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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,

Plaintiff and Appellant,

vs.

BETTY LeSOURD, a woman, ALEX T. DAVIES and THELMA DAVIES, his wife, and VALLEY BANK & TRUST COMPANY,

Defendants and Respondents.

Case No. 11860

BRIEF OF APPELLANT

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

---

Vernon B. Romney, Attorney General
State of Utah
By Brant H. Wall
Special Assistant Attorney General
State Capitol Bldg.
Salt Lake City, Utah
Attorney for Plaintiff-Appellant

Robert S. Campbell, Jr.
Stewart M. Hanson, Jr. and
George H. Searle
400 El Paso Gas Bldg.
Salt Lake City, Utah
Attorneys for Defendants-Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,

Plaintiff and Appellant,

vs.

BETTY LeSOURD, a woman, ALEX T. DAVIES and THELMA DAVIES, his wife, and VALLEY BANK & TRUST COMPANY,

Defendants and Respondents.

Case No. 11866

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

All italics are ours and are added for emphasis. The parties will be referred to as in the Trial Court. "R" refers to Record and "T. R." refers to Transcript of Record.

STATEMENT OF THE KIND OF CASE

This is an action in eminent domain, brought by the State of Utah, by and through its Road Commission to acquire certain land owned by the defendants for highway purposes. The only issues before the Court below were the fair market value of the property taken by the State as of the 12th day of September, 1967, the damage to the remainder, if any, and the amount of land owned by defendants and effected by the take.

DISPOSITION IN LOWER COURT

Civil actions Nos. 3753 and 3736, on file in the District Court of Summit County, State of Utah, were consolidated for purposes of trial before the Court, sitting without a jury. At the conclusion of the trial, the Court entered judgment in favor of the defendants and against the plaintiff in the sum of $65,990.00, as just compensation for the property condemned and damages to the remainder of defendants' properties. Plaintiff filed a Motion for New Trial, or in the alternative, a Motion for Remittiture, which Motions were duly argued to the Court and denied. Thereafter, the plaintiff filed its Notice of Appeal to this Court.

RELIEF SOUGHT ON APPEAL

Plaintiff asks that the judgment and ruling of the Lower Court be reversed and a new trial ordered.

STATEMENT OF FACTS

Plaintiff filed two actions in the District Court of Summit County, State of Utah, pursuant to the law of eminent domain in this State for the purpose of condemning, for highway purposes, defendants' rights in .48 acre of real property described as Parcel Nos. 28, 28:H, 28:F, and 28:G, as more fully set forth in the Complaints on file herein. ....

By stipulation of counsel, the Summons and Complaints were served upon the respective defendants on September 12, 1967, and as such would constitute the date of taking and the date upon which all testimony and evidetnce relative to values would be directed and predicated (R 79, 80).

The subject property is located near the intersection of U. S. Highway 40 and Highway U-248, in Summit County, Utah, commonly known as Kimball's Junction (TR 620). Prior to, and at the date of taking, a business consisting of a garage, service station, cafe, and small cabins was conducted upon a portion of the property. The improvements were concentrated upon approximately 1.33 acres of land adjacent to U. S. Highway 40 (TR 621, 631), being Parcels 5 and 6, Ex. P-4. Access was confined to two thirty foot openings located on opposite sides of the gasoline pumps (TR 620).

The defendants Alex Davies and Thelma Davies,

his wife, purchased their property from Emmett Brooks in 1952 (TR 70, Ex. P-13). At the commencement of the trial, defendants asserted that they owned approximately 8 acres of land which comprised the parcel from which the taking was made and was the parcel damaged in the condemnation proceedings (TR 56). The plaintiff maintained that the defendants did not own all of the land claimed, and the determination of just compensation should be limited to that unit or parcel of land owned by said defendants and effected by the take (TR 15, 16, 17).

