily from an official act done by the State for the purpose of "taking" some other property. The right to possess said automobiles and parts on that land is a valuable property right which has been taken. By reason of the and nature of said automobiles and limitation of space to which they could have been moved, and to mitigate damages, certain of said automobiles were scrapped and certain of them were removed to other property. The value of the automobiles which

were scrapped was as effectively destroyed by the condemnation as was the Appellants' right to possess and enjoy the real property upon which the automobiles were situated.

Admittedly the weight of authority is that moving costs of personal property is not compensable in eminent domain proceedings, however, this is probably explained by the fact that most states do not have a provision similar to our constitutional provision which requires just compensation for taking or damage (supra). (See cases annotated at 69 ALR2d 1453)

Costs incurred in moving personal property were allowed in Jacksonville Expressway Authority v. Henry G. Du Pree Co. (1958 Fla), 108 So. 2d. 289, 69 ALR 2d 1445; See also Date County v. Grigham, 47 So. 2d. 602; Date Co. v. Houk, Fla, 1956, 89 So. 2d 649; Arkansas Valley & W. R. Co. v. With, 19 Okla. 262, 21 Pac. 897, 13 LRA (NS) 237; Grand Rapids & I. R. Co. v. Weiden, 70 Mich, 390, 38 NW 294;

In State Highway Comm. v. Drake, 275 Mich 20, 97 NW 2d 748 the Court allowed recovery for fixture

removal damages for cost of relocating 180 different metal working machines, accessories, etc.

In *Edgcomb Steel of New England v. State*, 100 NH 480, 131 A. 2d 70 the Court held that the owner of real estate must be compensated for value of land, which includes payment for his right to use the land for storage of his personal property.

In *Braum v. Metropolitan West Side Elev. R. Co.* 166 Ill. 434, 46 NE 974 the Court stated that evidence of costs of moving was intended simply to aid in determining the fair cash value of the property in view of its present use.

In *Blincoe v. Choctaw, O. & W. R. Co.*, 16 Okla. 286, 83 P. 903, 3 LRA (NS) 890, 8 Ann Cas. 689 the Court held that damages for the cost of removing personal property must be considered in order to grant the landowner that just compensation assured him by the Constitution of the United States, as it was a direct loss to the owner and an added burden not shared by the other members of the public. (ART. I, Sec. 22, Utah Constitution also requires "just" compensation) See also *Hunder v. Chesapeake & O. R. Co.*

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.

107 Va. 158, 59 Se 415, 17 LRA (NS) 124 where expenses

of moving stock was also considered in determining market value of property taken.

A willing seller, about to sell the property in question as it was situated at the time of the taking in this case, would certainly have considered the cost of removal of the personal property situated thereon and any loss that might be sustained in connection with the removal in arriving at a price at which he would be willing to sell the property. In the same manner, if the property were to be sold with the personal property in place, a willing buyer would certainly have reduced the price which he would have been willing to pay for said property by the cost of removal. Appellants did not choose to sell the property taken by the State, and accordingly the State should be required to take the land as it finds it, and the loss incidental to that piece of a land being selected should be borne by the public at large and should not be imposed upon the Appellants.

## POINT II

THE COURT ERRED IN INSTRUCTING THE JURY CONCERNING

APPELLANTS' RIGHTS OF ACCESS AS ABUTTING PROPERTY OWNERS TO 21st SOUTH STREET.

In instructions 13 thru 16 the Court instructed the jury, in effect, that it could award no compensation to Appellants for denial of access to 21st South Street if they found that the denial was not unreasonable with regard to the safety and well being of the public in general, and that Appellants had no right of access to 21st South Street, the denial of which Appellants could be compensated, but that their rights, in common with the public at large, is limited to the right of reasonable access to the general system of highways. These instructions, when taken as a whole, tend to indicate to the jury that an abutting property owner has no greater or better rights to enter a particular highway than persons not situated near that highway, and that the use to which Appellants' land is devoted or could be devoted, if put to the highest and best use, and the unreasonableness of the denial of access onto 21st South Street with respect to that use, are not factors to be considered by the jury in determining the compensation to which Appellants are entitled. I submit that this is

