

1967

State Of Utah By And Through Its Road Commission v. Style-Crete, Inc. : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH by and through
its ROAD COMMISSION,

Plaintiff and Appellant,

vs.

STYLE-CRETE, INC., a Utah
corporation,

Defendant and Respondent.

Case No.
10902

APPELLANT'S BRIEF

Appeal from a Judgment of the District Court
of Salt Lake County, State of Utah
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Defendant and Respondent.

Case No.
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APPELLANT'S BRIEF

NATURE OF CASE

Separate eminent domain proceedings against two different portions of the defendant's property were consolidated and tried before a jury.

DISPOSITION IN LOWER COURT

At the jury trial the only issue was the amount of compensation to be awarded defendant. On the jury's answer to special interrogatories the trial court entered

judgment against the Road Commission for \$122,500.00, less a payment previously made, plus interest and costs.

RELIEF SOUGHT ON APPEAL

Plaintiff and appellant seeks reversal of the judgment and remand of the case for a new trial.

STATEMENT OF FACT

Defendant owned a pre-cast concrete (or "pre-cast stone") plant on a tract of 14.263 acres in Salt Lake City, lying east of the Surplus Canal, north of 5th South street, and straddling what has become 23rd West street (R. 180, Ex. 1). As shown in Appendix Figure 1, the property was irregular in shape, with a narrow neck fronting on 5th South, and a somewhat wider corridor continuing north to a relatively large, square area. There was no access to the property other than from 5th South.

On December 27, 1965, the Road Commission brought an action to condemn .417 acre of defendant's property for relocation of a railroad right of way, necessitated by highway construction in another area. This action involved a strip of land 100 feet wide, running east and west across the south end of the pan-handle of defendant's tract. The strip is identified as "railroad" on the Appendix Figure 2.

On March 1, 1966, the Road Commission brought a second action to acquire approximately 1.2 acres for construction of a portion of a new thoroughfare to be known as 23rd West street. The property to be taken was a strip 80 feet in width running northerly and southerly, bisecting the large north area of defendant's property. In a preliminary non-jury trial the court found defendant to be the owner of an additional strip approximately 20 feet wide along the east side of the panhandle, which increased the 23rd West taking to 1.582 acres (R. 182). These strips are identified on the Appendix Figure 2 as "23rd West street". The total property taken in both actions was 1.999 acres (R. 180, 182).

Taking of the two strips, and construction of the railroad bed and 23rd West Street, divided defendant's remaining property into three parts identified on Figure 2 as Parcels "A," "B," and "C". Parcel "A" contains .53 acres (R. 182) and now has frontage on both 5th South and 23rd West streets. Parcel "B", upon which was located the building used by defendant for the manufacture of pre-cast concrete, contains 3.472 acres (R. 183). Parcel "C," upon which defendant has constructed a new plant, lies east of 23rd West and contains 8.262 acres (R. 183).

Prior to relocation the railroad right of way had been 800 or 900 feet to the north of defendant's building (R. 190). The northern edge of the relocated right of way is 9 to 10 feet, and the center line of the track

about 40 feet, from the southwest corner of defendant's building. The railroad track is 8 or 9 feet high (R. 194). The right of way is to be fenced (R. 201).

The new 23rd West street, from a point level with 5th South street, rises in elevation to cross the railroad, then descends to a height of about two feet near the northern part of defendant's tract (R. 205-206). Defendant's access road having been taken, access to Parcels "B" and "C" could be had only from 23rd West, not a limited access highway (R. 209).

There is no existing dispute as to the location and description of the property taken, or the character of the improvements constructed on the property. There is no substantial difference of opinion respecting the value of the parcels actually taken. But there is serious disagreement as to the amount of damages to the property not condemned resulting from (1) its severance, and (2) construction of the improvements.

Defendant claims that its property has been so damaged by the severance and construction that it is now worth less than 1/3 of its former value. Testimony was presented to the effect that defendant's solidly constructed 17,000 square foot concrete building will no longer be useable for the manufacture of pre-cast concrete or anything else—indeed, will be suitable only for "dead storage" (R. 671). The primary factors requiring an almost total abandonment of the building were claimed by defendant to be (1) vibrations from railroad trains, and (2) the reduction in area as a result

of severance of Parcels "A" and "C" from the plant site, Parcel "B," depriving the plant of needed storage space for curing concrete products (R. 280).

There were conflicts in the evidence relating to the effect of railroad vibrations upon the concrete manufacturing operation.

The trainmaster for Western Pacific Railroad Company testified that 12 trains per day, averaging 80 to 100 cars and weighing approximately 5,000 tons per train, could be expected to pass the defendant's plant in a given 24 hour period (R. 225-226); the speed would vary, but the trains would be either accelerating or decelerating in that area (R. 229, 232). The train schedule showed, however, that most trains would pass the defendant's plant during periods in which it was not in operation (Ex. D-12).

David J. Leeds, an engineering seismologist, who had measured vertical vibrations emanating from other railroad tracks in the vicinity (R. 283), found that the vibrations measured 1/10,000 of an inch, and were repeated seven times per second during the period in which a train was passing (R. 307). In his opinion the vibration was unacceptable, in part because it "would upset the people" in the plant (R. 323), though admittedly the amount of upset would depend on how long-continued the vibration was and the type of operation being carried on in the plant (R. 323). Mr. Leeds expressed the opinion that setting concrete would be damaged by the vibrations (R. 319), "that incipient

hidden damage might be sustained" (R. 319). Mr. Leeds' knowledge of the properties of setting concrete was based in part upon information obtained from the Portland Cement Association (R. 329), but he had not read any P.C.A. publications relating to the effects of jarring on fresh concrete (R. 329).

Mr. McCown Edward Hunt, a consulting civil engineer and partner in an architectural engineering firm, stated that setting concrete would probably be affected by vibrations (R. 444), but Mr. Hunt was talking of vibrations of approximately 1/16th inch, not 1/10,000 as measured by Mr. Leeds (R. 447).

Mr. Wesley Riddle Budd, an architect, testified that concrete in the setting stage would be damaged by vibrations, and on the assumption that railroad vibrations would damage the concrete products, his recommendation would be that the plant not be used for the manufacture of pre-cast concrete. His opinions on the effect of vibrations were based in part on information obtained from the Portland Cement Association (R. 493).

Evidence respecting the critical character of setting concrete and the likely effect of railroad vibrations was rebutted by witnesses called by the Road Commission. Mr. Oswald C. Wilde, engineer and estimator for Otto Buehner Company, testified that the Buehner plant located on Wilmington Avenue in Salt Lake City was within 25 to 30 feet of railroad tracks, close enough for vibrations to be felt when trains passed.

