

1967

# State Of Utah, By And Through Its Road Commission v. Lloyd Stanger And Edna Olson Stanger, His Wife : Brief of Appellants

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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 Respondent,*

vs.

LLOYD STANGER and EDNA  
OLSON STANGER, his wife,

*Defendants and Appellants.*

Case No.  
11028

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## BRIEF OF APPELLANTS

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Appeal from Judgment and Order  
Second District Court, Weber County  
Honorable John F. Wahlquist, Presiding

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FILED

DEC 7 - 1967

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## BRIEF OF APPELLANTS

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### NATURE OF THE CASE

This is a highway condemnation action brought by the plaintiff against defendants to acquire certain lands from the latter, wherein the issues before this Court relate to whether or not defendants can recover damages sustained by their contiguous remaining properties by reason of the loss of the lands taken and the construction of the project in the manner contemplated.

## DISPOSITION IN LOWER COURT

The issues in this matter were reduced to a jury determination of the amount of “severance” damages, if any, sustained by defendant’s remaining properties by reason of the taking of .89 acre of land. The parties had previously stipulated as to the fair market value of the land taken.

From a jury verdict awarding defendants no “severance” damages, defendants filed a Motion for New Trial (R. 43), based primarily upon errors during the trial consisting of erroneous oral instructions and erroneous written instructions given to the jury at the end of the trial. The Motion for New Trial was denied.

## RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the Judgment on Special Verdict entered in this matter and of the Order denying them a new trial, and request that the matter be remanded to the Second Judicial District Court in and for Weber County for a new trial. Further, because of the importance of the issues involved in this case and many other pending cases, it is necessary that this Court clearly rule on the material distinctions between “severance” and “consequential” damages in eminent domain cases, and establish guidelines relating to the application of the doctrine of sovereign immunity—or to abolish it—in eminent domain cases.

## STATEMENT OF FACTS

On December 21, 1965, plaintiff served a condemnation complaint upon defendants for the purpose of acquiring a portion of defendants' lands for highway uses incident to the construction of the Interstate Freeway Project, which ran in a general north-south direction through Weber County in the area of the community of Marriott. Defendants owned approximately 23 acres of land on the north side of the center line of Seventh Street, together with a residence and miscellaneous outbuildings located at the extreme southwest corner of their holdings.

To assist the Court reference will be made to Exhibit A, which was the trial map prepared by the plaintiff for the use of the trial of this matter. Exhibit A shows the relationship of defendants' lands to the Freeway, the location of their improvements, the area taken for highway purposes, the prior location of Seventh Street, and the location of the Interstate Freeway.

Before the construction of the freeway project Seventh Street was a level road extending in an east-west direction along the entire south side of defendants' properties, and their residence and garage were so located that direct ingress and egress to and from Seventh Street was had on a level grade (See Exh. 1 and 2).

The main portion of the Interstate Freeway did not require the taking of any lands from defendants since it passed their properties a short distance immediately west of their west property line; however, as



a part of the project it was determined that the originally level Seventh Street must be so altered that it should pass over and above the Interstate Freeway. To accomplish this a large overpass embankment was constructed on both sides of the Interstate Freeway in the general area of what formerly was Seventh Street. In order to avoid the removal and taking of several homes in the area, the overpass fill veered slightly to the south as it approached the Interstate Freeway from its east side (thereby requiring the taking of lands south of the original right-of-way line of Seventh Street on the east side of the Interstate Freeway), and on the west side of the Interstate Freeway the overpass fill veered even farther to the south of the former Seventh Street at the point where it crossed the Interstate Freeway so that, at that point, it was on lands completely south of the south right-of-way line of Seventh Street as it previously existed (Tr. 86). As the overpass road continued westerly it veered back to the north several hundred feet west of the Interstate Freeway so as to again join the original Seventh Street at grade. The "bend" in the route of the reconstructed Seventh Street thereby missed several homes on the north side of what was formerly Seventh Street on the west side of the Freeway; only the defendants' home was involved on the same side of Seventh Street on the east side of the Freeway.

By its Complaint (R. 1) plaintiff sought to acquire fee title to the .89 acre of land shown on Exhibit A. Of the total area taken, .66 acre consisted of a strip

of land varying between 30 and 40 feet in width and running most of the distance along their south boundary line, but which was within and constituted the north half of previously existing Seventh Street. The additional .23 acre of land was taken from within the occupied area of the Stanger holding so as to furnish an area for the construction of a service road serving the Stanger home and providing access at the easterly end of the overpass constructed on Seventh Street. Because the .66 acre in the right-of-way area of Seventh Street had long been subjected to a public easement for travel, the parties stipulated that the net taking of .23 acre should be valued at \$517.00. Each appraiser (Tr. 35, 68) agreed that the land value on a per-acre basis along the north side of Seventh Street had a fair market value of \$2,250.00 per acre and, as testified to by defendants' appraiser, Haven J. Barlow, had a highest and best use as residential property (Tr. 24-25).

The effect of the taking required defendants to secure access from their home and other buildings to the re-constructed Seventh Street at a point where the overpass leveled off on the east side of the freeway via a service road requiring a traveling distance of approximately 400 feet (Exh. A), as compared to their former means of access directly onto Seventh Street in front of their residence. This service road dead-ended against the Interstate Freeway fence approximately 200 feet west of their home, serving no other homes in the area; in fact, the service road through the west one-half of its distance from its connection to

re-constructed Seventh Street utilized the north half of what formerly was Seventh Street.

In addition, directly in front of their home an earthen-type embankment was constructed at a height of 17 feet above the original level of Seventh Street (Tr. 6), and the base, or "toe" of the embankment was 79 feet from defendants' residence (Tr. 86).

The trial of the damage issue involved started off with an underlying basic dispute between plaintiff's counsel and the Court, on the one side, and defendants' counsel on the other side. The initial dispute centered around the matter of "severance" damages and what factors contributing to damage could be considered by the appraisers and the jury. Further, the additional legal issue developed as the trial progressed relating to whether any or all of the damages sustained by defendants' remaining properties were recoverable in view of the doctrine of sovereign immunity.

