

1967

Richard P. Hampton And Patricia L. Hampton, His
Wife v. State Of Utah: Utah State Road
Commission; Ernest H. Balch; Elias J. Strong;
Francis Feltch; W. J. Smirl; Ames K. Bagley; Utah
State Department Of Highways; C. Taylor Burton :
Appellant's Brief

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

RICHARD P. HAMPTON and PATRICIA L. HAMPTON, his wife,

Plaintiffs-Appellants

- vs -

STATE OF UTAH: UTAH STATE ROAD COMMISSION; ERNEST H. BALCH; ELIAS J. STRONG; FRANCIS FELTCH; W. J. SMIRL; AMES K. BAGLEY; UTAH STATE DEPARTMENT OF HIGHWAYS; C. TAYLOR BURTON;

Defendants-Respondents

Case No.
10997

APPELLANT'S BRIEF

Appeal from the Judgment of the District Court
for Davis County, Honorable Thornley K. Swan, Judge

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD P. HAMPTON and PATRICIA L. HAMPTON, his wife,

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- vs -

STATE OF UTAH: UTAH STATE ROAD COMMISSION; ERNEST H. BALCH; ELIAS J. STRONG; FRANCIS FELTCH; W. J. SMIRL; AMES K. BAGLEY; UTAH STATE DEPARTMENT OF HIGHWAYS; C. TAYLOR BURTON;

Defendants-Respondents

Case No.
10997

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action brought against the State of Utah, the State Road Commission, the individual members thereof, and others to enjoin them from building a fence and a guardrail across a public right-of-way in front of and adjoining appellants' residence in a manner which interferes with and restricts the appellants' right of ingress and egress to and from their property so as to constitute a taking of their property. This action is brought pursuant to Article 1, Section 22, Article 1 Section 7, and Article 1 Section 11 of the Utah Constitution and pursuant to the 14th amendment to the Con-

stitution of the United States to recover compensation for the taking and damaging without due process of law of private property belonging to the appellants.

DISPOSITION IN THE LOWER COURT

After the Complaint was filed, the respondents State of Utah, et al, made a motion to dismiss the Complaint on the grounds that it failed to state a cause of action. This motion was argued before the Honorable Thornley K. Swan, Judge of the District Court for Davis County on December 8, 1964. Nearly three years thereafter, on July 14, 1967, and pursuant to an alternative Writ of Mandamus from the Supreme Court, Judge Swan entered a ruling dismissing the Complaint on the merits, and with prejudice.

RELIEF SOUGHT ON APPEAL

The Appellants seek to reverse the ruling of the said Thornley K. Swan and to remand this matter for trial where all the evidence bearing on these issues can be presented.

STATEMENT OF FACTS

The appellants are the owners of certain real property together with a house and other improvements located thereon in the City of Clearfield, County of Davis, State of Utah, and described more particularly as follows:

All of Lot 19, TERRACE VIEW SUBDIVISION, a part of Section 1, Township 4 North, Range 2 West, Salt Lake Base and Meridian, in the City of Clearfield, County of Davis, State of Utah, according to the official plat thereof.

The Appellants have owned and possessed their said property since August, 1959, and since that time have enjoyed the peaceable possession of said property.

On or about October, 1963, the respondents, with the exception of the American Fence Company of Ogden, began to construct Interstate 15 as a public highway immediately adjacent to the property above described and upon 300 North Street, a public road running East and West in front of appellants' property and in which they had an established property right. The Respondents did not commence any condemnation proceedings as to these Appellants.

The construction activities were performed by the respondents in a negligent, careless, and reckless manner, and in complete disregard of the rights of the appellants as owners of the private property herein above described, and further have been performed in a manner which amounts to a direct taking of appellants' property rights in 300 North Street and a substantial injury and damage to the remaining property not actually taken. The Complaint alleges special harm and injury to the appellants herein not shared by other members of the community and in a manner which will not promote the greatest public good. It is alleged this negligent construction has proximately damaged the appellant's property by vibration caused by equipment operation, from excessive amounts of dust which have been deposited on their property, from excessive noise, by causing cracking in the walls and ceilings of the Appellants' home, and for other reasons, all of which have substan-

tially and materially interfered with the peaceable use and possession of their property, and all of which have depreciated the fair market value of their property. As a sole, direct and proximate cause thereof, the appellants claim damages in the amount of \$6,000.

In addition to these negligent design and construction activities, the appellants allege a direct taking of their property rights in 300 North Street and a substantial damage to the remainder of their property not actually taken. The appellants allege that in 1959 they constructed a driveway onto their property, which driveway, together with 300 North Street [a public road in the center of Clearfield, which runs directly in front of the Plaintiffs' property] jointly provided the only means of access to the property. Since 1959, the appellants had used 300 North Street in both easterly and westerly directions as a means of access to their property and did thereby acquire a substantial property right in the said street.

However, after the construction activities on Interstate 15 were commenced and respondents erected a fence across the entire distance of said 300 North Street in front of Appellants' property and further erected a guard railing across said street a few feet from said fence and further excavated 300 North Street easterly from said fence. This action was done in an arbitrary, careless, negligent, and reckless manner and in complete disregard of the rights of the Appellants.

As a sole, proximate, and direct result of this action by the Respondent, the Appellants now find that it is impossible to use 300 North Street as a means of access

to their property, and they further allege that there has been a substantial interference with the right of ingress and egress to and from their property and they claim this action constitutes a taking of and damage of their property rights for which they should be compensated pursuant to the Constitutional provisions set forth above.

The State of Utah, et al, admitted the taking and damaging of the easement and property rights of the Appellants and have offered to rebuild and realign their driveway so as to provide ingress and egress to the said property. This proposal was rejected by Appellants on the grounds that it would materially and adversely damage their property by lowering the fair market value thereof.

The Appellants submitted a written claim in the amount of \$8,000 to the respondent, Utah Department of Highways, in December, 1963. This claim was rejected on August 20, 1964, by the said Department of highways acting through its authorized agent, Llewellyn O. Thomas.

After the claim was rejected by the State of Highways, the Appellants commenced the instant action on or about October, 1964. The Complaint herein sets forth the foregoing facts, and is by reference incorporated herein and made a part hereof at this time.

At the time of filing the Complaint, the Honorable Thornley K. Swan issued an order directing the Respondents, State of Utah, et al, to appear before his Court on November 16, 1964, then and there to show cause why a preliminary injunction should not be entered

against them and why they should not remove the fence and guardrail across 300 North Street so as to restore to the Appellants their property rights, or in the alternative, why the Respondents should not be ordered to commence condemnation proceedings pursuant to Article 1 Section 22 of the Utah Constitution.