not the law and that since the verdict of the jury, and that answer to the special interrogatory put to the jury, were based upon an unduly restrictive and incomplete statement of the factors which should be considered in determining the reasonableness of the restriction and limited their determination of unreasonableness to factors affecting public without regard to factors affecting Appellants, and accordingly the amount of damages to which Appellants are entitled. Certainly said instructions should have advised the jury that reasonableness of the denial of access should consider the uses to which the Appellants' property is or could be devoted at its highest and best use, rather than just the convenience of the public generally, as it stated in said jury instructions.

Twenty-First South Street is an old highway (R. 113, L. 20). Before the advent of the modern automobile most roads were land service roads, built by and primarily to serve abutting land owners, and in a real sense the abutting land owners were the owners of the road and had access from all parts of their property, although the public was allowed to use them



ment of the modern expressway, such as is being constructed in front of Appellants' property, the emphasis is now shifting to a traffic service road which necessarily severely limits the access. It is argued by the State that the police power permits them to regulate and to restrict many rights formerly enjoyed by a land owner and abutter without compensation, and an effort is made to classify the right to deny access to a highway as within the police power and to thus avoid paying for the damage done to the abutting property owner by reason of denying him access to the highway. The distinction between police power and the right to condemn by eminent domain should be kept clearly in mind to avoid confusion from high sounding terms. If the injury is different in kind rather than merely in degree from that suffered by the public in general there has been a taking which should be compensated. (Oklahoma Turnpike Authority v. Chandler, Okla., 316 P. 2d 828). Clearly the right to ingress and egress onto and from Appellants' land to and from 21st South

Street is a right not enjoyed by the public at large and is not a right which can be destroyed without compensation by merely attaching to the taking the label of "police power."

Under our Utah constitutional provision which provides for "just" compensation for ". . . taking or damage" (Art. I, Sec. 22) the enjoyment of convenient access to 21st South Street is an appurtenance to Appellants' property which gives that property special value, so that any material impairment of such access is a special damage, differing in kind from that suffered by the general public, and must be compensated in damages. (Institute on Eminent Domain, Southwestern Legal Foundation, 1962, Matthew Bender & Co. Pages 7-13 and cases there cited: Chicago v. Taylor, 125 U.S. 161, 8 S. Ct. 820 (1838); Martin V. United States, 270 F. 2d 65 (4th Cir., 1959); Pima County v. Bilby, 87 Ariz. 366, 351 P.2d 647 (1960); Hot Springs R.R. v. Williamson, 45 Ark. 429 (1889), aff'd 136 U. S. 121, 10 Ct. 955 (1890); Colorado Springs v. Stark, 57 Colo. 384, 140 P. 794 (1914);

**Louisville & N. R.R. v. West End Heights Land Co.**  
**135 Ga. 419, 69 S.E. 546 (1910); Dougherty County v.**  
**Hornsby, 213 Ga. 114, 97 S.E.2d 300 (1957), affirming**  
**94 Ga. App. 689, 96 S.E.2d 326 (1956); Baidler v.**  
**Sanitary District, 211 Ill. 628, 71 N.E. 1118,**  
**67 LRA 620 (1904); Dep't of Public Works & Buildings**  
**v. Finks, 10 Ill, 2d 20, 139 N.E.2d 242 (1956); City**  
**of Channelton v. Lewis, 123 Ind. App. 473, 111 N.E.2d**  
**899 (1953); Leavenworth, N. & S. Ry. v. Curtan, 51**  
**Kan. 432, 33 P. 297 (1893); Yates v. Big Sandy Ry.;**  
**28 Ky. L. 206, 89 S.W. 108 (1905); Cucurullo v.**  
**City of New Orleans, 229, La. 463, 86 So.2d 103 (1956);**  
**Mississippi State Highway Comm'n v. Spencer, 231 Miss.**  
**865, 101 So.2d 499 (1958); DeGeofray v. Merchants'**  
**Bridge Term. R.R. 179 Mo. 689, 79 S.W. 386, 64 LRA**  
**959 (1903); Chicago, K. & N. Ry. v. Hazels, 26, Neb.**  
**364, 42 N.W. 93 (1889); State ex rel. Merritt v.**  
**Linsell, 163 Ohio St. 97, 126 N.E.2d 53 (1955);**  
**Matter of Zerick, (Ohio), 129 N.E.2d 661 (1955)**  
**Foster Lumber Co. v. Arkansas Valley & W.Ry. 20**