Nevertheless, no precautions were taken at that plant to protect pre-cast concrete from vibration while setting, and he knew of no deleterious effects upon the products manufactured at the plant (R. 850).

Mr. Wilde described operations in a new Buehner plant in Murray, Utah, including the use of a "Shok Beton," installed in place of traditional vibrators. A Shok Beton is a large steel table, weighing from 15 to 30 tons (including its load), which is raised $\frac{1}{4}$ inch above a solid concrete floor and dropped two hundred fifty times a minute (R. 852). The resulting vibrations can be felt without an instrument as far as 150 feet away (R. 854), but setting concrete is placed as close as 12 feet from the Shok Beton while in operation. It is the practice of the company to run the Shok Beton from a few to 30 or 40 minutes at a time, but during its operation no precautions are taken to prevent vibration-caused damage to other concrete previously left to set or cure.

Mr. Chris Pickett, district structural engineer for the Portland Cement Association, which performs technical services and studies in connection with uses and characteristics of cement and concrete (R. 859), testified that vibrations of the amplitude measured by Leeds, or other vibrations which might be expected from passing trains, would have no significant effect upon setting concrete (R. 865). A publication of the Portland Cement Association (Ex. 15) shows that random vibrations have not been found to be injurious to

setting concrete and in most instances have increased its strength.

Defendant's evidence as to damage resulting from the reduction in size of Parcel "B" because of its severance from Parcels "A" and "C", was more convincing; and, because of the court's rulings on evidence, largely unchallenged.

Delbert A. Peterson, defendant's president, testified that shop space, ample storage space, and parking space are needed for efficient operation of a pre-cast concrete plant (R. 263); and that construction of the railroad and 23rd West deprived defendant of space needed to store concrete products during the curing period (R. 265). He said that one of the major factors of damage to the concrete plant operation was that Parcel "C" (8.262 acres), separated from the plant by 23rd West, could not be used for such storage (R. 280).

Mr. Hunt confirmed the need for large outside storage areas in the manufacture of pre-cast stone, pointing out that storage must be available for various purposes (R. 439). The reduction in the size of the storage area adversely affects the flexibility of the plant, according to Mr. Hunt (R. 456). Mr. Budd agreed that plant expansion would be prevented (R. 497).

Ray Williams, defendant's appraiser, who concluded that defendant's Parcel "B" would be marketable only for dead storage, based his opinion in part upon the severance. He testified at great length as to the impor-

tance of a large area in the vicinity of the plant, not only for the manufacture of pre-cast concrete, but for necessary growth of any other potential industry (R. 687-688). C. Francis Solomon, an appraiser called by plaintiff, in concluding that the highest and best use of plaintiff's plant was no longer for manufacture of pre-cast concrete, had been impressed by the lack of storage area, and its effects as related to him by defendant's officers (R. 762-765, 831).

Notwithstanding the importance of size as an element of damage to the defendant's property, plaintiff was precluded from presenting evidence that comparable property was available as a substitute for the severed parcels.

After Mr. Peterson had told the jury of the need for a large storage area, he was asked on cross examination whether he had inquired into availability of property to replace that no longer available for storage. Objection was made, but the court adjourned before ruling. On recall Mr. Peterson testified that he had made an investigation of the availability of property before condemnation and knew that property was owned nearby by Mr. Arnold (R. 346).

Mr. Hunt, who had testified as to the need of large outside storage areas (R. 439), was asked on cross examination concerning the possibility of substituting land on the west, but an objection was sustained on the ground that there had been no showing of availability of other property (R. 457), notwithstanding Mr. Peter-

son's earlier testimony that he knew of the Arnold property.

When plaintiff called Mr. R. L. Arnold, president of Arnold Machinery Company (R. 736), objection was made to the testimony, before any questions had been asked. The court indicated that evidence respecting the availability of other property was not material, whereupon plaintiff made an offer of proof substantially as follows:

That Arnold Machinery Company, of which he is the president, owns a parcel of approximately 10 acres of real property lying between defendant's Parcel "B" and the right of way of the Surplus Canal; that there are no distinguishing land marks separating the defendant's property from the Arnold Machinery Company property; that the property, except for a small portion lying north of Style-Crete property along the old Western Pacific right of way, has been owned by Arnold Machinery Company for approximately 25 years; that as of December 28, 1965, [the date of condemnation] the property was available for purchase by a purchaser who was ready, willing and able to pay a reasonable purchase price therefor; that it was ultimately sold by Arnold Machinery Company in May, 1966, for \$3,000.00 per acre; and that the question of purchasing the property had been raised with officers of the defendant prior to its sale (R. 934).

[Figure 3, Appendix, shows the location of the Arnold Machinery Company property relative to defendant's property, the surplus canal, and other land-

marks. Plaintiff's Exhibit 28, an ownership plat, shows the location of the Arnold property, but the court refused to admit it.]

Half of plaintiff's case having been annihilated by the court's rejection of evidence that comparable property was available, the testimony of two appraisers was anti-climactic and of questionable value on the damages actually suffered by defendant.

Although somewhat different methods of computation were used, there was not much difference of opinion as to the total value of the property before condemnation. Mr. Williams' figure was \$183,112.96 (R. 594) and Mr. Solomon's \$184,700.00 (R. 726).

Mr. Williams believed the raw land itself would be damaged by the taking and construction, largely because of the need to fill to near street level. This and his belief that the building could no longer be used for anything other than dead storage led him to conclude that the value of the land after the condemnation would be \$32,532.00 and the building \$28,036.36, or a total of \$60,568.36 (R. 622), establishing \$122,526.60 as the amount necessary to compensate defendant for taking and damage.

Mr. Solomon was of the opinion that defendant's building would be suitable for a number of types of industry (R. 730); that the land would be worth \$44,450.00 after condemnation; and that the improvements would be worth \$68,750.00—for a total "after" value

of \$113,200.00 (R. 741). The amount needed to compensate defendant for taking and damage would thus be \$71,500.00.

[There was some evidence to the effect that the defendant could no longer use a septic tank on its property and would be forced to incur astronomical costs for acquisition and maintenance of a "sealed vault" for sewage disposal (R. 514-517). The evidence, however, was of doubtful weight; and the argument to follow will point out why it, and evidence relating to parking spaces and plant re-arrangement (R. 263-272) are of minor significance with respect to the issues raised in this appeal.]

ARGUMENT

THE COURT ERRONEOUSLY EXCLUDED EVIDENCE RELATING TO THE AVAILABILITY OF PROPERTY COMPARABLE TO THAT SEVERED FROM DEFENDANT'S PRE-CAST STONE PLANT.

Under the provisions of 78-34-10 Utah Code Annotated 1953, the jury in an eminent domain case is required to determine the value of the property condemned, and

"If the property * * * constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought

to be condemned and the construction of the improvement in the manner proposed by the plaintiff."

