

1968

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

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH by and through  
its Road Commission,

*Plaintiff and Appellant,*

v.

STYLE-CRETE, Inc., a Utah  
corporation,

*Defendant and Respondent.*

Case No.  
10902

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## APPELLANT'S REPLY BRIEF

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Appeal from a Judgment of the District Court  
of Salt Lake County, State of Utah  
Honorable Marcellus K. Snow

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FILED

FEB 8 - 1968

Clark, Supreme Court, Utah

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## TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	1
ARGUMENT .....	3
I. <i>The question of the availability of other prop- erty was necessarily included in the issues made by the pre-trial order and the pleadings.</i> .....	3
II. <i>Under the "before and after rule" relied upon by respondent evidence of the availability of other land is material.</i> .....	4
III. <i>The State was not "bound" by the testimony of its appraiser.</i> .....	12
CONCLUSION .....	13

## AUTHORITIES CITED CASES

<i>City of St. Louis v. St. Louis IM&amp;SR Co.</i> , 272 Mo. 80, 197 S.W. 107 (1917) .....	5
<i>Edgcomb Steel of New England v. State</i> , 100 N.H. 480, 131 A.2d 70 (1957) .....	6

	Page
<i>Highway Department of State of Michigan v. Dake Corporation</i> , 357 Mich. 20, 97 N.W.2d 748 (1959) .....	7
<i>Pima County et al. v. De Concini et ux.</i> , 79 Ariz. 154, 285 P.2d 609, 611 (1955) .....	7
<i>Schlatter v. McCarthy et al.</i> , 113 Utah 543, 196 P.2d 968, 975 (1948) .....	12
<i>Southern Pacific Company v. Arthur et al.</i> , 10 Utah 2d 306, 352 P.2d 693 (1960) .....	8
<i>State Highway Commission v. Hayes Estate</i> , 140 N.W.2d 680 (S.D., 1966) .....	6
<i>State of Utah v. Howes, Bingham, et al.</i> (No. 10831), not yet reported .....	9
<i>In re Widening of Michigan Avenue etc.</i> , 280 Mich. 539, 273 N.W. 798, 802 (1937) .....	7

## RULES, TEXTS AND TREATISES

Utah Rules of Civil Procedure, Rule 75(p) .....	2
McCormick on Evidence, §47 .....	13
4 Nichols on Eminent Domain (3rd Ed.) §14.247..	5
4 Nichols on Eminent Domain (3rd Ed.) §14.22..	5, 10
4 Nichols on Eminent Domain (3rd Ed.) §14.23 ....	11
III Wigmore on Evidence (3rd Ed.), §907 .....	13

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## APPELLANT'S REPLY BRIEF

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### PRELIMINARY STATEMENT

The original briefs adequately set out the nature of the case, its disposition in the lower court, and the relief sought on appeal.

### STATEMENT OF FACTS

Respondent asserts that appellant's brief did not conform to procedural requirements in that not all of

the evidence was included, and such facts as were included were not presented "in a light most favorable to support" the respondent's case. Such a requirement, like the respondent's history of eminent domain proceedings in the district courts of Utah, must exist only in the mind of counsel. Rule 75 (p), Utah Rules of Civil Procedure, was amended to restrict the statement of facts to those "material" to the appeal.

Respondent correctly observed at page 14 of its brief that appellant has not contended that the evidence was insufficient to support the verdict. The primary questions raised on appeal concern the refusal of the trial court to permit evidence of, and instruct with respect to, the availability of other property and its effect on respondent's damages. The facts set out by appellant were the ones material to those questions. The jury had not been asked whether any particular factor relied upon by respondent caused or contributed to its damages. As to all factors except the *size and shape* of the remaining land the jury might have found either way; but it was not permitted to consider whether the damages would have been minimized by the acquisition of other land and the rearrangement of the respondent's concrete plant.

Respondent's statement contains a number of "facts" that were only opinions of particular witnesses, contrary to the opinions of other witnesses. No inferences may be drawn from appellant's failure to have a witness contradict the testimony of A. R. Caldwell.

His credibility and the relevance of his testimony were successfully attacked on cross-examination. Moreover, the need for such a witness was not suggested by respondent's pleadings or the pre-trial order (R. 121-123, 812, and 889-894).