After the issuance of the said Order to Show Cause, the Respondents filed a motion to dismiss the Complaint on the grounds that it failed to state a cause of action. The said motion was set for hearing on November 17, 1964, but was continued by request of the Respondent's counsel until December 8, 1964.

On December 8, 1964, the said motion was argued and thereafter a minute entry was entered in the official record as follows:

"This matter comes before the court for hearing Defendants' Motion to Dismiss and Order to Show Cause, with James A. McIntosh, Esq., appearing as counsel for Plaintiffs, and Joseph S. Knowlton, Esq., as counsel for Defendants. Motion to Dismiss is argued by counsel, and the matter is taken under advisement."

After said December 8, 1964, the said Thornley K. Swan failed, refused, and neglected to enter his decision upon the said Motion to Dismiss notwithstanding repeated efforts by counsel to have the said motion decided. Finally, on or about July 5, 1967, the appellants filed a petition for a Writ of Mandamus in the Supreme Court of the State of Utah, [Case No. 10963] requesting that

the Supreme Court require the said Thornley K. Swan to decide the said Motion to Dismiss.

Pursuant thereto, the Supreme Court issued an alternative Writ of Mandamus requiring the said Thornley K. Swan to enter his decision on this matter by July 17, 1967, or appear before the Supreme Court to Show Cause why he should not decide the said Motion.

Thereafter, the said Thornley K. Swan called counsel for both parties and asked them to appear in his Court for another hearing on this matter. This hearing was held on July 14, 1967, at which time the parties reargued their respective position. Thereafter, the Court entered its ruling dismissing the Complaint. No cases were cited by the Court nor were any findings of fact or conclusions of law entered.

On August 10, 1967, the Appellants filed their Notice of Appeal to this court.

The only issue in this case is whether the State of Utah, by and through its Road Commission, Department of Highways, and individual members thereof, have the constitutional right to take and/or damage private property of the Appellants herein without due process of law. If a motion to dismiss is upheld under the circumstances set forth in the Complaint, the Appellants are denied a trial on the issues herein and their property is subject to a taking and to substantial damage without due process of law.

POINT I

BY ERECTING A FENCE AND GUARDRAIL ACROSS 300 NORTH STREET IN SUCH A MANNER AS TO SUBSTANTIALLY INTERFERE WITH THE APPELLANTS' USE OF SAID STREET AS A MEANS OF INGRESS AND EGRESS TO AND FROM THEIR PROPERTY, THE RESPONDENTS HAVE TAKEN THE APPELLANTS' PROPERTY WITHOUT A HEARING AND WITHOUT PAYING JUST COMPENSATION AS REQUIRED BY THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION AND AS REQUIRED BY ARTICLE I SECTION 22 AND ARTICLE I SECTION 11 OF THE UTAH CONSTITUTION.

A. *A Motion to Dismiss admits the truth of all the allegations in the Complaint:* The Motion to Dismiss was filed by the State of Utah; Utah State Road Commission; Ernest H. Balch; Elias J. Strong; Franchis Felteh; W. J. Smirl; Ames K. Bagley; Utah State Department of Highways; C. Taylor Burton. The other Defendants are not involved in this appeal. The moving parties are all part of the administrative hierarchy of the State of Utah through the State Road Commission and the Department of Highways. Judge Swan ruled that the complaint failed to state a cause of action as to these respondents.

None of the said respondents offered any exhibits, affidavits, depositions, or other evidence at any of the hearings on the said Motion to Dismiss. Consequently, the only matter before the Court was whether the complaint itself was sufficient to constitute a cause of action. This case must be determined by the allegations of the complaint and not by anything dehor the record herein.

In such cases, this Court has repeatedly held that the

trial Judge must view the Complaint as though all allegations therein could be proven as true, and should not pass upon proof which may or may not be produced later in support of those allegations. *Liquor Control Commission v. Atlas*, 121 Utah 457, 243 P. 2d 441 [1952]

B. *The Complaint sets forth a cause of action against the Respondents for taking the Appellants' property without a hearing and without the payment of just compensation:* Count II of the Appellants' Complaint alleges that the Appellants had been using 300 North Street in Clearfield, Utah for a period of six years before the Respondents commenced the construction of the highway facilities. 300 North Street runs in an east and west direction directly in front of the Appellants' property. The Appellants allege this street provided the only means whereby the Appellants could drive onto their property and could leave their property. Count II further states that the Appellants had constructed a driveway on their property and have been using 300 North Street together with the driveway since 1959 as the only means of access to and from the property. The Complaint states that after six years of established use and in 1963, the Respondents erected a fence across 300 North Street and further erected a guardrail near the fence which cut off the use of 300 North Street by the Appellants. Count II further alleges that the Respondents have agreed to rebuild and realign the Appellants' driveway but the Respondents would not pay any damages for the loss in market value because of the relocated driveway. Count II asks for \$8,000 damages

for lowering the fair market value of Appellants' property and Count III asks for an injunction against the Respondents preventing them from proceeding further with the construction of Interstate 15 until they fill 300 North Street and remove the fence and guardrail across 300 North Street, thereby allowing the Appellants access to their property and the peaceable use and occupancy thereof.

The earliest Utah case which holds that the owner of property abutting a public street has a property right in the street itself is *Dooly Block v. Salt Lake Rapid Transit Company*, 9 Utah 31, 33 Pac. 229 (1893). In *Dooly*, Salt Lake City had granted a franchise to the Salt Lake City Railroad Company to install additional railroad tracks on a public street known as 2nd South Street in Salt Lake City, Utah. The Appellants owned certain lots abutting 2nd South Street. They contended they were entitled to the free unobstructed use of the street as a means of access to their property. They alleged that by reason of the "Several uses with which it (2nd South) had been burdened, the ordinary use thereof for public travel and ingress and egress to the several premises had become impeded and embarrassed." On page 37 of the Utah Reports the Court held as follows:

"It follows that, when land is plotted by the owners of the soil, and lots sold, bounded by a street designated on the plat, *the grantee acquires a right to the street in front of the premises as a means of access.* [Citations omitted] Nor does it matter in this case that the fee is in the city

in trust for the use for the public, instead of in the abutting owner in trust for street purposes. Equally in both cases, the abutting owners are entitled to the use of the street as a means of access to their lots. . . . If the fee is in the city, the rights of the abutter are in the nature of equitable easements in fee; if in the abutter, they are in their nature legal. In either case, the abutters have the right to have the street kept open and not obstructed so as to interfere with their easements and materially diminish the value of their property. When the lots of the plaintiffs were sold under the town-site act, above mentioned, it was in effect, agreed with the grantees that they were entitled to the use of the street as a means of ingress, egress, light, and air. These rights were inducements to purchasers, became a part of the purchase, are appurtenances to the land which cannot so embarrassed or abridged as to materially interfere with its proper use and enjoyment *and they are in effect, property of which the owners cannot be deprived without due compensation.*