Following the holding of the trial judge and the position taken by the plaintiff, the plaintiff's appraiser testified that the remaining properties of the defendants suffered no "severance" damages (Tr. 68), while the appraiser for the defendants testified that their remaining properties had suffered "severance" damages in the amount of \$5,806.00 (Tr. 38). Plaintiff took the position that "severance" damages had to be special, peculiar and unique to the properties of the defendants as compared with damages which others in the general neighborhood whose properties had not been taken

might suffer (Tr. 70-71); in fact, plaintiff's counsel in his opening statement based his case on the premise that the State would show that defendants' damages were not in fact peculiar to their properties (Tr. 66). This same position, plus the additional claim of sovereign immunity, was advanced by plaintiff in its Motion For Directed Verdict (Tr. 65-66). Although the Court reserved ruling on the Motion For Directed Verdict, throughout the trial the lower Court adopted the identical position of the plaintiff as to its interpretation of what constituted "severance" damages and its position relating to the State's immunity from liability in this case under the sovereign immunity doctrine.

Defendants contended that "severance" damages need not be special, peculiar or unique to their properties as distinguished from similar damage sustained by others in the neighborhood who might not be in court, and further claimed that the doctrine of sovereign immunity was totally inapplicable in this proceeding. Facing an uphill battle throughout the trial on the legal principles involved, defendants suffered an adverse 6-2 jury verdict, holding that their remaining properties had sustained no "severance" damages.

## ARGUMENT

### I.

THE VARIOUS FACTORS WHICH CONTRIBUTE TO SEVERANCE DAMAGES IN AN EMINENT DOMAIN ACTION DO NOT

HAVE TO BE SPECIAL AND UNIQUE FROM THOSE SUSTAINED BY OTHER PROPERTIES IN THE GENERAL NEIGHBORHOOD IN ORDER TO BE CONSIDERED.

Throughout the trial of this matter the trial judge repeatedly furnished the jury with illustrations of situations where land owners could not recover damages to their remaining properties in eminent domain actions—even though a portion of their lands had actually been taken — unless the damages to their remaining properties were unusual or unique to the neighborhood in general. For instance, one of the several remarks made to the jury during the course of the trial was as follows (Tr. 43):

“ . . . whether these people are so closely involved in this project because they have lost this piece of land, *it has to be unique in the neighborhood so that their difference is a genuine severance damage.* This will be a fact question that you will have to determine. (Italics added)

\* \* \*

“Now, whether this case is severance damage or consequential damage is for you to determine.” (Tr. 42)

In the Court's instructions to the jury at the conclusion of the trial, the same requirement was impressed on the jury that damages to the remaining properties of the defendants must be unique and different from the type of damage which others in the neighborhood

might suffer in order to constitute severance damage. In Instruction No. 7, the Court first correctly informed the jury that the method to be employed in determining damages to the remaining property of the defendants would be to consider the value of the remaining property before the severance of the part acquired and, secondly, the value of the remaining property after severance. This statement substantially states the general rule of the measure of damages to remaining properties which is followed in Utah. However, in the second and last paragraph of Instruction No. 7 the following incorrect statement of law was added by the Court over defendants' objection:

"This is true if the loss in value is the result of severing part of the land from the whole thereof and construction of the project as designed; but it is not true if the loss in value is in part, or entirely, because of the projects (project's) presents (presence) in the general area independant (independent) of this taking of the defendants' land not sufficiently related thereto so as to situation the defendant land owner differently then (than) neighbors who have not lost lands." (R. 38—7)

It is submitted that the trial judge was clearly wrong in his statements to the jury regarding severance damages, both as to comments made during trial and in Instruction No. 7, in requiring that such damages must be unique and different from those suffered by other properties in the neighborhood. It is further submitted that the trial judge completely confused the

rule with respect to severance damages with the rule applicable in cases involving consequential damages.

In order to properly understand the issue presented in this portion of the argument, it is well to define our terms and to examine past Utah Supreme Court decisions in the field of eminent domain. Section 78-34-10, Utah Code Annotated, 1953, outlines three pertinent sub-sections relating to the types of compensation and damages to be awarded in an eminent domain proceeding. These sub-sections will here be separately listed, with a statement in parenthesis under each indicating the type of compensation or damage which is present for classification purposes:

- (1) The value is the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

(This is compensation for the **TAKING**)

- (2) If the property sought to be condemned 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.

(This is **SEVERANCE** damage)

- (3) If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

(This is CONSEQUENTIAL damage)

Our Utah Supreme Court has consistently followed the foregoing classification of damages in its various decisions in recent years. In the case of *Springville Banking Company v. Burton* (1960) 10 U. 2d 100, 349 P. 2d 157, wherein no property was actually taken, but a street was divided in front of appellant's business establishment by the placement of concrete islands therein, this Court clearly held that such an action involved damages which were *consequential* in nature:

"We espouse the notion that if the sovereign exercises its police power reasonably and for the good of all the people, when constructing highways, the *consequential damages such as those alleged here*, are not compensable."

Similarly, in the case of *Fairclough v. Salt Lake County* (1960) 10 U. 2d 417, 354 P. 2d 105, the highway grade was reduced about 16 feet below the property owner's abutting land, without there being an actual taking of his property. Again, this Court recognized the situation as one involving consequential damages. Further, in the case of *Parker (Sine) v. State Road Commission* (1962), 13 U.2d 65, 368 P. 2d 585, wherein there was no actual taking of affected properties, the distinction between severance and consequential damages was again brought out:



“Contentions (1) and (3) may be viewed in the aggregate, since both pose the same fundamental question whether the State is suable for *consequential damage* to property not sought for condemnation.”