By its rulings on the evidence in this case the trial court has disregarded the fact that "damages" not "market value" are in issue, and has held, in substance, that a condemnee has no obligation to mitigate those damages. Moreover, the ruling appears to have been made square in the teeth of cases decided by this court.

In the *Provo River Water Users v. Carlson*, 103 Utah 73, 133 P.2d 777 (1943), plaintiff had condemned 18.75 acres of defendant's pasture land for construction of a reservoir. The property owner sought severance damages on the theory that the taking of his pasture land damaged other property being used as a dairy farm. The trial court awarded severance damages but was reversed on appeal. This court said:

" * * * this uncultivated pasture land was not shown to be the only pasture land available within a mile and a half of the Carlson barns. * * *

"If other pasture lands approximately the same distance from the Carlson barns could be purchased, which would place Carlson in relatively the same position he was in before the 18.75 acre tract was condemned, he would be damaged only to the extent of the cost of acquiring such other pasture. The purchase price of such other pasture would substantially determine the market value of the 18.75 acres."

The court then pointed out that even if uncultivated pasture land was not available, defendant would

not be entitled to severance damage if other farm lands were available which would produce relatively the same results, and continued:

“If [defendant] could purchase other pasture land or farm land convertible into pasture, within a distance from his barns comparable to that of the condemned tract, and such other land would provide relatively the same kind of forage for the same number of cows or forage of equal ration-value throughout the seven months he used the wild pasture tract, it could not be contended that his properties in Charleston could be impaired or depreciated by taking the pasture. If another tract of equal foreage-producing value and conveniences could be substituted for the tract condemned, whether larger or smaller in area, the defendant would be in relatively the same position he was in before the construction of the reservoir.”

In *State v. Cooperative Security Corporation of the Church of Jesus Christ of Latter-day Saints*, 122 Utah 134, 247 P.2d 269, (1952), a highway condemnation case, plaintiff took 7.89 acres of pasture land, part of a 131-acre dairy farm. The new highway bisected the farm, leaving two small tracts separated from the main one. The trial court fixed \$2,564.00 as the value of the land taken, and \$10,919.00 as severance damage to the property not taken. On appeal, this court noted the award must have been based on the theory that the fair market value of the remaining property, including the two small tracts, had been depreciated by the \$10,919.00, and said:

“Even if it were conceded that the land taken was part of the unit operation * * * and that under the provisions of Sec. 104-61-11, (2), U.C.A. 1943, respondents were entitled to severance damages for the portion not taken, the question still remains whether under the facts of this case severance damages to the extent granted were proved.

The compensation to which an owner is entitled for severance damages in condemnation proceedings is the difference in fair market value of his property before and after the taking. *State v. Ward*, 112 Utah 452, 189 P.2d 113. *Where severance damage is sought to a remaining tract on the theory that the taking has depreciated the fair market value of that tract there must be proof that no comparable land is available in the area of the condemned land.*

* * * In the instant case there was evidence that at the time the summons was served and possession of the land sought to be condemned was taken by the State there was available a tract of pasture land adjacent to respondent's property on the east and only separated from it by a fence. This tract was comparable to the land taken for the use to which it had been put. It contained 15.3 acres and it was admitted * * * that at least a part of it was available and had been offered for sale but respondents had refused to buy it.” [Emphasis added.]

The court then went on to note that whether or not the land was still available was not determinative, inasmuch as damages accrue at the date of the service of summons.

The above cases should be controlling here unless a pre-cast concrete plant in eminent domain proceedings is *sui generis*, the principle having been applied to farm and factory alike.

A decision relied upon in the *Provo River Water Users* case, *City of St. Louis v. St. Louis I.M. & S.R. Co.*, 272 Mo. 80, 197 S.W. 107 (1917), involved a manufacturing plant used for the production of white lead. The plant consisted of two parcels divided by a street, the south parcel being used as a "corroding yard" upon which 48% of the lead production had been corroded. The balance had been corroded on the north parcel. The plaintiff condemned 17,800 of the 22,872 square feet on the south parcel, which rendered it useless as a corroding yard.

The condemnee contended that the taking from the south corroding yard destroyed 48% of the corroding area, practically resulting in destruction of the white lead plant. The condemnor on the other hand, contended that the value of the plant was not depreciated because other parcels of land could have been procured by defendant to take the place of the south corroding yard. The trial court found that immediately west of and contiguous to the north parcel there was for sale 21,000 square feet of land for about \$51,000, which was as available for use in connection with the part remaining as the part appropriated; that defendant could continue to use the north parcel for lead manufacturing to just as good advantage and as eco-

nomically as before the appropriation by rearranging it in connection with the 21,000 square feet; that it would be as valuable as it was before the appropriation; and, therefore, that the compensation allowed would be the market value of the 17,800 square feet taken, the depreciation in the market value of the 5,072 feet south of the part taken, the cost of rearrangement, and the depreciation in value of the 60,000 square feet in the north parcel in its rearranged condition. On appeal the Supreme Court of Missouri affirmed, stating:

“It is conceded, of course, that damages for land taken through the exercise of the power of eminent domain may not be paid in anything but money; that neither other parcels of land nor the sale thereof are current media of payment therefor, and that the owner of land may not be compelled to swap lands nor to move into another town, or city, or state where the land is cheap and have such cheapness compared as a criterion of value against the lands taken. But when land is devoted to a special use and it is urged that such use has been wholly or partially destroyed by the taking of a parcel of such land, it will be appreciated that some complete criterion by which to measure the quantum of damage sustained is absolutely necessary; otherwise the amount of depreciation would be a mere matter of bald guessing.

“ * * * The rule [adopted by the trial court], of course, should be limited to cases wherein only part of a tract devoted to a special use is appropriated. It can have no relevancy to a case wherein the whole of a parcel is taken. For, we repeat, in no case can the owner, for the con-

venience of the condemnor, be required to swap lands, or go into the market and buy other lands in lieu of those taken. But in a case *where the taking of a part of a tract which is devoted to a special use results in a large depreciation in value for that special use, the measure of that depreciation ought to be the sum required to be extended in order to rehabilitate the property for such use*, or replace the plant in statu quo ante capiendum; provided, of course, that rehabilitation in such matter be practicable. * * * In cases where no available property is owned by him whose land is taken, the price at which other lands adjacent, equally as valuable intrinsically, as convenient, as economical in use, and as accessible, and which can be bought, may be shown as measuring the amount of depreciation to which the lands damaged but not physically taken have been subjected.