“Counsel for appellant contend that, subject to special constitutional restrictions, the legislature has plenary power over all public ways and streets. If this position be tenable, then, in the absence of special constitutional restrictions, the legislature may authorize municipalities to devote the entire width of a street to railroad purposes, regardless of the property rights of abutting owners without compensation to injury to the property. This theory does not appear to be sustained by the authorities. *The legislature may delegate power over streets to municipalities, but in doing so it must recognize the property rights of a private individual . . .*

“[Page 41] The full conception of the true nature of a public street in a city as respects the right of the public on the one hand and the rights of the adjoining owner on the other has been slowly evolved from experience. It has been only at a recent period in our legal history that these two distinct rights have separately and in their relations to each other, come to be understood and defined with precision. The injustice to the abutting owner arising from the exercise of unrestrained and legislative powers over streets in cities were such that the abutter necessarily sought legal redress, and the discussion thence ensuing led to a more careful ascertainment of the nature of streets and of the rights of the adjoining owner in respect thereof. It would seem that he had, in common with the rest of the public of right of passage *but it was also further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the relation of his lot to the street in front of it; and that these rights, whether the bare fee of the street was in the lot owner or in the city, were rights of property, and as such, ought to be, and were, sacred from legislative invasion as his right to the lot itself.*” [Emphasis Added]

The *Dooly* case was decided in 1893 which was before the Constitutional Convention and before Utah become a state. However the fundamental property concepts expressed in the *Dooly* case were very carefully considered by the delegates to the Constitutional Convention as recorded in the minutes of said convention. These minutes are set forth hereinafter in this brief. It was clear that not only did the delegates to the Constitutional Convention want to protect the rights of

property owners who owned lots abutting public streets, but the Supreme Court of the State of Utah also recognized these rights after the Constitutional Convention.

In the case of *Morris v. The Oregon Shortline Railroad Company*, 36 Utah 14, 102 Pac. 629 (1909), the Plaintiff brought an action to recover damages as an abutting owner of certain property arising by reason of the construction and operation of a certain railroad in a public street in Salt Lake City. The trial judge found that the property owner had a right in the public street which ought to be protected pursuant to Article 1 Section 22 of the Utah Constitution. The Supreme Court stated in part as follows:

“[Page 17 Utah Reports] The theory adopted by the trial court was that an action by an abutting owner for damages to his property occasioned by the construction and operation of a commercial railroad in a public street in front of his property *by which ingress and egress to and from the property is impeded*, and the uses otherwise directly affected, comes within the provision of Section 22 Article 1 of our Constitution which reads: ‘Private property shall not be taken or damaged for public use without just compensation.’ *That an owner of property, which abuts on a public street, has such a property right in the street that he may in a proper action, recover damages for an interference with such right, when such interference directly affects his property, is too well settled by authorities to require further discussion.* Nor are the elements which may be considered in determining the damages to the property owner longer open to consideration. In such an action, everything which arises out of

the proper construction and proper operation of the railroad which directly affects the saleable value of the abutting property may ordinarily be considered as elements in assessing damages. Many things are usually taken into consideration in such actions, which would not give rise to an independent action, and in such a case all the damages are assessed as constituting a single cause of action, and the measure of such damages is the amount that the property has depreciated in market value. This is amply illustrated by the authorities. [citations omitted] Such an action is no different in principal from an action for damages to the remaining property where a part only is condemned. *The easement the abutting owner has in the street is a property right, and an interference with this right is, to the extent of the interference, deemed a taking of property for which, if such taking directly injures the abutting property, as aforesaid, the owner may recover damages.*" [Emphasis added]

The *Dooly* case and the *Morris* case clearly show that the abutting property owner has a *property right in the street* and the State of Utah cannot construct improvements in or across the public street where the affect of this construction is to interfere with or impede the abutting property owner in his use of the street as a means of ingress and egress to his property. The two cases cited clearly show that the property owner is protected by Article 1 Section 22 of the Utah Constitution.

These theories of property rights were also again reaffirmed by the Utah Supreme Court in a case decided in 1963, *Utah Road Commission v. Hansen*, 14 U.

2d 305, 309, 383 P. 2d 917 (1963). In *Hansen* the Utah Supreme Court reaffirmed the holding in *Dooly Block*, and although recognizing that the facts in *Dooly* and *Hansen* were different the court did say:

“We are aware that in the case of *Dooly Block v. Salt Lake Rapid Transit Co.* this court stated that an owner whose property abuts an established public street had an easement of access thereto, *and we agree where such is taken it would constitute the taking of property covered by our eminent domain statute.* It should be kept in mind that the *Dooly* case dealt with an established easement and whether such a right of access could exist in the absence of an established use was not considered.” [Emphasis Added]

This holding reaffirms *Dooly* if an established easement can be shown. In the instant case it is clear the Appellants had used the public street [300 North Street] since 1957 and consequently, would have a six year “established use.”

The next case dealing with these matters was *State by State Road Commission, et al, v. District Court, Fourth Judicial District*, 94 Utah 384, 78 P. 2d 502 (1937). This was an action by certain property owners to enjoin the state road commission and its individual members from constructing a viaduct along a portion of Center Street in Provo City. The Plaintiffs sought an injunction until the Defendants would start eminent domain proceedings. The statement of facts on page 504 of the Pacific Report is set out in part as follows:

“That this construction [of the viaduct in Center

Street] will deprive the Plaintiffs of the present convenient access to their property . . . will cause the grade of the street to be raised in front of their properties; and will prevent continuous travel on Center Street past the properties of the Plaintiffs except over the proposed viaduct . . . that the threatened acts of the Defendants, if not enjoined by Court, constitute a taking of damaging the Plaintiff's property; that the Defendant, Road Commission, has not instituted any condemnation proceedings; that if such construction is proceeded with, the Plaintiffs will have no remedy at law . . . and unless an injunction is issued the Plaintiffs will have no remedy and will suffer irreparable injuries."

These allegations are essentially the same as set forth in the Complaint in the instant case. The Attorney General argued that the injunction suit was in reality a suit against the State of Utah and the State had not consented to be sued in such a case. The Supreme Court agreed with this position and held that the State Road Commission could not be sued. However, it then went on to discuss the liability of the individual members of the road commissions and held that they could be enjoined:

"Can the injunction suit be maintained against the contractor —or against the individual members of the road commission — where the affect of a restraining order, if issued, will be to coerce the state into paying Defendants damages or to temporarily or permanently prevent the State from carrying out the proposed highway improvement?"