In the development of our Utah eminent domain law it is the present rule that cases involving *consequential* damages wherein the State of Utah is or might be a party litigant in court are controlled by the doctrine of sovereign immunity, which places the State of Utah beyond the grasp of the law. In short, under sub-section (3) of Section 78-34-10, *supra*, the State of Utah cannot be brought into court by any means whatever (except in rare cases), and consequential damages can only be secured by property owners against condemning authorities unable to get under the cloak of sovereign immunity, such as railroads and similarly situated utilities and agencies having eminent domain authority.

The distinction between severance damages and consequential damages has best been illustrated in Utah in the case of *Board of Education of Logan City v. Croft* (1962), 13 U. 2d 310, 373 P. 2d 697, involving the condemnation of certain lands for school grounds purposes. In that case the jury verdict form provided for damages in three parts — for the value of lands taken, for severance damages, and for consequential damages. In analyzing the situation this Court held that there could be no award for consequential damages since the award for severance damages “covered” and included consequential damages.

As a matter of fact, under the distinction between *severance* damages and *consequential* damages spelled out by our statute and the foregoing court decisions, there could never be both severance and consequential damage evidence in the same case where a partial taking occurs. Consequently, the trial judge's comment to the jury during the trial of this case constitutes an incorrect statement of the law:

"It is possible for the same piece of land to suffer both consequential damages, which is not recoverable, and severance damages . . . I will leave that to the jury." (Tr. 43)

A careful reading of the *Croft* case clearly points out the errors which the trial judge in this case adopted, in (a) failing to properly distinguish between severance damages and consequential damages, and (b) in failing to realize that the same elements and items of damages are not applicable to each. In the *Croft* case this entire matter was answered in one paragraph, as follows:

"Damages to land, by the construction of a public or industrial improvement, though no part thereof is taken as provided for under 78-34-10 (3), *contrary to the rule for severance damages*, is limited to injuries that would be actionable at common law, or 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 re-

quires a definite physical injury cognizable to the sense with a perceptible effect on the present market value; such as drying up wells and springs, destroying lateral supports, preventing surface waters from running off adjacent lands, or the depositing of cinders and other foreign materials on neighboring lands by the permanent operation of the business or improvement established on the adjoining lands.”

(Italics added)

The foregoing statement clearly explains what type of injury constitutes consequential damages. Further, it clearly states that the measure of severance damages is not restricted and limited as with those situations involving consequential damages; and in support thereof adopts the rule from 2 Nichols on Eminent Domain 326, Sec. 6.411 (1). As pointed out by Nichols in his general discussion of the subject (Sec. 6.441 - Sec. 6.4432 (2) ), consequential damages must be special and unique from those generally sustained in the general neighborhood; while severance damages are not so restricted and follow the general valuation rule set down in the case of *Weber Basin v. Ward* (1959), 10 U. 2d 29, 347 P. 2d 862, as follows:

“ . . . all factors bearing upon . . . value that any prudent purchaser would take into account . . . should be given consideration, . . . ”

A case of recent vintage from South Carolina will be cited at this point to further illustrate the error of the trial court's thinking that severance damages must be special and unique in the neighborhood in order to

be considered. In *South Carolina Highway Dept. v. Touchberry* (1966), 148 SE 2d 747, the general rule is quoted from 4 Nichols on Eminent Domain, Sec. 14.1 at page 473:

“A distinction must be drawn between consequential\* damages to a remainder area where part of a tract is physically appropriated and consequential damages to a tract no part of which is physically appropriated. In the latter case the damage must be peculiar to such land and not such as is suffered in common with the general public. *In the former case it matters not that the injury is suffered in common with the general public.*” (Italics added)

\*This type of “consequential damage” is defined by statute as ‘severance’ damage in Utah. Nichols points out (Sec. 6.4432) that, broadly speaking, “. . . all damages must of necessity be consequential since all damage is the consequence of an injurious act.”

In *State Highway Commission v. Bloom*, 93 N.W. 2d 572 (S. D. 1958), the court cited 18 Am. Jur., *Eminent Domain*, Sec. 265, and said on page 577:

“But where a part of an owner’s parcel or tract of land is taken for a public improvement such as a public highway the owner is entitled to be compensation for the part taken and for consequential damages to the part not taken *even though the consequential damage is of a kind suffered by the public in common.*” (Italics added)

In the *Bloom* case the court went on to hold that for the purpose of determining severance damage to

the part not taken, the part of defendant's land taken is to be considered as an integral and inseparable part of a single highway project not limited to the segment of the highway on his land.

27 Am. Jur. 2d, *Eminent Domain* (which is the present counterpart of 18 Am. Jur., *Eminent Domain*, Sec. 265), at Section 310, p. 124 elaborates on the foregoing rule:

“Where part of a parcel of land is taken by eminent domain, the owner is not restricted to compensation for the land actually taken; he is also entitled to recover for the damage to his remaining land. In other words, he is entitled to full compensation for the taking of his land and all its consequences, and the right to recover for the damage to his remaining land is not based upon the theory that damage to such land constitutes a taking of it, *nor is there any requirement that the damage be special and peculiar*, or such as would be actionable at common law; it is enough that it is a consequence of the taking . . . ”

(Italics added)

There are numerous cases from other states setting forth the foregoing rule, but the law is so clear as to require no further emphasis in this writer's opinion.

There is a sound practical reason why there should be no attempt to segregate factors contributing to severance damages on the basis of whether or not such factors are unique to the affected property or whether such factors generally, equally or to some lesser degree, affect other lands in the vicinity. Following the “before-

and-after" rule, which is the general rule applied in determining severance damages in Utah, an appraiser compares the remaining property not taken as it was in its former condition as part of the whole, and as it subsequently exists in its severed condition. From this comparison he forms an opinion as to the total difference in market value caused by the taking and the construction of the public improvement in the manner contemplated. This difference, or "severance" damage, is not an amount of money which he or a jury can usually separate with any degree of precision so as to point out what portion of the damage might be attributable to one factor and what portion might be attributable to another factor. The problem becomes readily apparent, and the resulting confusion from such an attempt would almost always produce ridiculous results. In short, such an approach would clearly abandon the "before-and-after" rule of damages to remaining properties which remain in their severed condition, and a trial would degenerate into a knit-picking expedition. Worse still, most trials would get so involved with the issue of whether or not a neighboring property not involved in court proceedings sustained greater or lesser damages—and the degree of such damage—as actually happened in this trial, that other people's problems would become the greater part of a trial. The obvious prejudice to the involved litigant becomes readily apparent.