The Trial Court concluded that an issue of title existed which should be resolved before considering any evidence relative to damages (TR 52). The evidence of title to the area consisted, in part, of plaintiff's Exhibits P-4 and P-10, and Abstracts of Title (P-11, P-12, P-13, P-14, P-15, P-16 and P-17), which were used extensively in tracing the indicia of title of the parcels of land directly involved. Exhibit P-4 is a tracing with several overlays prepared by the witness, Darwin McGuire, licensed abstractor, who appeared as a witness in behalf of the plaintiff. The exhibit is designed to illustrate the land description in the chain of title to each tract, and is numbered and colored to correspond with each Abstract of Title (Ex. P-11 to P-17). Mr. Charles W. Romney, Esq., who is a licensed abstractor and attorney, searched and examined the official records of Summit County, State of Utah, and examined the Abstracts of Title in evidence and

testified relative to the title to the various parcels (TR 223, 224, and 225).

Utilizing the parcels numbered on Exhibit P-4, the testimony of both the abstractor, Darwin McGuire, and the testimony of Charles W. Romney, Esq., can be summarized in the following manner:

1. Parcels 1 and 2 are vested in Summit County, a municipal corporation (TR 223).

2. Parcel 3 (not involved in this action) is vested in the American Legion (TR 223).

3. Parcel 4 was owned by C. H. Stoven and Florence M. Stoven, his wife, and was sold to Summit County by an Agreement to Sell Real Estate which appears of record in the office of the County Recorder of Summit County, State of Utah, as Entry No. 49040 (Ex. P-11) (TR 173).

4. Parcels 5, 6 and 7 are vested in Betty LeSourd (TR 223).

5. Parcel 8, in yellow and the unnumbered portions in yellow, are vested in the State of Utah (TR 224), (P-4).

6. Parcel 9, in red, belongs to U. S. Highway Thirty Association (TR 225).

7. Parcels 10A. 10B, and 10C, colored in light blue, with the exception of that portion of 10C covered by red hash m arks, belongs to L. J. Tree (TR 223, 224).

8. That portion of Parcel 10C, in blue and covered by the red hash marks, belongs to Betty LeSourd (TR 223).

9. Parcel 11, in the dark green, is vested in the State of Utah (TR 224).

In 1963 the defendants, Alex Davies and Thelma Davies, his wife, executed a Warranty Deed in favor of their daughter, Betty LeSourd, pertaining to Parcel No. 7, shown on Exhibit P-4 and reserved a life estate unto themselves (TR 188). Thereafter, in March, 1964, Alex Davies and Thelma Davies, his wife, executed a Warranty Deed in favor of Betty LeSourd, describing Parcels 5, 6, and 7 as shown on Exhibit P-4 and reserved life estates therein (TR 188).

In 1965, Alex Davies and Thelma Davies, his wife, executed two Warranty Deeds in favor of Betty LeSourd (Ex. D-7, D-8). One deed used the description of Parcel No. 2 of the Bush and Gudgell Survey (Ex. P-10), and comprised 0.595 acre, which constitutes a part of Parcels 9 and 10-A, of Ex. P-4 (TR 189). The other deed used the description of Parcel No. 1 of the Bush and Gudgell Survey (Ex. P-10) comprising 7.975 acres, which constitutes Parcels 1, 2. 4, 5, 6, 7, parts of 9, 10-B and 10-C of Ex. P-4 (TR 190).

With respect to the land claimed and in dispute, the defendants had only paid taxes upon the same for

two years immediately preceding the filing of the Condemnation Complaints (R 49, TR 209).

The defendant Thelma Davies testified that the old county road, which bisects the land claimed by them, has in fact, been used at times by the public (R 100). Alex Davies testified that gravel had been removed from the old road right of way without his consent (TR 116, 123).