The Supreme Court held that Article 1 Section 22

of the Utah Constitution was self executing and that it prohibited the State from taking private property without just compensation. It cited the *Dooly* cause *supra* and held as follows:

“[Page 507]. This court [in *Dooly*] having upheld the right of an abutting owner to enjoin the construction or operation of a railroad in a public street where condemnation proceedings have not been taken, will an injunction be proper to restrain a contractor or members of a public commission from constructing a viaduct upon a public street or highway where no condemnation proceedings have been instituted? . . . *We are of the opinion that where private property is taken or damaged for public use, as is alleged in the Complaint in the injunction suit, without any agreement with the owner for compensation, and without any proceedings for assessment in the manner provided by the Statute relating to eminent domain, a court of equity may properly take jurisdiction where the only remedy remaining to the landowners is to present a claim to the Board of Examiners . . .*” [Emphasis added]

“[Page 508] It must be remembered that we are here dealing with a right expressly reserved to the citizen in the State Constitution: ‘Private property shall not be taken or damaged for public use without just compensation.’ Article 1 Section 22. In Section 26 of the same Article we read: ‘The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.’ Again we are told in Section 11 of Article 1: ‘All courts shall be open and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be

administered without denial or unnecessary delay.’ “We think it clear that the framers of the constitution did not intend to give the rights granted by Section 22, and then leave the citizen powerless to enforce such rights. We hold that this is so whether the injury complained of by the Plaintiffs in the injunction suit is considered a ‘taking’ of property or a ‘damaging’ of property. *The framers of the fundamental law, after much debate and careful consideration of the hardship of the old rule which allowed compensation only in the case of a taking of property, wrote into the constitution a provision by which we think they intended to guarantee to the landowner whose property is damaged just compensation with the same certainty as to the landowner whose property is physically taken.*” [Emphasis Added]

It is obvious from these citations that the Utah Supreme Court in 1937 correctly interpreted the intent of the delegates to the Constitutional Convention. That is, that the words “or damage” were put into the Utah Constitution to prevent the state from constructing highways and other improvements which depreciated the fair market value of an owner’s property as much as if his land had been actually taken. This is clearly in line with the discussions which took place in the Constitutional Convention as set forth hereinafter. The *Fourth District Court* case continues as follows:

“[Page 598] However, without further argument as to whether there is in the case at bar, a “taking” or a “damaging” of defendant’s property, *we hold that the Road Commissioners are not authorized to either take or damage the citizen’s property without the proceeding as provided by*

law for assessment of his damages. Therefore, when suit is brought to enjoin the contractor, or the road commissioners as individuals for violation of the constitution right, the injunction should be granted, unless the State Road Commission submits to a hearing in the manner provided by law upon the questions of the landowner's damages. We do not believe that the Constitution intends that the court shall decide in advance whether there is a damage "amounting to a taking" and refuse the injunction in case the damage is found to be less than enough to constitute a "taking" of the property. *Infinite confusion results from such a rule.* One court will consider that any substantial damage to property constitutes a taking of property while others may hold that nothing short of damage which will render the property wholly useless amounts to a taking. [Emphasis Added]

It will thus be seen that the Utah Supreme Court held that the individual members of the State Road Commission could be enjoined from commencing the construction of a proposed public improvement until eminent domain proceedings were commenced. The Supreme Court has followed this rationale and has allowed injunctions against individual members of the State Road Commission and has also allowed injunctions against the State of Utah itself or its political subdivisions when engaged in a governmental function. See *Hjorth v. Whittenburg*, 121 Utah 324, 241 P. 2d 907 (1952); *Shaw v. Salt Lake County*, 119 Utah 50, 224 P. 2d 1037 (1950); *Frank O Reeder v. Brigham City*, 17 Utah 2d 398, 413 P. 2d 300 (1966). See also 18 AmJur. 788, 815, 888 and 43 ALR 2d 1072.

C. *The Complaint does set forth a cause of action against the Respondents herein on the grounds of negligent construction activities:* In Count I of the Complaint, the Appellants allege ownership of private property and construction of a highway adjacent thereto. In this Count, the Appellants emphasize the negligent, careless, and reckless manner in which the highways was constructed. They allege that their private property was harmed in a special way not shared by other members of the community. This special harm was caused by vibration from heavy equipment operation; from excessive amounts of dust which have been deposited on their property; from excessive noise; by cracking in the walls and ceilings of their home; and for other reasons. They allege that they were damaged in the amount of \$8,000 because of this negligent action. They further allege in the Complaint in Count II thereof that a written claim was submitted to the Utah Department of Highways in December 1963, and that this claim was rejected on August 20, 1964, by said Department. In paragraph 4 of Count II the Plaintiffs also allege that the action of the Defendants in erecting the fence and guardrail was careless, negligent, and reckless, and was not required in the public interest. The substance of this allegation is that the Defendants were negligent in designing the freeway structure itself and it could have been located on another piece of property, or in another way which would not take and/or damage Appellant's property, and that actual damage was done to appellant's home during construction.

On July 1, 1966, the Utah Governmental Immunity

Act [Section 63-30-1 et sequel, UCA-1953] became law in the State of Utah. At this time the legislature waived sovereign immunity as to certain injuries. Section 63-30-6 waives governmental immunity in all suits for the recovery of any property real or personal or for the possession thereof or to quiet title thereto. The Appellants submit that their Complaint deals with the peaceable recovery and possession of their property rights in 300 North Street, as those property rights are more fully described in the Utah Cases cited hereinafter. Furthermore, Section 63-30-10 waives immunity for injuries caused by negligent acts. The Appellants in their Complaint allege damages because of the negligent acts of the State of Utah and its employees. Furthermore, the Appellants in their Complaint allege that the construction activities commenced in October of 1963 and that their claim was submitted to the Respondent Utah Department of Highways in December, 1963. Consequently, the requirements of Section 63-30-13 have been met. It is true that Section 63-30-12 requires a filing with the attorney general and the agents involved within one year, but the sheriff's return in the record herein shows that the Attorney General and the various state officers were served on October 28, 1964. The Appellants submit this serving of the Complaint constitutes sufficient notice as required by Section 63-30-12.

The Appellants submit that the governmental immunity act waives immunity from suit and actions such as set forth in the Complaint herein. It is true that the governmental immunity act did not take effect until

July, 1966; however, the Appellants contend that the Complaint alleges a continuing damage and injury to their property which persisted from October, 1963, to the present time. They have alleged faulty design and construction of the fence and guardrail, and negligence in locating the fence and guard rail which amounts to a taking of the Appellants' property. This taking persisted after July 1, 1966, and the Appellants would have a right to institute an action at the present time for this injury. The Appellants submit that they should not have to be put to a multiplicity of suits especially where they have alleged a continuing trespass. This theory of a continuing trespass. This theory of a continuing trespass as sufficient grounds for injunctive relief was upheld by the Supreme Court in the case of *Shaw v. Salt Lake County*, 119 Utah 50, 224 P. 2d 1037 (1950).