The statement at page 12 of respondent's brief that it had not offered any evidence that the property constituted "an economic unit dependent on its size for full value" before condemnation is true only to the extent that respondent did not use the term "economic unit." Style-Crete's owners, its appraiser, and its other experts testified that one of the elements rendering the building unsuitable for any use other than dead storage was the reduced size of the parcel upon which the plant is located.

## ARGUMENT

### I

*The question of the availability of other property was necessarily included in the issues made by the pre-trial order and the pleadings.*

Style-Crete's claim that "no issue of 'availability of replacement land' was raised by the pleadings or incorporated within the pre-trial order" (Brief, p. 15) is not correct. In one of its answers Style-Crete suggests it will be necessary to spend substantial sums of money to build ramps to connect two of its parcels (R. 10-11) after construction of 23rd West Street. In another

answer (R. 892) it avers that the taking of the property for the railroad and 23rd West Street “destroys the existing construction site for a substantial addition to the cast stone plant,” and “requires this defendant to relocate and construct an enlarged office and other plant facilities in another location.” The pre-trial order provides (R. 122) that in each case the property being taken bi-sects Style-Crete’s property and that higher-than-usual severance damages are claimed because of the elevation of the road.

The pre-trial order made no attempt to set out the various factors contributing to the amount of severance damages. The question of the availability of other property and its effect upon the concrete plant is implicit in the pleadings and pre-trial order.

## II

*Under the “before and after rule” relied upon by respondent evidence of the availability of other land is material.*

The difference between “damages” to remaining property, and “value” of property taken, is recognized in Utah constitutional and statutory provisions governing eminent domain, and in the cases which refer to “severance damages,” and the duty to “mitigate” them. Nevertheless, there is merit in respondent’s position that the modern trend in eminent domain cases and texts is toward a test of “before” and “after” market values, even where portions of the damages are based



upon injury to property not taken. This change in approach, however, does not answer the question of whether a court should take into consideration the availability of other land to replace land previously used with the remaining parcel.

On pages 17 and 18 of its brief, Style-Crete touches on the problem but stops short. It recognizes, as would be expected, that all factors "which reasonably tend to *depreciate*" the remainder may be taken into account in determining after value, but it does not acknowledge that factors "which reasonably tend to *appreciate*" the remainder should also be taken into account. The authorities relied upon by the respondent do acknowledge it. In 4 *Nichols on Eminent Domain* (3rd Ed.) §14.247, in a discussion of expenses incurred by the owner in taking preventive measures, the writer states that it is proper, and in many cases essential, that the owner take preventive measures by which he may be able to restore, at least to a certain extent, if not completely, the potentiality of such property for the use of which he has been deprived." Although Professor Nichols is among the "before-after" advocates, he cites in support of his statement *City of St. Louis v. St. Louis IM&SR Co.*, 272 Mo. 80, 197 S.W. 107 (1917), so disdained by respondents.

The authority also says (4 *Nichols on Eminent Domain*, §14.22) :

"When the damage to the owner's remaining property can be avoided by grading or repairs,

and the reasonable cost of such work is less than the decrease in the market value of the real estate, such cost forms the measure of damages."

The rule on minimization can be rationalized as either "mitigation" (under a "damage" theory of severance), or as affecting the value of the remaining property (under a "before and after" theory). This is made clear from the cases dealing with this problem.

In *State Highway Commission v. Haycs Estate*, 140 N.W.2d 680 (S.D., 1966), which involved a partial taking and damage to property not taken, the South Dakota Supreme Court considered the effects of "rehabilitation, rearrangement, restoration and readjustment," saying:

"In estimating damages to the remainder, or in other words, the depreciation in value of the part not taken, the land owner is entitled to have the jury apprised as to all those facts which legitimately bear upon the market value \* \* \* before and after the taking, and those factors that would ordinarily influence a prospective customer in negotiating for the property.