Okl. 583, 95 P. 224, 100 P. 1110. 30 LRA (NS) 231 (1908); Pennsylvania S. v. R.R. v. Walsh, 124 Pa. 544, 17 A. 186 (1889); Houston v. Kleinecke, 26 S.W. 250 (Tex. Civ. App., 1894); Morris v. Oregon S.L.R.R., 36 Utah 14, 102 P. 629 (1909); Lund v. Idaho W. & N. R.R., 50 Wash. 574. 97 P. 665 (1908); Fowler v. Norfolk & W. Ry., 68 W. Va. 274, 69 S.E. 811 (1910).) When the construction of a limited-access highway results in the destruction of a pre-existing right of access, the damages are the difference between the value of the land before the destruction of the access and its value thereafter. (People v. A. T. Smith Co., 86 Cal. App. 2d 308, 194 P.2d 750; Boxberger v. State Highway Comm'n., 126 Colo 526, 251 P.2d 920.

Since Appellants' right of access to 21st South is an easement which differs in kind from that of the general public, it's substantial impairment is compensable, and although the service road constructed over the East portion thereof may be considered in mitigation of the damage, it does not relieve the State of its obligation to compensate for the impairment

of access. (State ex rel. Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988; People v. Riccidari, 23 Cal. 2d 390, 144 P. 2d 799; McMoran v. State, 55 Wash, 2d 37, 345 P. 2d 598.) The creation of a non-access highway on 21st South where a general access highway theretofore existed unreasonably affects Appellants' rights of access as abutters and they are entitled to a jury instruction which indicates that they have a right to compensation therefor. (Blount County v. McPhearson, 268 Ala. 133, 105 So. 2d 117 (1958); State v. Thelberg, 87 Ariz. 318 350 P.2d 988 (1960); Florida State Turnpike Authority v. Anhoco Corp. (Fla.), 116 So. 2d 8 (1959); Holman v. State, 97 C.A. 2d 237 P.2d 448 (1950); Holo-way v. Purcell, 35 Cal. 2d 220, 217 P.2d 665 (1950); People v. Sayig, 101 Cal. App. 2d 890, 226 p.2d, 702 (1951); Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959); Nichols v. Commonwealth, 331 Mass. 581, 121 N.E.2d 56 (1954); Parrotta v. Commonwealth, 339 Mass. 402, 159 N.E.2d 342 (1959); Mississippi State Highway Comm'n v. Finch, 237 Miss. 314, 114 So. 2d 673 (1959); State v. Clevenger, 365

Mo. 970, 291 S. W. 2d 57 (1956); *Hederick v. Graham*, 245 N.C. 249, 96 S.E. 2d 129 (1957); *Williams v. North Carolina State Highway Comm'n*, 252 N.C. 772, 114 S.E.2d 782 (1960); *Neuweiler v. Kauer*, 62 Ohio L. Abs. 536, 107 N.E.2d 779 (1951); *In re. Appropriation of Easement for Highway Purposes*, 93 Ohio App. 179, 112 N.E. 2d 411 (1962); *State v. Collins*, 50 Wash. 2d 716, 314 P.2d 449 ( 1957).)