In addition to the Governmental Immunity Act, Section 27-12-10 UCA-1953 as amended in 1963 provides as follows:

“Authority of commission to settle claims — the commission [State Road Commission] is given authority to settle all claims not in excess of \$3,000 for each claimant arising out of accidents, damage, or injuries caused through the negligence of the commission, its employees, or any employees of the State Department of Highways in the course of their employment.”

Count I of the Appellants' Complaint clearly is a claim for the negligence of the commission, its employees, and employees of the State Department of Highways, during the course of their employment in constructing Inter-

state 15. The fact that the claim was submitted by two Plaintiffs for \$8,000 requires, of course, an interpretation of this section. Admittedly, this section only gives the Commission authority to settle claims not in excess of \$3,000 for each claimant; however, the Appellants ask the Court to interpret this provision as meaning (1) that a husband and wife constitute two claimants and consequently, the Commission has authority to compromise claims brought by two homeowners in the total amount of \$6,000 and (2) that even though the claim as originally submitted is greater than the maximum amount specified in Section 27-12-10, that the Commission is authorized to approve a settlement figure less than the amount claimed. This Section of the Utah Statutes clearly waives sovereign immunity and gives the injured parties a right of redress against the State Road Commission even without the Governmental Immunity Act, *supra*.

The Appellants submit that all of the foregoing authorities acknowledge that an owner of property which abuts a public street has a property right in the street for the purpose of ingress and egress to his lot and that any action by the State which interferes with this property right is taking and a damage contemplated by Article 1 Section 22 of the Utah Constitution; that if the State refuses to commence condemnation proceedings, the landowner is entitled to an injunction against the individual members of the State Boards involved prohibiting further construction until condemnation proceedings are commenced.

POINT II

EVEN IF THE COURT FINDS THAT THERE IS NO ACTUAL TAKING OF APPELLANTS' PROPERTY, THEY ARE STILL ENTITLED TO RECOVER DAMAGES PURSUANT TO ARTICLE I SECTION 22 OF THE UTAH CONSTITUTION.

The Appellants submit there is an actual taking of their property rights in 300 North Street as set forth in the *Dooly case* supra, etc., and that there is a substantial damage to their remaining property not actually taken. Because of these allegations, the Appellants submit that they are brought squarely within the protection of Article 1 Section 22 of the Utah Constitution and Sections 78-34-10 (1) and (2) Utah Code Annotated — 1953. If this court should find that there is no actual taking of Appellants' property, then Appellants submit there is still a consequential damage which entitles them to compensation pursuant to Article I Section 22 of the Utah Constitution and especially that portion of the constitutional provision which states "or damaged," and pursuant to section 78-34-10(3) UCA-1953.

The Appellants submit that subsection 78-34-10 (3) was enacted by the legislature to recognize that a property owner is to be compensated for damages to his property even though no part is actually taken. If some land is taken, then subsections (1) and (2) will fully compensate the owner for all damages he has sustained. It is only when no property is taken that subsection (3) must apply. Otherwise, subsection (3) would be superfluous and could be left out because subsection (1) (2) would cover the field.

Subsection (3) has been discussed by the Supreme Court in the case of *Board of Education of Logan City School District v. Jack Croft and Lucille B. Croft*, 13 U. 2d 310, 373 P. 2d 297 (1962).

In the *Croft* case, the Utah Supreme Court held that this subsection applied to injury that would be actionable at common law as where there has been some physical disturbance of a right either public or private which the owner enjoys in connection with his property and which gives it additional value and which causes him to sustain a special damage with respect to his property in excess of that sustained by the public generally. It requires a definite physical injury cognizable to the senses with a perceptible effect on the present market value.

In the instant case, the Appellants have alleged that the action of the Respondents has made it impossible for them to use 300 North Street as a means of ingress and egress to and from their property as it was being used formerly. They further allege that they have sustained a special injury not shared by other members of the public. Finally in Count IV they allege that Clearfield City has not deeded this property to the State nor has the city abandoned or vacated the street. Consequently the Appellants are entitled to assert their established property rights in the street against an interloper such as the State of Utah.

The Appellants acknowledge that since 1960 the Utah Supreme Court has decided certain cases which cast

doubt upon the meaning of Section 78-34-10 (3) and that the affect of these decisions has been to ignore subsection (3) and to hold that Article I Section 22 of the Utah Constitution is not self-executing and that a landowner has no remedy against the State if its property is damaged but not actually taken. *Fairclough v. Salt Lake County*, 10 Utah 2d 417, 354 P. 2d 105 (1960), *Springville Banking v. Burton et al*, 10 Utah 2d 100, 349 P. 2d 157 (1960).

Fairclough v. Salt Lake County, *supra*, is perhaps the best example of this new emphasis. In *Fairclough*, the State of Utah was constructing a highway project adjacent to the Plaintiff's property. This project reduced the grade of the road about 16 feet below the owner's abutting land. The State of Utah did not commence condemnation proceedings because no part of the owner's property was actually taken. The property owner contended that by lowering the grade 16 feet he was damaged just as much as though his property had been taken because his rights of ingress and egress were taken. The Supreme Court held that the State could not be sued without its consent and that the Constitutional provisions to the effect that private property shall not be taken or damaged for public use without just compensation were not self-executing and did not constitute consent by the state to be sued.

These cases have been followed since 1960 repeatedly by the trial courts in this state, and they were argued by counsel for the state before Judge Thornley K. Swan in the instant case.

The Appellants submit that the instant action is factually different from the *Fairclough* line of cases because:

- (1) The instant case seeks an injunction whereas the other cases sought other extraordinary relief. Prior decisions allowing injunctions are set forth *supra*. *Shaw v. Salt Lake County, Fourth District Court*; *Hjorth v. Whittenberg*; *Reeder v. Brigham City*, 18 Am. Jur. 788, 815, 888.
- (2) The instant case claims negligent action on the part of the state and its employees in constructing the highway facilities whereas negligent construction was not alleged in the *Fairclough* line of cases. The instant case also alleges a special burden on the Appellants' property not shared by the public generally which brings it within the exception stated in the *Springville Banking Company* case on page 158 of the Pacific Reports.
- (3) In July, 1966, the Governmental Immunity Act [Section 63-30 et sequel, Utah Code Annotated — 1953] became effective and abrogates the doctrine of sovereign immunity under the circumstances set forth in the Appellants' Complaint. The *Fairclough* line of cases pointed out that if a change was to be made in sovereign immunity, it should be done by the legislature. The Appellants submit that the legislature has now done this. It is true that the initial injury to the Appellants' property arose prior to July, 1966, but the Appellants allege a continuing damage to the present time. This clearly persists after the effective date of the Governmental Immunity Act. The Appellants submit this would be sufficient justification for the application of

this Act. Otherwise, the Appellants might have to start a new action claiming damages after July, 1966, which would result in a multiplicity of suits which ought not to be suggested.