“A situation wherein any other view is unthinkable is possible. For if the appellant’s lead factory had been worth a million dollars and the parcel actually taken had been itself of little value and it contained an accessory of small intrinsic worth, but one without which the million dollar plant would have been rendered useless, the principle would be exactly the same. But even if appellant in the supposed case itself possessed no other land, would it be contended that the city could be saddled with the entire value of the plant as damages, when other lands in every way as available could be bought to reduce the damages? We think not, and conclude that, insofar as the learned trial court considered the price at which other lands, equally as available and useable by appellant could have been obtained, as the measure of damages

of the depreciation in value of the whole plant by reason of the taking of the corroding yard, he was right * * * ” [Emphasis added.]

In *Hannibal Bridge Co. v. Shaubacher*, 57 Mo. 582 (1847), the defendant's brewery occupied two lots separated by a street. A lot containing a portion of the brewery equipment, connected to the other part by pipes, was condemned. Without the equipment the brewery could not be operated successfully. The defendant contended that the taking of the one lot destroyed the brewery and that it was damaged to the brewery's full value. Although land was available on the other side of the street on which the equipment could be located so that the brewery could be successfully operated, the trial court refused to hear any testimony on the cost of removing the equipment to the other side of the street. The Missouri court reversed, holding:

“If [the equipment] could have been transferred to the western side of the alley and placed in such a situation that the brewery could have been just as effectively operated as it was before, then the actual loss to defendants would have been the trouble and expense of making the removal.

“This, then we are inclined to think would be the proper and appropriate measure of damages, viz., the cost and expense of removing the malt house, horsepower, pump and pipe to the west side of the alley so it could be used as effectively and advantageously for running the brewery as it was run before. * * * ”

In *Illinois & St. L. R. Co. v. Switzer*, 117 Ill. 399, 7 N.E. 664 (1886), the railroad condemned a right of way across land upon which defendant operated a mill.

The railroad would have severed the main portion of defendant's mill from lands containing its water supply. When the railroad offered to prove that there was other water which would be available to defendant and serve its purposes just as well, the trial court refused the offer, but the Illinois Supreme Court reversed, stating:

"There was, in this, manifest error, for which the judgment must be reversed. There having been an estimate of damages made on the bases that the pond would be destroyed as a source of supply of water for the mill and that there would be no other means of such supply, it obviously should have been permitted to show that there would be other sources of supply not, as is supposed by appellee's counsel, for the purpose of showing that there would be no damage, but for the purpose of affecting the amount of damage; the amount of the estimate of damages by appellee's witnesses having based on the supposition that there would be no other means of supplying the mill with water."

In *City of St. Louis v. Paramount Shoe Mfg. Co.*, 168 S.W. 2nd 149 (Mo. Ct. of Appeals, 1943), the plaintiff had condemned a portion of defendant's land upon which it proposed to expand its shoe manufacturing plant sometime in the future, plans for the expansion having been in existence. The defendant maintained that the city, by cutting off a small portion of

the land upon which expansion was contemplated, had substantially damaged the balance of the plant. As noted by the court:

“Such consequential damage allegedly resulting from the limitation put upon the plant’s future expansion was the chief factor taken into consideration by respondent’s witnesses in connection with damages occasioned by the taking.”

The value of the land actually taken was only a small portion of the damages claimed. The city had contended that evidence regarding the cost of available land in the area should not have been admitted. The appellate court rejected this contention, stating:

“It was competent for respondent to show, not only the cost of any adjacent land upon which a future additional building might be erected but also the infeasibility of operating its plant under the conditions which the erection of the new building at that location would impose. All this was relevant to the issue in the case for if additional land could be acquired upon which respondent’s enlarged plant could be completed and operated as satisfactorily as would have been the case upon the land originally bought for that purpose, then obviously there would have been no injury done to respondent’s property through hinderance to expansion and its total damages could hardly have exceeded the value of the land actually taken by the appropriation.

“It has been said that in the case where land is taken by condemnation, the price at which he may buy equally valuable, convenient and accessible land may be shown by the owner as

measuring the amount of depreciation to which the land damaged but not physically taken has been subjected * * * in this case it was undoubtedly respondent's duty, when injured by the appropriation of part of its land, to minimize the damages to the remainder if it could."

In *Gulf C. & S.F. Ry. Co. v. Brugger*, 24 Tex. Civ. 367, 59 S.W. 556 (1900), the railroad had condemned a portion of defendant's timber lands. The defendant maintained that without these timber lands the value of the remainder of his farm was seriously depreciated. The plaintiff argued that there were other timber lands in the area which were available to the defendant. The court stated:

"It is clear to us that the proximity and the price of adjacent or contiguous timber land of a similar character was a fact proper to be considered by the jury in determining the extent to which appellee's lands would be depreciated by the loss of this particular tract."

The court pointed out that this was not for the purpose of showing separate items of damages but a matter to be considered in determining to what extent the value of his land would be affected by the condemnation. The court held the testimony not to be proper in that case, however, because it was not shown when the lands were available. See also *Union Electric Light & Power Co. v. Snider Estate Co.*, 65 F.2d 297 (8th Cir., 1933).

Section 78-34-10, U.C.A., 1953, and the cases construing it, e.g., *State v. Ward*, 112 Utah 452, 189

P.2d 113 (1948); *State v. Fourth Judicial Court*, 94 Utah 384, 78 P.2d 502, (1937), make it plain that there is a substantial distinction between *compensation* for land taken, and *damages* to property not taken. For property taken, the measure of just compensation is the market value of land taken; but for property not taken, an owner is entitled only to an amount representing the damage actually done to the land. It is an elementary principle of the law of damages that any person damaged is required, where possible, to minimize or mitigate his loss. If property were damaged by someone lacking the power of eminent domain, the mitigation rule would apply. It is difficult to conceive a rational basis for relieving a land owner of the duty to mitigate solely because his property is damaged by a legitimized public use.

In the present case attempts to examine defendant's witnesses about the availability of land adjacent to that being condemned and the feasibility of utilizing that tract were thwarted by the court's rulings on the defendant's objections. The Road Commission's offer to prove the availability of comparable property was refused. And the court failed to give any instruction on the availability of other property.

The offer to proof, made after the objection to testimony of R. L. Arnold, shows that there was land adjacent to respondent's plant which would have from all appearances, served to replace Parcel "C". The land was available for sale on the date the summons was

served and was ultimately sold for \$3,000.00 an acre—substantially less than defendant's land was claimed to be worth.

The value of the land actually taken in this case was very small (approximately \$10,000) compared to the total amount awarded by the jury (\$122,500). Although not presented by the defendant in that way, simple mathematics shows that of the total award, \$112,500 was for severance damage to defendant's remaining land.

The court's rejection of evidence of the availability of comparable property was error, and it can hardly be gainsaid that the error was prejudicial, in light of the theory on which the case was tried.

The exceedingly high severance and proximity damages claimed by the defendant in this case were based upon the following factors:

(1) Vibrations emanating from the relocated track of the Western Pacific Railroad would be expected to damage setting concrete, thus prohibiting further use of defendant's plant for pre-cast concrete products.