The trial of this case actually illustrated the very problem just mentioned since the plaintiff, with the

approval of the trial judge, went into substantial detail attempting to show that other residences and properties on the west side of the freeway—and also being on the north side of Seventh Street—sustained damages by reason of the construction project. The State's appraiser pointed out that he felt there were three homes on the west side of the freeway sustaining somewhat the same type of damage due to the construction of the overpass and the location of the homes on a dead-end street (Tr. 70-71), to which defendants' witness Barlow pointed out that, although at least one of the homes across the freeway sustained *some* damage caused by being on a dead-end road, the damage sustained by the defendants' properties was much worse, and that there was no real similarity at all (Tr. 88). Actually, the most affected residence on the west side of the freeway was 118 feet from the toe of the freeway fill (as compared with a distance of 79 feet from the toe of the fill to the defendants' residence), since the location of the overpass fill on the west side of the freeway was placed entirely beyond the south right-of-way line of what was formerly Seventh Street. Likewise, while the defendants' residence faced an embankment of 17 feet, the most affected residence on the west side of the freeway—which was located 118 feet from the toe of the fill—was only faced with an embankment of 6' 9". The dissimilarity and degree of damage was major between the properties of these defendants and any other property similarly affected across the freeway but, as pointed out in Instruction No. 7, since another property not

involved in a condemnation action sustained a damage—though lesser in degree—of a similar nature to that sustained by these defendants' properties, the jury could well find as it did.

On the general subject of attempting to segregate and place values upon different factors contributing to damage to remaining properties, the Appellate Division of the Supreme Court of New York (1967) in the case of *Dennison v. State*, 281 N.Y.S. 2d 257, pointed out that a consideration of noise as a factor contributing to damages was not separable from other concededly legitimate factors, and therefore, was not subject to a valuation by the Appellant Court. It also pointed out that the inter-relation of noise with elements such as vision and privacy would have made it impossible to attribute a separate specific amount to noise. However, the issue was resolved since the court held noise was properly considered a factor of damage caused by the construction of a new highway.

Having covered the distinction between severance and consequential damages under Utah law, it now becomes necessary to analyze the facts of this case to determine which type of damage situation presented itself here. There is absolutely no dispute but that the State Road Commission instituted a condemnation action against these defendants, and that it had to do so because it was acquiring specific fee title interests in and to .89 acre of their real properties. An examination of the Trial Map (Exh. A) indicates that the



plaintiff condemned a strip of land running along the south side of their larger holding of approximately 23 acres. The lands actually taken included a strip of land varying between 30 feet to 40 feet in width, lying between the center line of Seventh Street and the enclosed or occupied area of defendants' holdings (within which taken area of public easement for highway purposes had been created over the years), plus a wider strip extending into a portion of the defendants' holdings to which no public easement had ever been created—thereby providing a route whereby defendants could secure access onto the re-constructed Seventh Street which passed over the Interstate Freeway.

There can be no doubt whatever that the State of Utah was properly in court; in fact, it had to bring the action to acquire the properties taken in the litigation. In addition, since the construction of the project in the area deprived defendants of their former means of ingress and egress to Seventh Street which they had used for a great many years (See Exhibits D-1 and D-2, which show the condition of the affected premises prior to any construction), plus the construction of a 17 foot fill directly in front of the home of the defendants, there was also a taking of property rights of light and view, and of access. These special items of taking will be discussed in the next section.

At this point it is well to analyze the factual situation to determine whether, as the lower Court felt, this case comes within the doctrine of sovereign immu-

nity under the case of *State Road Commission v. Parker (Sine)*, 1962, 13 U. 2d 65, 368 P. 2d 585. The trial judge, after extensive exceptions were taken to the Instructions by defendants' counsel, stated (Tr. 112)—

“I think the Syms (Sine) case, I'm adopting the position and the interpretation of the Syms' case to be that the vulnerability of the state to damages in this proceeding are not greater, does not reach matters which are not related to the severance. The mere fact that they are in court does not expand the general scope. This is my interpretation of the Syms' case.”

\* \* \*

“I appreciate the fact that there is a great deal of difference in the interpretation between counsel as to the law applicable to this case.”

In the *Sine* case the State Road Commission constructed its freeway system crossing North Temple Street near the SeRancho Motel in Salt Lake City. The freeway missed the motel property on the north side of North Temple Street, but it was necessary to acquire a portion of a residential property located on the south side of North Temple Street, which was owned by the same property owners. When the State Road Commission brought action to condemn a portion of the residential property, Sine filed a counter-claim to secure “consequential damage” to the SeRancho Motel property. In dismissing the counter-claim on the basis of sovereign immunity under the authority of *Fairclough v. Salt Lake County*, supra, this Court pointed out that the “. . . motel property (had) no

*economic or functional connection with . . .*” the residential property. This Court further pointed out that by means of a counter-claim a litigant cannot cast himself in any other role than that of a plaintiff.

Defendants submit that there is not the slightest comparison on the facts between the *Sine* case and this matter. The plaintiff in this case certainly felt that the properties here being taken were part and parcel of an integrated unit holding, as illustrated by its trial map (Exh. A), its identical exhibit attached to its complaint (R. 1-Exh. A-Y), and in its very pleading in the Complaint (R. 1-11), wherein it stated:

“6. That the parcels of real property sought to be condemned, . . . are but a part of an entire parcel or tract or piece of property, or interest therein or to property owned by aforesaid defendants.”