Even assuming there are no differences between the instant case and the *Fairclough* line of decisions, the Appellants submit that this Court erred in deciding *Fairclough*, etc., and that it ignored or misinterpreted the provisions of subsection (3) of 78-34-10 UCA-1953. The Appellants further suggest that the holding of the *Fairclough* case is contrary to the Constitutional intent as expressed in Article 1 Section 22 of the Utah Constitution and as the intent is reflected in the minutes of the Constitutional Convention. To the best of this writer's knowledge the discussion in the Constitutional Convention has never been urged upon this Court in any of its prior decisions. The Appellants will attempt to show from these minutes that the delegates to the Constitutional Convention placed the words "or damaged" in the Utah Constitution to cover the very situation which existed in *Fairclough v. Salt Lake County*. The following citations are taken from the "Proceedings of the Constitutional Convention of 1895" a two-volume work which contains the minutes and discussions of the various constitutional provisions.

On Page 164 of the said proceedings, Mr. Thurman introduced the following proposition as file No. 69:

"Private property shall not be taken for public purposes without a just compensation first made, or secured to be made, as may be determined by law . . ."

This proposition was read a second time by its title and referred to a committee on preamble and bill of rights.

Page 300 of the proceedings states that proposition file No. 150 was referred to the committee of the whole to be considered in connection with the article on preamble of the bill of rights. This proposition dealt with private property being taken for public use. Starting with page 326 and going through page 345 there is a discussion of these propositions.

Page 326 brings out that the second reading of the proposition was as follows:

“Private property shall not be taken or damaged for public use without just compensation.”

Mr. Thurman moved to strike out the words “or damaged.” He stated that the purpose in offering this amendment was that it would be extremely difficult to assess damages and on Page 327 he goes into his reasons.

On Page 328 at the top of the page, Mr. Eichnor asks that the words “or damaged” be taken out. His argument is similar to the argument of the Utah Supreme Court as found in *Fairclough* and *Springville*. He says:

“Take a city like Salt Lake where grading is required or any other city where grading is required, and you will bankrupt those cities if you place this in the Constitution. Every man that owns property in the street — the street will be graded and one or two or three people will claim damages, and the result will be it will bring the municipalities into court.”

Mr. Pierce then addressed himself to the very situations

covered in the *Fairclough* and *Springville* cases as a reason for leaving the words "or damaged" in the Constitution:

"Mr. Chairman, I am in favor of retaining the words "or damaged." I recollect a spectacle a few years ago grading in Salt Lake City. There was a certain street—I believe it was State Street — the grade had been established for some years and the city came in and established a different grade and built the street up some 10 feet higher than the property abutting it [*In the Fairclough case the state lowered the street 16 feet lower than the property abutting it*] There is a spectacle where they could not get any damage for it, and the street, as it was built, absolutely destroyed the value of the property and they could not get a cent for that. I say that it ought to be fixed so that the city must adjust the grade for the accommodation of people who own property along the certain street, and that is the reason that I am anxious the words "or damaged" should be left in. And in speaking of the remarks Mr. Varian made, I desire to read a line or two from Louis in his work upon eminent domain: 'When the people of Illinois revised their constitution, in 1870, they introduced an important change into the provision respecting the power of eminent domain. The provision reads as follows: 'Private property should not be taken or damaged for public use without just compensation.' Every other state which has revised its constitution since 1870 except North Carolina — which never had any provision on the subject — has followed the example set by Illinois by adding the word "damaged" or its equivalent to the provision in question. And the question not only refers to the street grades in cities but refers to grades of

railroad property . . ." [Reference to *Fairclough* added]

On Page 328 Mr. Richards offers another one of the strongest arguments in favor of retaining the words "or damaged."

"Mr. Chairman, I am opposed to the motion to strike out the words, "or damaged." *I believe, as has been said already in this discussion that when the public uses a man's property or makes an improvement that virtually destroys the use of that property, that they should pay for it as much as if the property itself were taken.* Of course, as has been suggested by the gentleman from Salt Lake, whatever benefit results by reason of this improvement is set off against the damage that it has caused, and in that way, the public gets absolute justice in relation to the matter. But to say that public corporations should be permitted by the raising of a grade or the lowering of a grade [*as was the case in Fairclough*] or by any other kind of improvement to injure private property, and because they don't actually enter upon and take the property itself, although they do destroy the use of the property, that they should be liable for damage. I think it is unjust and unfair and I am, therefore, opposed to this motion." [Mention of *Fairclough* added]

Two other men also spoke on this subject. Mr. Varian from Salt Lake had this to say on Page 326:

"Mr. Chairman, I am in accord with the motion of the gentleman to require compensation be first made, but it seems to me that to strike out "or damaged" is a very material matter. I had taken pains to look at it a little today in the late works on eminent domain and I found it was put in

other constitutions or statutes to meet the entire case. In some states, some courts have held that damage to property of a consequential kind was not necessarily within the meaning of the article of the Constitution. [*This is exactly what Utah has held in the Fairclough and Springville cases.*] For instance, I believe in Pennsylvania — may have confounded the state — the question arose — where an elevated road was erected upon the street and while it did not touch the property of the abutting owner, did not destroy a brick, did not take a foot of his ground, it did affect his use and occupancy of his premises very disastrously. It affected the convenience of the inhabitants of the house and in this, particular case following later, it was held that there was no remedy. There was not the taking of the property. That the courts in New York went off in another direction and it is finally settled in that case that such injury as that could be compensated under the law of eminent domain. To make it perfectly clear, this word has been put in laws and constitutions and the text writers say that it is equivalent for any kind of injury of that kind.” [Reference to *Fairclough and Springville* added]

Mr. Thurman replied that he thought compensation ought to be paid but that he thought there would be a lot of trouble in assessing consequential damages, whereas he didn't think these problems would exist where there had been an actual taking of the property. To this argument, Mr. Farr replied on Page 327 as follows:

“I do not see why. Take a case like this, it could be estimated there could be no subsequent change. There is the railroad, there is the house, and there are the windows. There is a deprivation of light and air. There are all the necessary incon-

veniences of noise, cinders, and soot, and disturbing the peace in reference to the family. This can be compensated for just as well in the beginning as it can after a lapse of ten years. It is within the knowledge of man and can be deduced before a jury. I do not care how the gentleman does it. I do not wish to be technical about it. I would like to see those words "or damaged" kept in some way. I hope those words "or damaged" remain in that section. I do not wish to argue the point but I can see in a great many instances where it would be very important. For instance, on the sidewalk, a person owning land, they dig down a bank 10 or 15 feet and damage that lot to a great extent. I think the man should be remunerated for the damage done to his lot. I move that those words remain in that section if they possibly could remain there."