"\* \* \* it is proper to take into consideration the expenses made necessary by the improvement \* \* \* in order to restore the land to its most advantageous use, or in adjusting it to the changed conditions brought about by the taking \* \* \*"

In *Edgecomb Steel of New England v. State*, 100 N.H. 480, 131 A.2d 70 (1957), the court discussed the severance damage problem as follows:

“The state as condemnor was not necessarily to be held liable for damages upon the theory that the value of what remained after condemnation was substantially reduced because it was no longer usable for the purpose for which it was designed. If by provision for expansion in another direction the most advantageous use of the plaintiff’s land could still be preserved, its value was to be determined in light of that prospect.”

In *In re Widening of Michigan Avenue etc.*, 280 Mich. 539, 273 N.W. 798, 802 (1937), the Supreme Court of Michigan said:

“Where only a part of a building is taken, if the remaining portion is of great value and there can be advantageous reconstruction, rearrangement and new adjustment, then the cost of altering the building and all consequential damages because of such alteration, plus the value of the part taken, furnishes the rule for measuring the compensation to be awarded. If what remains after a part is taken is worthless, the jury should allow the whole value of the building. If not, they should consider what may be done with the remainder and the cost of doing it.”

The concept and the case were cited and quoted with approval in *Highway Department of State of Michigan v. Dake Corporation*, 357 Mich. 20, 97 N.W. 2d 748 (1959).

Another case dealing with the rehabilitation or reconstruction of property to minimize damages is *Pima County et al v. De Concini et ux.*, 79 Ariz. 154, 285 P 2d 609, 611 (1955), wherein the court said:

“The rule also is that in arriving at the market value of land which has been damaged by the exercise of the right of eminent domain the court has a right to admit evidence of possible expenditures which, if expended, would diminish the damages. While the measure of severance damages is the difference between the market value before and after the taking, evidence of expenditures which, if made, would cause a change in market value are admissible and should be considered by the court in arriving at such value.”

The purchase of additional property is but one kind of expenditure which might be made to diminish damages by rehabilitation, rearrangement, restoration and readjustment of the property.

The hypothetical buyer and seller relied upon by respondent differ from those found in the cases. Style-Crete argues that the issue is not whether the railroad vibrations will damage concrete, but whether the “willing buyer” would be influenced by his belief that they would. This argument is specious. It ignores the universal requirement that the hypothetical willing buyer and willing seller must be “fully informed.” Certainly an informed purchaser of a concrete plant would understand the characteristics of setting concrete and the effect of random vibrations. Popular misconceptions would not determine the market value of a concrete plant.

Respondent cites *Southern Pacific Company v. Arthur et al.*, 10 Utah 2d 306, 352 P.2d 693 (1960), as a case restricting application of the rule that avail-

ability of other land should be considered. The case has few similarities with the present one. There the property had special value because it was the customary route by which sheep were moved from one side of the valley to another. The court correctly observed that evidence of availability was immaterial "under the above facts" because "the damage to the remaining lands *cannot be mitigated* by obtaining other lands in other places." (Emphasis added.) Moreover, the error claimed with respect to availability of other property was an after-thought, the condemnor having objected to introduction of evidence of the unavailability of other land; and no instructions having been requested concerning unavailability. (See Briefs of the Supreme Court of Utah, Vol. 713, Case No. 9123, Brief of Defendants, Respondents, and Cross-Appellants, page 45.)

In Style-Crete's supplemental "Citation of Newly Decided Case, etc." served on February 5, 1968, great reliance is placed upon *State of Utah v. Howes, Bingham, et al.*, Case No. 10831, handed down by this Court of January 23, 1968. Insofar as the case bears upon the technical accuracy of appellant's Requested Instruction No. 15, it is in point, because it refuses to place on the condemnee the burden contended for in that instruction.

But the case was decided on a narrow technical issue of whether a condemnee has the burden of proving a negative, viz., that other property is not available to replace that taken by the condemnor. The case does

not suggest that evidence of the availability of other land is not relevant, material and admissible; and in the instant case the State Road Commission attempted cross-examine Style-Crete's witnesses with respect to the effect of additional property on the severance damages, and to introduce independent evidence that such property was available. The trial court simply would not let the issue be tried.