(2) The manufacture of pre-cast concrete required a relatively large outside area in which to store the concrete products while they cure. Prior to condemnation such an area was available in Parcel "C," but after condemnation, because of the grade of 23rd West, it was not, and defendant's plant therefore could no longer be used for the manufacture of pre-cast concrete.

(3) All industrial plants need an area for contemplated future expansion. By severing Parcel "C" from Parcel "B", the area surrounding the defendant's pre-cast concrete plant was too small, and a reasonably prudent man would not purchase Parcel "B" for any manufacturing operation. It must therefore be used for dead storage, a most uneconomical use.

(4) By severing Parcel "A" from Parcel "B" and taking the 20-foot way along the east side of Parcel "B", the parking area was eliminated and the unloading areas were reduced to such a size that operations of the plant for the manufacture of pre-cast concrete would be adversely affected.

(5) The railroad with its nine-foot fill would interfere with the esthetic enjoyment of those working in or visiting the plant.

(6) The pressure of the railroad embankment has so changed the character of the underlying ground that the water table has been raised, it will no longer be possible to have a septic tank on the premises, and the defendant will be required to use an inordinately expensive sealed vault for sewage disposal. A septic tank cannot be installed with drain fields running in a different direction largely because of the reduced size of Parcel "B". A reasonably prudent person, therefore, would not purchase the property for manufacturing, and the property is useful only for dead storage.

The height of and vibration emanating from the railroad are the only factors unrelated to the size of

Parcel "B". A witness with long experience in the manufacture of pre-cast concrete testified to the effect that random vibrations have never been a problem; a Portland Cement Association expert testified that vibrations of an amplitude much greater than those found by Mr. Leeds would not affect adversely setting concrete; and a publication of the Portland Cement Association indicates that random vibrations not only do not damage setting concrete but in many instances strengthen it. For industry, esthetics is minor.

The evidence relating to the ability of the defendant to locate a septic tank upon its premises was speculative. Mr. Caldwell, of the Salt Lake City health department, testified that the necessary steps to obtain approval of location of a septic tank, including the furnishing of information about test holes and the character of the underlying ground, had never been submitted to the City by the defendant.

The defendant did not offer any substantial evidence that the interference with the parking areas and the unloading areas would prevent the continued operation of defendant's plant for the manufacture of pre-cast concrete.

There was evidence that the size of Parcel "B" and the need for curing, as well as the need for room to expand in the case of other industrial operations, was critical, and the jury must have been left with the impression that even if the plant could continue operations despite railroad vibrations, septic tank problems

and reduced parking and unloading areas, the reduction in size of Parcel "B" was so serious that the plant could no longer be used for any purpose other than a "dead storage" warehouse.

The court would not permit plaintiff to show that the plant could have been "salvaged" and the damages greatly reduced if the defendant had only desired to do so, and if the jury believed defendant's evidence respecting the size of Parcel "B", it had little choice but to do what it did, even if it rejected all other factors. On its face the error was prejudicial and a new trial should be granted.

II

THE COURT ERRED IN REFUSING THE PLAINTIFF'S REQUESTED INSTRUCTION NO. 15, AND IN FAILING TO GIVE ANY INSTRUCTION RELATING TO THE EFFECT OF AVAILABILITY OF COMPARABLE PROPERTIES ON SEVERANCE DAMAGES RECOVERABLE BY THE DEFENDANT.

The *Provo River Water Users and Co-Operative Security Corportaiion* cases, cited supra under Point I, went further than merely holding that evidence of the availability of comparable property is relevant and material on the issue of severance damages. Both of the cases are authority for the proposition that the condemnee has the burden of proving unavailability of replacement land.

In the *Co-Operative Security Corporation* case the court said:

“Where severance damage is sought to a remaining tract on the theory that the taking has depreciated the fair market value of that tract *there must be proof that no comparable land is available* in the area of the condemned land.” (Emphasis added.)

Although the court had effectively precluded the plaintiff in this case from showing that other land was **available**, plaintiff asked the court for an opportunity to let the jury consider the question of the lack of proof of unavailability of comparable property, much of the opinion evidence in the case having been based upon the assumption that the diminished size prohibited any economical use of Parcel “B”. Plaintiff’s requested Instruction No. 15 (R. 80) was directed at this point. The requested instruction was as follows:

“Damages sought by defendant in this case include ‘severance damages,’ that is, damages resulting to the defendant’s remaining property because of the separation of portions of the property of the property by 23rd West street on the one hand and the railroad right of way on the other.

“In order for the defendant to recover such severance damages it has the burden of proving, by a preponderance of the evidence, that as of December 28, 1965, the date of service of the summons, no comparable land was available to it in the area which could be substituted for the land taken or severed. If such comparable land

was available to the defendant, proximity and severance damages should total an amount representing the difference between (1) the value of the remainder before the taking and (2) the value of the remainder plus the comparable land after the taking less the cost of the comparable land."

The requested instruction substantially incorporates the reasoning of the court in the *Provo River Water Users* and *Co-operative Security Corporation* cases. By refusing to permit the plaintiff to introduce evidence respecting availability of additional property, and refusing to give the requested Instruction 15, or any instruction relating to the effect of comparable land upon severance damages, the court placed the jury in a position in which it had little choice but to accept the opinion of one appraiser or another, whereas the jury should have been free to consider the validity of the assumptions made by both appraisers in arriving at their opinions of "after" value.

Possibly requested Instruction 15 is not a model instruction, but even so, the court had some duty to place before the jury the "availability" question. It is a matter that bears not only upon the direct claims of the parties but the credibility of the various witnesses who saw nothing but chaos in defendant's future.

Some instruction on this should have been given; and if, for some reason, this court finds the requested instruction was properly refused, it should exercise the discretion provided for in Rule 51, U.R.C.P., and

review the failure to give *any* instruction on availability of comparable property.

III

THE COURT MISDIRECTED THE JURY ON THE LAW AND COMMENTED ON THE EVIDENCE.

Not only did the court confine plaintiff to trial of half a case, but with respect to that half it misdirected the jury and commented on the evidence in such a manner that the jury must have understood that it would be pleasing the court if it gave full credence to defendant's evidence and returned a verdict for as much as the defendant was asking. A number of the instructions given by the court (at defendant's request) were erroneous, and the cumulative effect was to deprive the plaintiff of a fair trial by an objective jury uninfluenced by the court's expression of its views.

Instruction No. 4 (R. 19) which invokes Article 1, Section 22 of the Utah Constitution, and the Fifth Amendment of the United States Constitution, might be proper in a civics class, but it directs the jury's attention away from the issues being tried, i.e., the amount of compensation and damages to be awarded for the taking of defendant's property and construction of the improvement, pursuant to Title 78, Chapter 34, Utah Code Annotated, 1953, and decisions thereunder.