After these discussions, Mr. Thurman withdrew his motion to delete the words "or damaged" and the committee adopted Article I Section 22 of the constitution leaving in these words.

The discussions continue to page 345 of the proceedings. They then commence again on page 623 of the proceedings and continue through page 651. These latter pages refer to discussions before the Constitutional Convention as a whole. These discussions center around possible changes that could be made to Article 1 Section 22; however, the committee decided against any changes or amendments. Each of the delegates state why they wanted to leave the words "or damaged" in the provision.

One of the most significant parts of the discussion

before the Convention as a whole begins on page 641. Because this discussion involves the power of the sovereign to take private property without compensation, it is included at this time.

Mr. Varian began his discussion of several cases from the United States Supreme Court and other authorities from state case law and from leading text books. He then quoted Mr. Justice Field of the United States Supreme Court as follows:

“The power to take private property for public uses generally termed the right of eminent domain belongs to every independent government. It is an incident of sovereignty and as such in *Boone v. Patterson* requires no constitution or recognition. The provisions found in the Fifth Amendment to the Constitution and in the Constitutions of the several states for just compensation for the property taking is merely a limitation upon the use of the power.”

Mr. Varian interpreted this citation as meaning that a state normally would not need any power to be able to take private property because it is an incident of sovereignty that all states have. This led him to the conclusion that by putting a provision in the Utah Constitution, that just compensation should be paid, that it would limit or control the power of the sovereign to take or damage property and that the limitation is self-executing and that that's the only reason it's put there, i.e. to be a limitation which is self-executing and that it requires no implementing legislation. Otherwise, it could have been left out of the constitution all together. He goes

on to point out on Page 642 that the Constitutional Convention could enact certain measures which amounted to confiscation of private property without having to pay just compensation if Article 1 Section 22 were not included.

On page 651 a roll call was taken for the entire Article 1 entitled "The Declaration of Rights." This page shows that there were 96 affirmative votes and no negative votes. Page 650 shows that there were two members [Mr. Partridge and Mr. Thurman] who felt that Article 1 Section 22 should have been passed as it came from the committee of the whole requiring that compensation be first made before the property was taken or damaged. However, neither of these gentlemen objected to the words "or damaged" being left in.

It seems evident from the discussions in the Constitutional Convention both in the committee and before the Convention itself that there was a considerable amount of debate as to just what the words "or damaged" meant. It seems just as obvious that these words were left in to prevent the state of Utah from interfering with an abutting property owner's right of ingress and egress to his property by lowering or raising grades, erecting fences, guide posts, etc. across public streets. Notwithstanding this Constitutional Provision and all of the cases before and after Utah become a state, the Supreme Court since 1960 has held that the words "or damaged" in Article 1 Section 22 do not add anything to the word "taken", and there can be no compensation unless there is an actual taking. The *Fairclough* situation was decided

against the property owner notwithstanding the fact that the delegates to the Constitutional Convention inserted the words "or damaged" to protect the property owner, and notwithstanding Subsection 78-24-10(3) UCA-1953 was enacted to protect the property owner.

POINT III

THE HOLDING OF THIS COURT THAT ARTICLE I SECTION 22 IS NOT SELF-EXECUTING IS CONTRARY TO THE OVERWHELMING WEIGHT OF AUTHORITY AND IGNORES SUBSECTION 78-34-10 (3) UCA — 1953.

In *Springville Banking Company v. Burton, supra*, at page 171 of the Pacific Reports, the court stated in part as follows:

"Nowhere in the *Jacobs* case can be found any pronouncement to the effect that the Fifth Amendment, *which is exactly like our Article 1 Section 22*, waived any sovereign immunity or constituted a consent to be sued." [Emphasis added]

In *Fairclough v. Salt Lake County, supra* at page 107 of the Pacific Reports, the court stated in part as follows:

"The Fifth Amendment to the United States Constitution is like Article 1 Section 22 of our Constitution, save for the word "damage." *By no stretch of the imagination could this alter the principle involved.*" [Emphasis added]

In these two citations, it is obvious that the court decided these cases on the basis that the Utah Constitution was exactly the same as the Federal Constitution and that the words "or damaged" in the Utah Constitution made no difference. The Appellants submit that

this conclusion is a mere gratuity and is contrary to everything which was discussed by the delegates to the Constitutional Convention as set forth hereinabove. It is obvious that the words "or damaged" were put in the Utah Constitution to make it different from the Federal Constitution and to make it different from those State Constitutions which contain only the word "taken." By holding as it does, this Court has now equated the Utah Constitution with those states whose constitutional provisions do not include the words "or damaged." In this one gesture, the Supreme Court has overturned the entire intent of the delegates of the Constitutional Convention and has overturned the entire line of decisions from 1893 to 1960. This has been done without the citation of any cases to support the conclusion and without any reasons being given therefor, other than the statement that no stretch of the imagination could hold otherwise. The Appellants submit that the imagination of such an authority as Nichols on Eminent Domain has reached a different result, which result is based upon case citations, constitutional authority and legislative enactment from every state in the country having constitutional provisions similar to Utah.

In 2 Nichols on Eminent Domain, Third Edition, pages 486-487 Section 6.44 entitled "*Damage*" *Clause in the State Constitutions* the author states as follows:

"Except in the extreme northeastern section of the country, the state legislatures showed no sympathy with the concept that there was a moral obligation to compensate an owner of land which had been damaged by the construction of a public

improvement, and continued to authorize the exercise of eminent domain, and the use of the public streets, for public improvements of every description without providing any remedy for the landowners other than that which the letter of the constitution required. It was in the rapidly growing city of Chicago that the most serious injuries to property by the construction of public improvements occurred and the attention of the people of that city was focused upon the hardship of the rule by a number of especially striking examples. Finally, in 1870 a constitutional amendment was adopted in Illinois providing that private property should be neither taken *nor damaged* for public use without compensation. This action by Illinois was followed by many of the other states; by West Virginia in 1872, by Arkansas and Pennsylvania in 1874, by Alabama, Missouri, and Nebraska in 1875, by Colorado and Texas in 1876, by Georgia in 1877, and by California and Louisiana in 1879. It is now contained in the constitutions of Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. There is a similar provision in Iowa, applicable, however, only to the change of grade of highways. It has been said that under the constitutional provisions protecting an owner under a "taking" he is guaranteed compensation for any depreivation of *res*, but not of *jus*. *It is under the later provision of the constitution protecting an owner against "damage" that a landowner may claim compensation for the destruction or disturbance of easements of light and air, and of accessibility, or of such other intangible rights as he enjoys*

in connection with and as incidental to the ownership of the land itself."