Consistently, in their Answer these defendants did not set forth any counter-claim (as happened in the *Sine* case), but affirmatively answered the Complaint (R. 18) and asserted damages to their residence and remaining tract of land, and specifically pointed out that their access to Seventh Street had been destroyed, that a 17 foot fill had been placed in front of their home, that their frontage had been interfered with, and that they had been left with their home on a dead-end street. The matter went to trial with no attempt on plaintiff's part to assert sovereign immunity or to otherwise strike these damage claims from the proceedings.

As to whether the remaining properties of these defendants had any "economic or functional" connection with the portion taken, by way of making comparisons with the *Sine* case, it appears self evident that the home and contiguous land holdings of these defendants were highly related in use and value to Seventh Street which ran along the front of their properties, and to the specific areas taken from them in Seventh Street and beyond Seventh Street. Further, since the plaintiff was condemning a strip of land in the public street to which these defendants held fee title for many years—which carried with it a corresponding annual obligation to make payment of property taxes—the use of their home and the surrounding lands was highly integrated with and dependent upon an obstructed access to Seventh Street and the right to have uninterrupted use of their easements of light and view.

To say that this case presents a situation analogous to the *Sine* case in view of the clear-cut visible facts would be to carry the principle of that case to an absurd and ridiculous extreme. Further, a holding that sovereign immunity could possibly exist under the factual situation here present would undoubtedly open the door to the State's claiming sovereign immunity in probably half of the pending and future highway cases, with resulting chaos. Despite actual takings of property, the State could then attempt to claim that sovereign immunity existed because there was no "substantial" taking, or that damages could not be considered unless of a type unusual and unique as compared with those

sustained by other property owners in the neighborhood. Such a holding would simply flood this court with future appeals from both sides.

Although the State's appraiser did not find any "severance" damage to the remaining property (Tr. 68), following the views of the Court and stating that there were three homes on the west side of the freeway (and on the north of Seventh Street) which had also been somewhat similarly affected by the overpass structure (Tr. 70-71), the land owners' appraiser, Haven J. Barlow, found substantial severance damages—utilizing the contrary definition of severance which did not require the damages to the affected properties to be different and unique to this particular property as distinguished from others in the neighborhood (Tr. 28, 39, 41). Mr. Barlow attributed damages to the affected Stanger holdings in the amount of \$5,806.00 (Tr. 38), resulting from the following factors: A portion of the property (including the home) was now left on a dead-end street; mail service, garbage service and similar services would no longer be available as before; the 17 foot fill (located 79 feet from the home) was unsightly and practically eliminated all view from the front of the home; that there was a degree of hazard created by the high overpass; and that there was a substantial loss of privacy (Tr. 44-48).

He felt that the home and lot, plus two adversely affected acres lying immediately east of the home, were originally worth \$18,896.50 (Tr. 35), but that because

of the factors entering into a reduction in value of those same properties, they were worth \$13,090.00 after the taking — or a total severance damage of \$5,806.00 (Tr. 38).

Plaintiff will undoubtedly claim that the jury found there was no severance damages to the remaining properties of the Stangers. In anticipation of such an argument, the jury verdict form, and answers, is here reproduced (Instruction No. 8):

You are instructed that your award will be determined as follows:

1. The loss in value to the defendants' remaining land and improvements because of the severance of the land taken and the construction of the project as designed, is, if any ..... \$ -0-

2. How much of the above, if any, are severance damages ..... \$ -0-

3. How much, if any, of the above are non-compensatory incidental damages .... \$ -0-

Dated this 2t8h day of June, 1967.

S/d L. W. Kasting  
Jury Foreman

Answering any argument plaintiff might make that the insertion of the amount "None" in answer to the first question of the verdict form has significance in this case, the following points are submitted as explanatory of the jury's finding:

1. Under Instruction No. 7 it was made clear to the jury that there could be no "severance"

damages unless defendants had sustained damages unique and different from those of neighbors who had not actually lost lands;

2. Throughout the trial the Court interrupted the proceedings to furnish the jury with many illustrations of situations where damages could not be secured because of actions affecting streets and highways (Tr. 42, 43); as to whether loss of view was a "consequential damage" common to the neighborhood . . . or a true severance question (Tr. 45); the inability of Slim Olson to recover damages to his business because of the moving of the highway (Tr. 82); that the large motel (Se Rancho) in Salt Lake City could not recover since there was no taking even though they "broke the motel" (Tr. 94); asking the jury to determine if other people on the west side of the freeway from the Stangers had in fact sustained economic loss and, if so, implying that any such situation would bar recovery by these defendants (Tr. 43, 94)—all of which heavily impressed the jury as to the Court's thinking in this case.

3. The appraiser for the State found no damages by way of "severance" (Tr. 68), since he obviously was following the same test relative to severance damages used by the Court in that they must be "special and unique" in the neighborhood; and he elaborated extensively on somewhat similarly situated homes located on the west side of the freeway (Tr. 70-71).

4. The jury had no basis for segregating items of damage inasmuch as neither appraiser attempted to segregate damages as to "severance" items vs. "consequential" items, or as between

either of the foregoing and “non-compensatory incidental damages.”

5. The verdict form, as written by the trial judge, when taken with the instructions in general, is submitted by this writer to be both legally incorrect and grammatically confusing; that this, in part, undoubtedly concerned the jury arriving at its 6-2 decision.

## II.

### THE DOCTRINE OF SOVEREIGN IMMUNITY IS INAPPLICABLE IN EMINENT DOMAIN CASES WHERE SEVERANCE DAMAGES RESULT FROM THE TAKING OF REAL PROPERTY, OR ESTABLISHED EASEMENTS OR OTHER RIGHTS APPURTENANT TO REAL PROPERTY.

The logical end result of the lower Court’s confusion between severance damages and consequential damages, and the damage factors applicable to each, logically extended itself into a belief that—after all—this case was really one where the doctrine of sovereign immunity should be applied. Support for this proposition is clearly evident from the lower Court’s previously quoted statement that he felt the Syms’ (Sine) case controlled this case. Further, the verdict form bears out this observation.