It has been argued by the State that the taking in this case does not result in a denial of access to Appellants' property, but merely makes the route more circuitous, and accordingly that Appellants are not entitled to compensation, whoever, this argument overlooks the important factor here involved that we have an unusually large tract of land. If the portion abutting on 21st South street was sold in parcels as commercial lots as would have been possible before access was denied, their value would have been substantial. Access by a circuitous route from



the frontage road on the East portion of Appellants' property does mitigate damages to some extent, but the net effect is that the commercial value of said lots abutting on 21st South Street is destroyed and said property becomes low value industrial property. If this argument was carried to its logical conclusion a person owning a square mile, or ten square miles, would still have access by a circuitous route to the general system of highways and would be denied compensation. If the Appellants' land was owned by several persons it would be unreasonable to even argue that each should not have access to 21st South Street, either directly or by means of a frontage road. Why then should Appellants be penalized because they own the entire tract. Certainly Appellants are entitled to the same privileges as would be afforded a group of persons who owned the same property.

The law is well settled that where an established "land-service" road such as 21st South Street is converted into a limited or non-access way, the owners of the rights of access which have come into being on the "land-service" road are entitled to compensation,

exactly as they would be if such rights were destroyed by any other type of construction. (43 ALR 2d 1074 and cases there annotated)

The question of police power vs. eminent domain in the right of access of abutting owners has been before the Utah Supreme Court on several occasions. In the *Basinger v. Standard Furniture Co.* case, 118 U. 121, 220 P.2s 117, 119 the Court stated: "The right of access to the highway, however, is in the nature of a special easement, which exists as a right of ownership of abutting land, and is a substantial property right which may not be taken away or impaired without just compensation." See also *Hagur v. Jaub County Mill & Elevator Co.*, 37 U. 290, 107 P.249; *Sowadski v. Salt Lake County*, 36 U. 127, 104 Pac. 111; *Richards v. Salt Lake City*, 49 U. 28, 161 Pac. 680; *Webber v. Salt Lake City*, 40 U. 221, 120 Pac. 503; *Kimball v. Salt Lake City*, 32 U. 253, 90 Pac. 395; *Hempstead v. Salt Lake City*, 32 U. 261, 90 Pac 397;

see also discussion by counsel for Respondent in Vol 8, Utah Law Review, No. 1 at P. 14)

It appears clear that the decisions denying recovery for interference with access rights are based upon constitutional provisions which allow compensation for taking only, while the decisions which permit recovery are primarily based upon constitutional provisions which permit compensation for taking or damaging and/or require just compensation as does the Utah Constitution. It appears that the jury instructions in question reflected the law in states which do not have constitutional provisions permitting compensation for "damage" and that accordingly said instructions were erroneous under Utah law.

---

## CONCLUSION

---

Appellants' offer of proof as to costs and damages, in connection with the removal of personal property stored on the land taken, should have been allowed wither to show the damage sustained by Appellants or to show that the price for which a willing seller would sell said land or a willing purchaser

would be adjusted by the cost of removal of the personal property situated thereon.

The instructions to the jury erroneously indicated that Appellants had no more vested interest or right of access to 21st South Street than have persons who are not abutting property owners, and accordingly Appellants were denied compensation justly due to them by reason of damage to their remaining property by reason of denial of access to 21st South Street from their said abutting property. The instruction as given did not permit the jury to consider the effect upon the value of Appellants' land of the denial of access, but restricted their consideration as to whether the taking was unreasonable with regard to the interests of the general public, under a definition that the word unreasonable meant "not based upon reason; arbitrary, capricious, absurd, immoderate or extortionate."

Obviously any reasonable person could find some reason or justification for the actions of the State and if we then disregard the detriment to Appellants'

remaining land it is difficult to understand how the jury, in view of said instructions, could have reached a contrary verdict. The practical effect of the instructions was to instruct the jury to find that the State had a right to deny Appellants' access on 21st South from their abutting property if they could find any justification whatever for the denial with regard only to the interests of the public as a whole, and without any regard to the interests and rights of the Appellants. We submit that this instruction was highly prejudicial to Appellants and the verdict should be set aside and a new trial granted.

Respectfully submitted

RONALD C. BARKER  
Attorney for Appellants  
2870 South State Street  
Salt Lake City, Utah