At the conclusion of the hearing on the title issue, the Court ruled that the defendants had established their "claim of interest" in and to 6.27 acres of land to "be considered for the purpose of this taking as being the property of the defendants" (R 49, 50), (TR 266, 267). As a consequence of the Court's ruling, and subject to the objections of plaintiff, all evidence and testimony relative to the damages were predicated upon the premise that the taking was from the 6.27 acres and damage to the remaining parcel by reason thereof.

POINT I

THE TRIAL COURT COMMITTED ERROR IN HOLDING THAT THE PARCEL OF LAND OWNED BY THE DEFENDANTS, ALEX T. DAVIES AND THELMA DAVIES, HIS WIFE, AND BETTY LESOURD, EFFECTED BY THE CONDEMNATION CON-

SISTED OF 6.27 ACRES OF LAND.

A. THE COURT ERRED IN ALLOWING TESTIMONY OF THE VALUE OF THE PARCEL COMPRISING 6.27 ACRES BEFORE THE TAKE AND EVIDENCE OF VALUE OF THE REMAINING PROPERTIES COMPRISING 5.85 ACRES.

POINT II

DEFENDANTS HAVE FAILED TO SUSTAIN THE BURDEN OF PROOF OF SUCH AN INTEREST IN THE PARCEL OF LAND AS WOULD SUPPORT THE AWARD OF SEVERANCE DAMAGES.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED ERROR IN HOLDING THAT THE PARCEL OF LAND OWNED BY THE DEFENDANTS, ALEX T. DAVIES AND THELMA DAVIES, HIS WIFE, AND BETTY LESOURD, EFFECTED BY THE CONDEMNATION CONSISTED OF 6.27 ACRES OF LAND.

The law is well settled in this State that in order to acquire title by adverse possession, it is essential under the provisions of 78-12-11 and 78-12-12 Utah Code Annotated 1953, as amended, claimants must show and prove all of the requisite elements set forth.

> "78-12-11. What constitutes adverse possession not under written instrument. — For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree land is deemed to have been possessed and occupied in the following cases only:
>
> 1. Where it has been protected by a substantial inclosure.
>
> 2. Where it has been unusually cultivated or improved.
>
> 3. Where labor or money has been expended upon dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating such lands amounting to the sum of $5 per acre."
>
> "78-12-12. — Possession must be continuous, and taxes paid — In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law."

The cases are legion that unless each of the elements set forth under the aforesaid Code provisions have been complied with, no valid title can be

acquired in properties occupied by claimants. See the following authorities:

Jenkins vs. Morgan, 113 Utah 534, 196 P. 2d 871;

Tripp vs. Bagley, 74 Utah 57, 72, 276 P. 912;

D. H. Perry Estate vs. Ford, 46 Utah 436, 151 P. 59;

Homeowners Loan Corporation vs. Dudley, 105 Utah 208, 221 P. 2d 160;

Keller vs. Chournos, 102 Utah 535, 133 P. 2d 318;

Smith vs. Nelson, 114 Utah 51, 197 P. 2d 132.

There is no evidence or testimony in the record which would sustain any claim of any right, title, interest, or estate in and to Parcel No. 3, vested in the American Legion; Parcel No. 4, owned by C. H. Stoven and his wife Florence M. Stoven subject to a contract of sale in favor of Summit County; Parcel No. 9, vested in U. S. Highway Thirty Association; Parcels 10A, 10B, and that portion of 10C not covered by red hash marks, vested in L. J. Tree, all of which are shown on plaintiff's Exhibit P-4 and supported by Exhibits P-11 through P-17.

With respect to the portion of land owned by Summit County comprising tracts designated as Parcels 1, 2, and 4 upon plaintiff's Exhibit 4, it is likewise patently clear and well established under the law of this State that a party cannot, by adverse use or possession,

perfect or acquire any interest in realty, adverse to the interest of the sovereign. By virtue of this rule of law as recognized by this Court, the defendants would, in no event regardless of the extent and nature of their use of said land, acquire any interest by adverse use against Summit County. The undisputed evidence and testimony is that Summit County acquired the fee title to the subject property by Warranty Deed in statutory form, without restriction (Ex. P-17), and was on the date of the taking vested with the fee simple title of said land.