To further distinguish this case from *State Road Commission v. Parker (Sine)*, 13 Utah 2d 65, 368 P 2d 685, here the affected and damaged properties of these



defendants were directly tied to the fee title and established easement interests being taken. Specifically, as previously pointed out, these defendants owned one-half of Seventh Street in its original condition in fee simple; similarly, and notwithstanding any fee title interest, they had traveled directly from their home and garage area to and from Seventh Street in its previously unaltered condition, and their residence enjoyed an unobstructed easement of light and view. It would serve no real purpose here to quote from the many cases in Utah and from other jurisdictions recognizing such property rights, particularly since the 1963 legislative revisions to the Highway Code in Utah clearly recognize and authorize the acquisition for highway purposes of just such interests:

**27-12-96 ACQUISITION OF RIGHTS-OF-WAY AND OTHER REAL PROPERTY** — The commission is authorized to acquire any real property or interests therein, deemed necessary for temporary, present, or reasonable future state highway purposes by gift, agreement, exchange, purchase, condemnation, or otherwise. Highway purposes as used in this act shall include, but shall not be limited to the following:

(3) Limited access facilities, *including rights of access, air, light and view*, and frontage and service roads to highways.

In the case of *Utah Road Commission v. Hansen* (1963) 14 U. 2d 305, 383 P. 2d 917, this Court observed that—

“ . . . an easement of access contemplates a traveled way from the property to the highway.”

“Absent an established easement, all the abutting owner is entitled to is some reasonable means of access to the highways . . . .”

“We are aware that in the case of *Dooly Block v. Salt Lake Rapid Transit Co.* (9 U. 31, 33 P 229) this Court stated that an owner whose property abuts an established public street had an easement of access thereto, and we agree that where such is taken it would constitute the taking of property covered by our eminent domain statute . . . .”

Since defendants used the former Seventh Street for purposes of ingress and egress for a great many years, by what process of reasoning can it be said that a property right had not been condemned and taken from them because they were furnished with another route to the same street by a greatly inferior means of access and which left their properties on a dead-end street? It is submitted that the trial judge completely disregarded the *Hansen* case in this instance.

The *Hansen* case states that a *reasonable* access to the highway system should be accorded all properties, but aside from the factual issue as to whether or not an access is or is not reasonable it clearly holds that *established easements of access* must be considered in the severance damage analysis. Further, with respect to the north half of Seventh Street, these defendants owned fee title, and the only interest in that street which the public had acquired was a public easement

of travel. This was clearly recognized here because the plaintiff determined it necessary to condemn the fee interest in the street.

Plaintiff may attempt to claim that the actual physical construction of the overpass fill in front of defendants' residence did not extend north of the original center line of Seventh Street into the fee title area which defendants previously owned, thereby leaving the defendants "half" of the original Seventh Street fully available to them at that point. However, such an argument completely fails to establish any material point of advantage for many reasons, among which are these:

1. The portion of the original Seventh Street now left defendants' use is actually no longer "Seventh Street" — it is now a dead-end "service" road;
2. By acquiring fee title to the north half of what was formerly Seventh Street, the plaintiff acquired full rights to that area, including its use for maintenance of the overpass fill (Tr. 12); and
3. Complete dominion was thereby acquired by plaintiff to place fill in any portion of the green area, which plaintiff's engineer indicated might be the case along the easterly portion of the green area being condemned (Tr. 11).

In any eminent domain proceeding it is a simple matter for the condemning authority to limit the right, or the extent of the right, being taken. Whenever a fee

or an easement taking occurs the courts have uniformly held that it must be presumed that the taking was calculated with the intention that the rights acquired would be exercised in the most injurious manner legally possible. Courts have consistently taken a dim view of arguments advanced by condemning authorities based on the premise that, although they were taking a complete fee title, their intentions were not to fully utilize such rights acquired and, therefore, that the damages should only be measured by the "intended" use which they then planned to make. See *Richardson v. Big Indian District* (Nebraska—1967), 151 N. W. 2d 283; *Sullivan v. Marcello* (R. I.—1966), 214 A. 2d 181; and *People v. Lundy* (California—1966), 47 Cal. Rep. 694.

The cases involving damages where there have been actual takings of property—thereby avoiding the problem of sovereign immunity—have substantially ruled that "viaduct-fill and dead-end" situations give rise to severance damages as a matter of law. The measure of such damages is, of course, always a matter of determination.

In the case of *Weber Basin District v. Gailey* (1956), 5 U. 2d 385, 303 P. 2d 271, it was observed that—

" . . . we have held that a change in the grade of an adjoining highway and the building of a viaduct in the adjoining street inflicted compensable damages to the property of the adjoining landowner."

The foregoing rule was probably best set forth in the case of *State Road Commission v. Fourth District Court* (1937), 94 U. 384, 78 P. 2d 502, which involved the building of a viaduct along Center Street in Provo, Utah. The factual comparison is generally identical with this case, except that it did not appear in the *Fourth District Court* case that there was any necessity that the State Road Commission acquire any properties from any of the defendants abutting the affected street, thus distinguishing the two cases insofar as this Court's present view of the doctrine of sovereign immunity is involved. In passing on the facts presented in that case, this Court stated:

“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 Plaintiff's 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.”

In the case of *Dooly Block v. Salt Lake Rapid Transit Co.* (1893) 9 U. 31, 33 P. 229, our Court long ago recognized that, when properly in court, a land-

owner could recover for established rights of easement interfered with by condemning authorities:

“It would seem that he (abutting property owner) had, in common with the rest of the public a 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.”

In this case the defendants submitted to the Court an Instruction covering the basic factual situation involved. The proposed instruction was denied by the Court, and exception was duly taken. It follows:

“Under the law of the State of Utah a landowner having properties bordering a street or highway is entitled to recover damages sustained by his adjoining properties if the grade of the street or highway is substantially changed, either by the placement or removal of fill material in the roadway area or by the building of a viaduct, overpass or similar structure. In determining the amount of damages to the adjoining properties in view of their highest and best use or uses, you may consider the effect of such change in grade on the various factors which would be considered by willing buyers and sellers in determining market value.”