It is incorrect to state that a person whose property is condemned for public use is to be made "no worse

economically," than if his property had not been condemned. Frequently great economic losses result to condemnees because of the need to abandon or relocate an established business; yet the compensation awarded must come from within specific statutory and court rules. See, e.g., *State v. Ward*, 112 Utah 452, 189 P.2d 113 (1948); *State v. Rozelle*, 101 Utah 464, 120 P.2d 276 (1941); *Springville Banking Co. v. Burton*, 10 Utah 2d 100, 349 P.2d 157 (1960); *State v. Bettilyons, Inc.*, 17 Utah 2d 135, 405 P.2d 420 (1965). Instruction No. 4, in effect, suggests to the jury that it may consider factors, not wholly expressed in dollars, which might injure defendant in its future operations or interfere with its plans for expansion and increased profits. Moreover, the instruction erroneously states the damages for severance as the "loss of value" in the defendant's remaining property. This is particularly so in light of the court's refusal to give plaintiff's requested Instruction No. 15 and its refusal to hear any evidence respecting the availability of property which would have permitted the defendant to mitigate its damages. The jury was left only with an expert's opinion as to the diminution in the value of the property without the opportunity to consider other factors which might permit continued use of the concrete plant.

Instruction No. 8 (R. 23) unduly emphasizes the defendant's evidence with respect to the damages it suffered. The instruction is simply a catalogue of each item of evidence relied upon by the defendant's appraiser and would be expected to impress the jury as

a comment by the court that this evidence was of greater importance than other evidence in the case relating to damage. As stated in 88 C.J.S. Trial, §340:

“Since instructions should not draw the attention of the jury to particular facts, it is error to give instructions and under other circumstances it is proper to refuse to give instructions which unduly emphasize issues, theories, defenses, particular evidence, specific or assumed facts, or burden of proof, whether by singling them out and making them unduly prominent * * *”

citing, among other cases, *Mecham v. Allen*, 1 Utah 2d 79, 262 P.2d 285 (1953).

We have been unable to find any support in the cases for the proposition embraced by Instruction No. 10 (R. 25), i.e., that notwithstanding severance of the property into three more-or-less separate parcels the jury was to consider the value of the remaining property as if it were still one parcel. It was undisputed in the evidence that the three parcels were separated by construction of the railroad right of way and 23rd West street. The testimony of both appraisers, referred to the property as three separate parcels, and there was no evidence in the record respecting the market value of the property as a single piece. Not only did the instruction ignore defendant's obligation to mitigate its damages, but invited the jury to speculate whether defendant's damage might exceed even the damages fixed by appraisers, who testified as to the values of each of three separate parcels of property, it being

common knowledge that marketing three parcels as one would be more difficult. In *State v. Tedesco*, 4 Utah 2d 248, 291 P.2d 1028 (1956), this court held that property taken by condemnation must go to the condemnor for its fair market value for the total price and not for an amount based on an aggregate of values of individual lots in a subdivision, which the condemnee hoped to sell individually. This, however, was for land taken, not that remaining, and is the reverse of the situation dealt with in defendant's instruction. It was noted in *Tedesco* that "a condemnee is not entitled to realize a profit on his property," but a profit could very well be realized under defendant's theory.

Instruction No. 11 (R. 26) details factors testified to by the defendant's appraiser respecting the comparability of properties used in arriving at his market value opinion. This instruction substantially repeats the views of the defendant's appraiser, and amounts to an adoption of those views by the court. The jurors are supposed to determine the credibility and weight of the evidence; but the court assumed to tell the jurors what factors they should find to be most influential:

"The more elements of comparison and similarity that the sale has with the subject property, the more weight it is entitled in your determination of fair market value."

This is not a proper instruction. It is patently a comment by the court upon the credibility of the defendant's appraiser as compared with the appraiser called by plaintiff. The instruction is not only subject to the

same objections as Instruction No. 8, but as a whole, violates the well- established rule that it is error for the trial court to charge on the weight or sufficiency of the evidence. 88 C.J.S., Trial §285; Reid's Branson Instruction to Juries, Vol. 1, 1960 Repl. §27; *Smith v. Cummings*, 39 Utah 356, 117 Pac. 38; (1911) *Olsen v. S. H. Kress & Co.*, 87 Utah 51, 48 P.2d 430 (1955).

Instruction No. 12 (R. 27) is similarly objectionable, since it emphasizes the rental-capitalization theory of the determination of value as against the other theories testified to by the appraisers, i.e., market sales analysis, and reproduction cost. Again, it suggests to the jury that the evidence given by the defendant's appraiser respecting capitalization rates and rentals was entitled to more consideration in determination of the "after" value than was the reproduction cost evidence given by the plaintiff's appraiser. In addition, the instruction improperly assumes facts (that buyers do investigate rental income of property in determining market value) not admitted. That this is improper is clearly stated in Reid's Branson Instructions to Juries, supra §27:

"A trial judge must not incorporate into his charge assumptions or positive statements as to facts which are in dispute since this practice may impress his interpretation of the evidence upon the jury."

Instruction No. 19 (R. 34) must have left the jury with the impression that the defendant was a knight in shining armor, who needed protection against a

grasping, unhuman Road Commission. Loaded words dominate the instruction. A mild preface respecting the State's right to take the property, is followed by the lament that a citizen has "no choice but to surrender and yield up its property," and that the citizen is to be paid "justly and fairly" for the property "expropriated from it." This instruction unfairly compares the positions of the citizen and the condemning authority, and like previously mentioned instructions erroneously states the law respecting the measure of damages to the property not condemned. Moreover, the use of capital letters in "JUST COMPENSATION," added to the other factors, tends toward a rather one-sided presentation to the jury. Instructions which are inflammatory or tend to excite passion, prejudice or sympathy are improper and "the giving of such an instruction will ordinarily result in a reversal". Reid's Branson Instructions to Juries, *supra* §110; 88 C.J.S. Trial, §343.

Instruction No. 20 (R. 35) would reasonably be interpreted by the jury as a comment by the court that the appraiser called by the defendant was most believable, particularly in light of developments subsequent to the court's ruling that the appraiser called by the State, Mr. C. Francis Solomon, might remain in the courtroom notwithstanding the defendant's motion for exclusion of witnesses (R. 168-172).

In his cross examination of Mr. Solomon, the defendant's counsel emphasized the term "advocate"

and explored at length the reasons for Mr. Solomon's continued presence in the courtroom following the court's ruling, and the possibility of some interest in the outcome (R. 747-752). In addition, during the course of the trial, counsel repeatedly made remarks in the presence of the jury concerning the fact that Mr. Solomon had not been excluded and was remaining at the instance of the plaintiff (R. 173, 261, 283, 749).