It seems obvious that the words "or damaged" do make the Utah Constitution different from the Federal Constitution and state constitutions which contain only the word "taken."

The Appellants further submit that the holding in *Fairclough* that "Article 1 Section 22 of the Constitution is not self-executing, nor does it give consent to be sued, implied or otherwise; and that to secure such consent is a legislative matter, a principle recognized by the legislature itself. . . ." [354 P. 2nd 106] is contrary to the overwhelming weight of authority.

In 2 Nichols on Eminent Domain, Third Edition, 498 Section 6.441 [4] *Damage clause is self-executing*, the author defines the words self-executing to mean:

"That is, if the legislature authorizes the construction of a public work which may injuriously affect neighboring property and fails to provide a special procedure for ascertaining or recovering damages, the statute authorizing the work is not treated as unconstitutional but the owner of the injured property is allowed to recover his damages in an ordinary civil action."

This is clearly what the delegates to the Constitutional Convention meant the Utah Constitutional provisions to be, that is to be self-executing and to protect property owners against unlawful interference by state agencies.

Furthermore, it is obvious that in the case of Eminent Domain, the legislature has provided a special procedure for ascertaining or recovering damages when no

property is actually taken but when the land is only damaged in a consequential manner. This legislative enactment is expressly found in Section 78-34-10 (3) UCA — 1953. Consequently, even if the Utah Constitution is held not to be self-executing, there is a provision supplied by the legislature in subsection (3) which does make it executing as to consequential damages. It appears the *Fairclough* decisions have ignored this provision of the Utah Statutes.

Finally, the Appellants submit that the holding of the *Fairclough* decision that the constitutional provision is not self-executing is contrary to the overwhelming weight of authority. In every state which the writer of this brief has analyzed having constitutional provisions similar to Utah's and containing the word "damage" it appears that all of these states save Utah and possibly New Mexico and Pennsylvania, hold that the constitutional provisions are either self-executing or that consequential damages can be allowed for interference with the right of ingress and egress. [*Arizona* — Article II §17; *County of Mohave v. Chamberlin*, 78 Ariz. 422, 281 P. 2d 128, 133, (1955). *Arkansas* — Article II § 22; *Dickenson v. Okolona*, 98 Ark. 206, 135 S.W. 863 (1911). *California* — Article I § 14; *Bacich v. Board of Control of California*, 23 C. 2d 343, 144 P. 2d 818 (1944) see also *Rose v. State*, 105 P. 2d 302, 310, (1940) affirmed on rehearing, 19 Cal. 2d 713, 123 P. 2d 505 (1942). *Colorado* — Article II § 15; *Board of Commissioners of Logan County v. Adler*, 69 C. 290, 194 P. 621 (1920). *Georgia* — Article I § 3, *Pause v. City of Atlanta*, 26 S. E. 489 (1896);

Alexander et al v. City Council of Augusta et al, 68 S. E. 704 (1910). *Illinois* — Article II § 13; *People ex rel Mangnaff v. Rosenfield*, 383 Ill. 468, 50 N.E. 2d 479 (1943); *People ex rel Wanless v. City of Chicago*, 378 Ill. 453, 38 N. E. 2d 743 (1942); *City of Chicago v. George F. Harding Collection*, 70 Ill. App. 2d 254, 217 N. E. 2d 381 (1966). *Minnesota* — Article I § 13; *Dickerman v. City of Duluth*, 88 Minn. 288, 92 N. W. 119 (1903); *Austin v. Hennepin County*, 130 Minn. 359, 253 N. W. 738 (1915). *Mississippi* — Article III § 17; *Parker v. State Highway Commission*, 173 M. 213, 162 So. 162 (1935). *Missouri* — Article II § § 20 & 21; *Bohanon v. Camden Bend Drainage District*, 240 Mo. App. 492, 208 S. W. 2d 794 (1948); *Page v. Metropolitan St. Louis Sewer Dist.*, 377 S. W. 2d 348 (sup. 1964); *Hickman v. City of Kansas*, 25 S. W. 225 (1894). *Montana* — Article III § 14; *Eby v. City of Lewiston*, 55 M. 113, 173 P. 1163 (1918); *Less v. City of Butte*, 28 M. 27, 31, 72 P. 140 (.....). *Nebraska* — Article I § 21; *Gentry v. State*, NY Neb. 515, 118 N. W. 2d 643 (1962); *Omaha & R.U.R.R. Co. v. Standen*, 22 Neb. 343, 35 N. W. 183 (1887). *New Mexico* — Article II § 20 (no cases) *North Dakota* — Article I § 14 *Mayer v. Studen & Manion Co.*, 66 N.D. 190, 262, N. W. 925 (1935); *Chandler v. Hjelle*, 126 N. W. 2d, 141 (1964). *Oklahoma* — Article II §§ 23 & 24; *Missouri, K&T.R. Co. v. State*, 167 Okl. 23, 229 P. 172 (1924). *Texas* — Article I § 17; *Craig v. City of Dallas*, 20 S. W. 2d 154 (1929); *Powell v. Houston & T.C.R. Co.*, 104 & 219, 135 S. W. 1153 (1911). *Virginia* — Article IV § 58; *Swift & Co. v. Newpost News*, 105 Va. 108, 1131 52 S. E.

821 (1906). *Washington* — Article I § 16; *State ex rel Spokane, P.&S.R. Co. v. Yelle*, 199 Wash. 70, 90 P. 2d 263 (1939). *West Virginia* — Article III § 9; *Javins v. City of Dunhar*, 110 W. Va. 271, 157 S. E. 586 (1931); *Thorne v. Clarkshung*, 88 W. Va. 251, 106 S. E. 644 (1921). *Wyoming* — Article I § § 32 & 33; *Hirt v. Casper*, 56 Wyo. 57, 103 P. 2d 394 (1940)].

For the reasons set forth above, it is respectfully submitted that the Appellants' Complaint does state a cause of action against the State of Utah, and the individual members of the State Road Commission, that the decision of Judge Thornley K. Swan was contrary to the law in the State of Utah, and is contrary to the overwhelming weight of authority as set forth herein. For these reasons it is respectfully requested that the decision of Judge Swan be reversed, that the motion to dismiss be denied, and that this case be remanded to the trial judge so that the Appellants may have a complete trial upon the issues presented in their Complaint.

Respectfully submitted,

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