Defendants submit that the refusal to give the foregoing instruction, since the issues were properly

before the court and the doctrine of sovereign immunity was not available to the plaintiff, was clear error. In lieu of the proposed instruction the Court gave its instruction No. 10 (R. 39), attempting to cover generally the same law and subject matter. This writer will leave to the Court the problem of analyzing the Instruction actually given if it so desires — to which exceptions were taken by defendants on the basis of containing incorrect statements of law and of being inapplicable to the facts of this case. It is felt that a complete analysis of the Instruction would probably not result in lessening the confusion created by the Instruction as written.

It does not require extensive analysis to understand why courts in general have been greatly disturbed with the effect upon market value caused by these “viaduct-fill and dead-end” situations. The effect of such obstructions and their interference with access and view have been the subjects of extensive court opinions and comments in recent years in a great number of cases from other jurisdictions. In the case of *Dennison v. State* (New York—1966), 265 N. Y. S. 2d 671, that Court extensively reviewed and commented upon the adverse effect upon the value of a home caused by a highway embankment being constructed in front of it. In *DuPuy v. City of Waco* (Texas—1966), 396 S. W. 2d 103, that Court held that where a property owner had full access to a level abutting street and where highway construction had created an elevated overpass in its place at a height of 14 feet, thereby requiring the

property owner to get access through a service route which left the property in a dead-end, or cul-de-sac, such interference with access entitled the landowner to get damages as a matter of law. Even as to warehouse properties, the case of *People v. Wasserman* (Calif.—1966), 50 Cal. Rep. 95, recognized that an easement of reasonable view of one's property from the highway to the property is a valuable property right which, if existing, entitles the property owner to compensation. Space does not permit commenting upon the great number of cases recognizing these property interests.

The Utah Rule set forth in the *Fourth District Court* case is stated in 26 Am. Jur. 2d, Sec. 242, P. 931, as follows:

“ . . . many courts hold that an owner is entitled to compensation where all access from his property to the system of streets in one direction is cut off, so that his property is left at the end of a cul-de-sac, at least where the market value of the property is lessened thereby. An abutting owner on a public street has been said to have a special right and a vested interest in the right to use the whole of the street for ingress and egress, light, view, and air, and that if the vacation of a portion of the street opposite his property should materially diminish his light, air, view, or access, he has a right to have the amount of damage determined by the jury.”

(Nichols on Eminent Domain is in accord—  
Sec. 16.101(5) )



The concept of sovereign immunity in such situations is not in issue since such takings directly and substantially affect contiguous properties having both a functional and economic relationship. Perhaps, as Justice Wade observed in the *Fairclough* case in his dissent, had there been no need for the taking of any land from these defendants, they might be in the position of having no remedy by virtue of the doctrine of sovereign immunity, since there was not a total destruction of access so as to invoke principles of equity—as observed by Justice Henriod in the *Springville Banking Company* case. Nevertheless, this writer intends to make some observations concerning the doctrine of sovereign immunity in eminent domain cases inasmuch as it was a factor which actually entered into the trial of this case.

Rather than boldly advance a possibly unpopular suggestion to this Court that the doctrine of sovereign immunity advanced in the *Fairclough* case is wrong in eminent domain cases, and that Utah stands practically alone—as it really does—in “inverse” condemnation situations among those states providing constitutional mandates that just compensation shall be made for properties taken “or damaged”, this writer will point out some of the awkward results which the court-adopted concept of sovereign immunity creates in eminent domain situations.

Once the doctrine of sovereign immunity is adopted by any court in eminent domain cases with constitu-

tional mandates similar to those of Utah, the problem always becomes one of where to draw the line. Until this instant case came along, it possibly could have been said with reasonable certainty that sovereign immunity in eminent domain cases ceased to apply once the condemning state agency actually acquired a property interest in a court action, thereby submitting itself to the court's jurisdiction and effecting a waiver of its sovereign immunity. Of course, the foregoing statement is made with full knowledge of the factual limitations of the *Sine* case. Thus, a property owner whose lands have been taken in part is in a position to recover damages to his remaining properties which are functionally or economically affected via the route of severance damages. On the other hand, a property owner in the position of *Fairclough* (except in situations where the action might leave him landlocked) is powerless to recover any damages. The illustration just given shows the two extremes; but the intermediate grey areas will show how ridiculous the concept of sovereign immunity becomes in actual practice.

Several years ago a highway department in the State of Oregon constructed a road through a rancher's property, and refused to instigate eminent domain proceedings or to make arrangements to purchase the properties. We can certainly assume that this would be the classic example of a state's sovereign immunity or, bluntly stated, "thumbing the nose". However, the enraged property owner, being advised that the courts were not going to help him at all, barricaded both ends

of the road where it crossed his properties, erected a headquarters in the middle of the road, put a rifle on his lap, and dared anyone to trespass upon his lands. Despite a great amount of publicity and the usual threats by impressive public officials with a lot of governmental power behind them, the matter finally resolved itself into that of making a settlement with the property owner. It seemed that no one wanted to get shot—including state officials—for the deliberate trespass, and the state was sort of “smoked out.”

The foregoing story quite accurately illustrates the situation in Utah today and, in this writer's opinion, points out how absurd the doctrine of sovereign immunity can become in these eminent domain cases. Simply stated, in about 99% of the cases (other than those within the limited range of the “Utah Governmental Immunity Act”) the only “taking” situations where the State of Utah is presently vulnerable to damages are those where it requires a *physical surface or sub-surface use of a property* in the form of a fee title or an easement interest. This statement will bear up under close scrutiny. This writer makes the further observation that the State of Utah (nudged along by the U.S. Bureau of Public Roads) could and would, within the protection of the doctrine of sovereign immunity now prevailing in Utah, even take fee title and easement rights without payment of compensation, except for either or both of two basic reasons: (1) That some higher authority requires that there be a transfer of title to a legal interest in real property in order to

satisfy title and conveyancing requirements; or (2) the property owner could physically utilize self-help, notwithstanding the doctrine of sovereign immunity.