Instruction No. 20 cannot be read without consideration of the court's ruling on the exclusionary motion, Mr. Solomon's continued presence, the cross examination concerning "interest in the outcome of the case," and counsel's questions about advocacy. The effect of Instruction No. 20 in this context is to suggest to the jury that Mr. Solomon, whose interest in the case was "demonstrated" by his remaining in the courtroom, was not nearly so entitled to belief as was Mr. Williams, the appraiser called by the defendant, because the latter did not remain in the courtroom and ostensibly had no interest in the outcome. The fact that the instruction covered some of the same ground as Instruction No. 25 makes the effect of the suggestion even stronger.

Instruction No. 21 (R. 36) is not particularly harmful as the case was tried, inasmuch as the plaintiff was prohibited from introducing evidence of the availability of comparable property. However, when the case is remanded the trial court should be advised that the jury need not return a verdict between the ranges

testified to by the experts. The jury is entitled to consider the factors taken into account by each of the experts in arriving at his opinion as to the value of the property, and if it finds that some of these factors do not exist or have been overstated, it can adjust the expert's opinion accordingly.

IV

THE COURT ERRONEOUSLY EXCLUDED EVIDENCE OFFERED BY PLAINTIFF.

During the cross examination of C. Francis Solomon, the appraiser called by plaintiff, defendant's counsel went into great detail on the methods followed by Mr. Solomon in preparing his appraisal report. During the examination he asked for and obtained a copy of the appraisal report (R. 808-809), and then proceeded to cross examine Mr. Solomon in great detail about the computations and contents found in the report (R. 809 et seq.) He suggested the report, made prior to trial, did not include any reference to the relocation of septic tanks (R. 827). He cross examined Mr. Solomon further with respect to the report and the method used in arriving at the conclusions contained in the report (R. 831-838).

On redirect examination Mr. Solomon identified Exhibit P-33 as his appraisal report prepared on February 4, 1967 (R. 844). He said the report was prepared and submitted prior to the date of the trial, and that it contained the various computations with respect

to which the defendant's counsel had cross examined him (R. 845). But on objection of defendant's counsel the court refused to admit the appraisal report in evidence, contrary to an established rule of evidence that when a witness is cross examined with respect to the contents of a document the document itself may be introduced in evidence as part of the redirect examination of the witness. Nichols on Eminent Domain, Vol. 5, § 18-1(1), 98 C.J.S. Witnesses, §427, *Wooten v. State*, 348 SW 2d 281 (Tex. Civ. Apps., 1961); *Derrick v. Blazers*, 355 Mich. 176, 93 N.W.2d 909 (1959). As suggested in a number of cases the rule is a corollary of that followed in *State v. Cooper*, 114 Utah 531, 201 P.2d 764 (1949), that any evidence logically tending to rebut inferences raised on cross examination is admissible.

V

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL.

On April 5, 1967, plaintiff moved for a new trial and pointed out to the court the error in its refusal of evidence relating to the availability of comparable property, its refusal to give the plaintiff's requested Instruction No. 15, and its giving of various other instructions (R. 95-96). On April 27, 1967, the motion for a new trial was denied (R. 99), and an appeal was thereupon taken to this court.

Plaintiff regards it as unnecessary to quote authorities in support of this point, since it is apparent that if the court ruled improperly on the evidence and instruction with respect to comparable property, a material issue was never tried, and the only appropriate relief to be granted is reversal of the judgment and remand of the case for a new trial.

CONCLUSION

A determination of the amount of damages suffered by a land owner (because of severance and the construction of the improvement) requires evidence not so much of the “after” *market value* of the property, as of the damages suffered. The damages may or may not be the same as the “before” less the “after” value. If there were no duty to mitigate damages, there would be little room for argument, but the cases recognize such a duty to mitigate, and this duty should be translated into a duty to obtain comparable property, if available, to replace that severed, or that damaged by construction of the improvement by the condemnor.

The trial court’s refusal of evidence of the availability of comparable property, and its refusal to instruct the jury on the effect of availability, prevented the jury from giving consideration to a substantial factor in the determination of compensation and damages, and completely ignored a rule of law clearly established by this court. Moreover, the court’s rulings

on the evidence, its misdirection of the jury, and its comments on the testimony, precluded fair, objective consideration of the issues actually tried.

The judgment should be reversed and a new trial ordered.