Recognition of the materiality of evidence of the availability of other land which might be economically used with the owner's remaining land is not tantamount to requiring him to go out and buy property which he may not want, or cannot afford. The rule is said to apply only if "reasonable cost of such work is less than the decrease in the market value" Nichols, *op. cit.* §14.22). And the owner need not buy; he may sell. Admission of evidence that other property can be obtained for use with the owner's remaining property is proper because a hypothetical "willing buyer," interested in acquiring property of an optimum acreage, would be influenced by the fact that other available property could be used in conjunction with the property he is about to purchase. The "willing seller" would also be expected to consider this. Accordingly, the availability of other property, like other factors (such as the cost of rehabilitation, filling the property if low, scraping it if high, and so forth) has a direct bearing upon the market value. Buyer and seller would fix the price of the property in light of what had to be done to it and what properties might have to be bought for

use with it. The purchase of additional property qualitatively is no different than the purchase of fill material, or the hiring of bulldozers or carpenters to rehabilitate and reconstruct.

The obligation to minimize damages should not be limited (as argued at page 24 of Respondent's Brief) to cases in which there was a "formerly balanced economic land unit." "Balanced" implies something that is not necessary for the rule, and restricts the application of the rule beyond its obvious purpose. Size and shape are the important factors. And there is no requirement that the "substituted property will be of the *same* functional use and will *cure* the severance damage." As pointed out above, even Professor Nichols, in talking about minimization of damage, talks about restoration of the property "*to a certain extent, if not completely.*" The cases recognize that restoration costs may be properly inquired into if the after value of the property, after deducting restoration costs, would require the payment of less compensation than the payment of the after market value of the property.

This view was incorporated into appellant's requested Instruction No. 15. Respondent's interpretation of that instruction as set forth at pages 29 and 30 of its brief is neither reasonable nor allowable. The requested instruction is almost an inversion of the Nichols Formula (§14.23) for cases in which the cost of restoration will result in a decrease in damage to the remainder:

“Value of part taken + Cost of rehabilitation  
— Value recovered by reconstruction = Just  
compensation.”

### III

*The State was not “bound” by the testimony of its appraiser.*

Style-Crete argues that inasmuch as the appraiser called by the state believed that the highest and best use of the Parcel “B” remainder was no longer operation of a concrete plant, the state was precluded from introducing contrary testimony and from arguing to the jury that one or another fact assumed by the appraiser did not exist.

The law does not support the contention. There was no attempt on the part of the state to “impeach” its own witnesses. It is well-known that appraisers are not usually “concrete” experts; and their judgments often are based upon information obtained from others. If such information is erroneous, the jury should be so shown.

As was pointed out by this court in *Schlatter v. McCarthy et al.*, 113 Utah 543, 196 P.2d 968, 975 (1948):

“ \* \* \* but a party is not bound by every statement that his witness makes, and he may, by testimony of other witnesses and in argument to the jury, show that the facts were different from those testified to by the witness. This is permitted not for the purpose of impeaching the witness



(although it may have that incidental effect), but for establishing the true facts. It would be a monstrous rule that would bind a party to every witness produced by him. \* \* \*

Accord: *III Wigmore on Evidence* (3rd Ed.), §907; *McCormick on Evidence*, §47.

With respect to items as to which there was a conflict in the evidence, the State had the right to argue to the jury that the supposed damages did not exist. The state had not been able to frame a hypothetical question to its appraiser with respect to a complete cure of Style-Crete's damages because the appraiser himself had expressed the opinion that the size of Parcel "B" precluded continued operation of its concrete plant; and the court had not permitted the State to show that the size problem could be cured by the acquisition of other property.

## CONCLUSION

In those instances in which the size and shape of the remaining parcel of property, after condemnation, affect the value of or damages to that remainder, evidence should be presented as to the availability of other property through which the remainder might be rehabilitated, rearranged, restored and readjusted.

Such evidence is material, relevant, and important, whether the Court follows a "damage" or "before and after value" theory. In either case the availability of

other property has an influence upon the amount of money needed to compensate the owner.

The trial court prevented the State from presenting evidence to support its theory that the building on Parcel "B" could thereafter be used for a concrete plant if Style-Crete's officers had taken reasonable steps to protect its property and rearrange the concrete operation. If the judgment is not reversed, the probability exists that Style-Crete will have its concrete plant and damages for abandonment, too—a result which should not occur unless the parties have been afforded an opportunity to present evidence on all of the material issues. The judgment of the trial court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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