The foregoing observations are blunt, to-the-point, and accurate. Sovereign immunity permits the State in many situations to acquire, damage or destroy rights and easements of access, light and view, and similar property rights which a property-owner may have without going to court or paying compensation. There is a taking of property when such rights are acquired just as much and real in the eyes of the law as if the surface or sub-surface physical use of a property is involved.

In support of the foregoing, 26 Am. Jur. 2d, *Eminent Domain*, Sec. 200, p. 882, states—

“As a general thing, where the easements of access, light, air, and view are recognized in an abutting owner, the devotion of the adjacent street or highway to inconsistent uses destructive of such easements is a *taking of property* within a constitutional provision requiring compensation therefor . . .”

(Italics added)

In short, easement rights in the nature of *appurtenances* can often be taken in Utah by the State without payment of just compensation as provided by our Constitution, as well as consequential damages to properties not taken. If we re-analyze the aforementioned three sub-sections of Section 78-34-10, Utah Code Annotated, 1953, the doctrine of sovereign immunity

often denies all manner of compensation to a property owner when a State taking occurs unless there has been an underlying fee title taking, or an easement taking — except in possible rare cases as mentioned in the *Springville Banking Co.* case. Actually, the very recognition of such an exception constitutes an effective admission that sovereign immunity is a make-shift proposition completely out of harmony with the Constitution. Unless such types of actual takings occur, all and every other manner of damage set forth in the three sub-sections of that statutory section fall before sovereign immunity.

A further practical analysis of property rights taken, such as light and air, access, etc., reveals that it is virtually impossible to place a dollar value upon such property rights. *Any qualified valuation appraiser will, and must, value these property rights in relation to the remaining affected properties.* This is proper appraisal practice and technique; in fact, it is usually the only method by which such rights can be valued, since these rights are appurtenances to the remaining properties after a taking has occurred.

The appraisal problem presents a practical reason why sovereign immunity must not apply in severance situations involving damages to the remaining properties where there has been a taking of a portion of the property. But the same reasoning applies, notwithstanding the prior position taken by a majority of this Court, in all cases where damage occurs to properties

not taken and where there has not been a taking of a portion of the property. If Section 22 of Article I of our Utah Constitution has any significance at all, there can be no answer but that sovereign immunity has no place in the picture:

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

Any other conclusion will eventually create mounting confusion in the eminent domain law.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides—

“ . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Since a State acts through its courts, and inasmuch as the courts in Utah sanction the doctrine of sovereign immunity in taking or damaging situations of all types other than the exceptions previously noted, how can it be said that there is not a violation of the Fourteenth Amendment in permitting the taking of property rights under sovereign immunity? Further, where is the equal protection of the laws which permits one property owner to recover where a portion of his properties are taken, but which denies recovery to another property owner sustaining identical damages but having no properties taken? It is submitted that the doctrine of sovereign immunity will not stand up against our State and Federal Constitutional mandates.

## CONCLUSION

The argument and analysis in this brief quite possibly has extended beyond that which is necessary to a reversal in view of the basic errors made by the lower Court and counsel for plaintiff associated with the confusion between "severance" and "consequential" damages. Further, the additional inter-related issue of sovereign immunity which was interjected into the case raises a specter of ominous proportions for the property owners, their lawyers and the courts in this State if the legal errors are not clearly corrected in this decision.

Since 1958 this writer has personally handled 165 eminent domain cases involving court condemnations of properties and property rights primarily related to river and reservoir projects, community utilities, national park and recreational acquisitions, and highway acquisitions. Of this number, 120 cases have gone through trial. If indications received from officials of the Federal Bureau of Public Roads are meaningful, this writer has handled more cases involving condemnation acquisitions for property owners since 1960 than possibly any other attorney in the nation. This information is advanced because of assertions made in this brief as to the results which probably will occur if this case is not reversed.

It is not a pleasant prospect to imagine the trouble which will occur in our courts if, in condemnation actions involving the State of Utah where there has been an actual taking of a portion of one's property,

the dispute degenerates into a search for other affected properties in the vicinity which are not involved in actual takings but which have sustained somewhat similar type damages, in part, to those sustained by the defendant litigant. To imagine the problems involved in arguing the degree of comparative damage (which would have meaningless effect in most cases)—and the impossible attempts to segregate allowable “severance” damages from unallowable “consequential” damages—is a frightening prospect. This Court should clearly define the distinction and set the law straight once and for all on this matter inasmuch as it appears that the language of the *Croft* case has not been sufficiently convincing. In all of the cases tried by this writer not one has presented legal issues and results as they developed during the trial of this action.

On the matter of sovereign immunity in eminent domain cases, it is submitted that this case certainly is not one where the doctrine should even be considered. Nevertheless, since a great number of similar cases are reaching our courts each year, this writer earnestly requests this Court to have another good hard look at the doctrine, its ramifications, and its applicability in eminent domain situations. It is again submitted that the doctrine will not stand up to analysis, reason, and the applicable Constitutional provisions.

The great impact of eminent domain proceedings in recent years clearly points the trend of the future. It is submitted that this method of acquiring private



property rights is probably—next to the power of taxation—the greatest device whereby property rights can be confiscated *without the payment of just compensation*. This erosion of private property rights is possible because the property owner has his property taken against his will, he is forced to pay legal fees in his defense and must pay expensive appraisal costs in valuing his property and his damages, there is nothing allowed to him for loss of business profits, and the available relief for moving costs and similar non-compensable items is only partial via other laws. The property owner has no way of being compensation for the anguish associated with losing the one item of property which has been most sacred since the departure of the feudal system when the common law provided that a man could own title to real property. Further, even in a trial seeking just compensation, it is submitted that the property owner, having the burden of proof as announced by our Utah Supreme Court, can really hardly hope for compensation equal to that of the true loss of market value.

The judgment should be reversed and the matter remanded for a new trial.

Respectfully submitted,

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