Respectfully submitted,

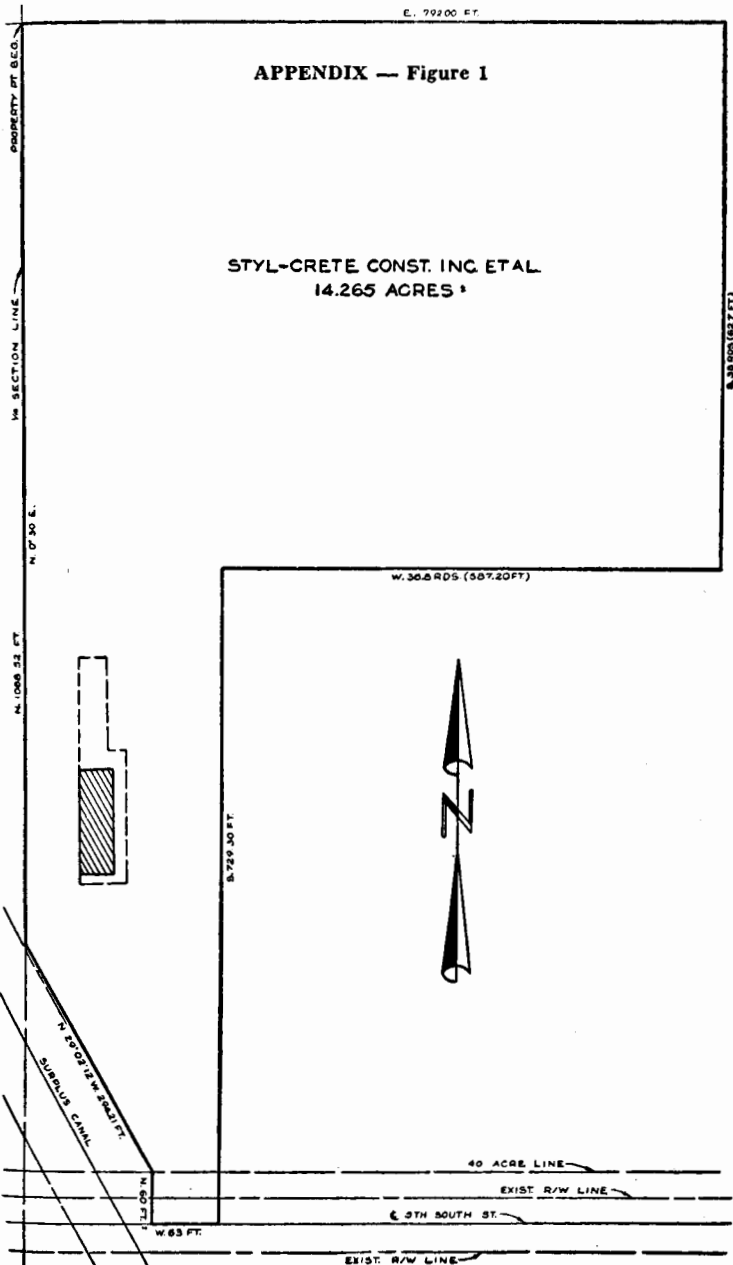
PHIL L. HANSEN
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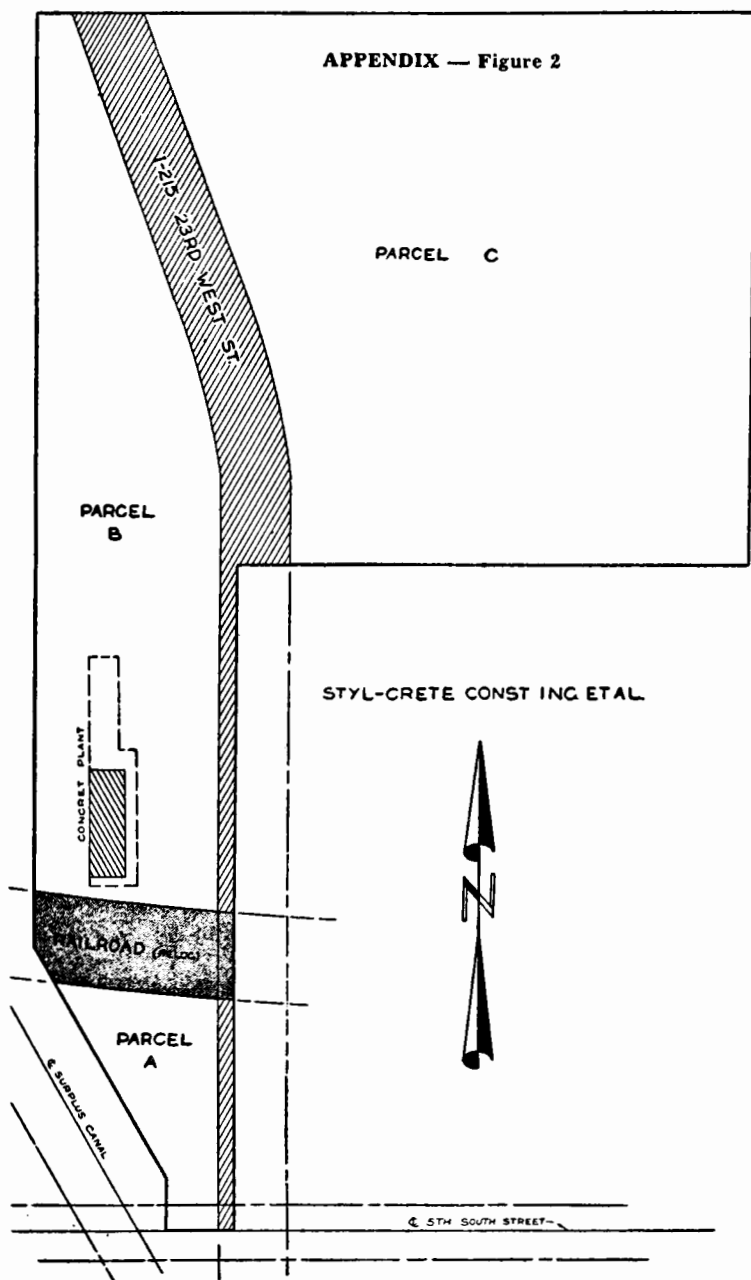
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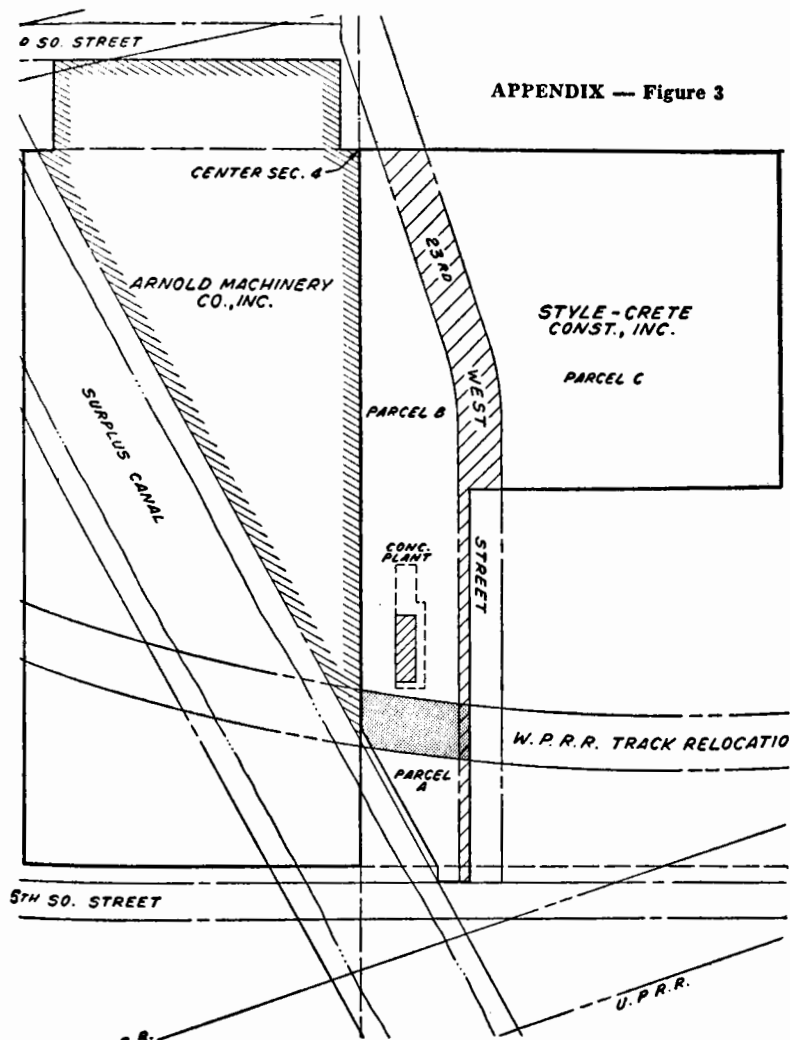
APPENDIX — Figure 1

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APPENDIX — Figure 2





APPENDIX — Figure 3