In Peterson vs. Johnson, 84 Utah 89, 34 P. 2d 697, this Court stated as follows:

> "Moreover, one may not acquire title to any part of the public domain by enclosing the same within his fence or by adverse possession. Utah Copper Company vs. Ekman, 47 Utah 164, 152 P. 178."
>
> In Cassity vs. Castagno, 10 Utah 2d 16, 347 P. 2d 834: "One may not adverse the sovereign. Lund vs. Wilcox, 34 Utah 205, 97 P. 33."

The rule of law is likewise announced in 2 C.J.S., Adverse Possession, Section 14 as follows:

> "Generally speaking, title to property dedicated or devoted to a public use cannot be acquired by prescription or adverse possession. Title to such property cannot be acquired by adverse possession as against the public or as against the State or a political subdivision thereof, such as a county." (See authorities cited therein.)

Under the provisions of 57-1-12 Utah Code Annotated, 1953, as amended, which replaces former 78-1-11 U.C.A. 1943, when a Deed of Conveyance has been executed and delivered in the form prescribed by said statute it has " * * * the effect of a conveyance in fee simple to the Grantee, * * * ."

57-1-3 Utah Code Annotated 1953, which is the former 78-1-11 U.C.A. 1943, sets forth the following provision:

> "A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lessor state was intended."

In the case of White vs. Salt Lake City, 121 Utah 134, 239 P. 2d 210, this Court in considering the facts, issues, and certain statutes, which we believe are applicable to the issues raised in this case, there stated:

> "But as long as the dedicated street remains platted as a public thoroughfare, the statutory provision that the fee is vested in the County Commission can only be interpreted to mean that the rights of the county, acting through its Commissioners, are superior to those of the abutting property owners insofar as the normal use of the street is concerned. We have clearly changed by statute the old common law rule insofar as streets in platted subdivisions are concerned."
> " * * * The provisions enumerating the powers of the County Commissioners clearly indicate that the legislature did not regard the dedication to the public of the street in a platted subdivision as the surrender of an easement with

> retention of the fee to the corpus in the abutting owner the segregated statutory provisions are reconcilable when construed to mean that the county or city authorities are vested with the fee in the streets. Such ownership carries with it the right to use it for the enumerated purposes when, in their discretion, it best serves the public interest. It may be abandoned and, in that case, the right to the use and control of this roadway would revert to the abutting owner pursuant to 36-1-7 and common law principles."

Of further significance to the issue are the provisions of Title 36, Chapter 1, Section 3, Utah Code Annotated, 1943, and 36-1-3 U.C.A. 1943 and 27-1-3 U.C.A. 1953 which provide as follows:

> "All highways once established must continue to be highways until abandoned by order of the Board of County Commissioners of the County in which they are situated or other competent authority."

The defendant land owners did not present any competent evidence or testimony that the Board of County Commissioners of Summit County, or other competent authority had enacted in proper statutory form, or otherwise, any appropriate Resolution or Ordinance authorizing or directing the abandonment or vacation of Parcels 1, 2, and 4, Exhibit P-4.

The distinction between a situation where the municipal authorities have acquired the unqualified fee and where a mere easement of use as a public street or highway has been taken is set forth in 70 A.L.R.

at Page 565:

> "The rule to the effect that, where the absolute and unqualified fee in a street is in a municipality, the title remains in the municipality unaffected by the vacation or abandonment of the street as such, is impliedly supported by Schlanger vs. Schulman (1925) 211 App. Div. 601, 207 N. Y. Supp. 723, and Frank W. Coy Real Estate vs. Pendleton (1924) 45 R. I. 477, 123 Atl. 562.

Of further significance is the language set forth and contained in 39 Am. Jur. 2d 518 Section 146, which reads as follows:

> "Where the procedure for the vacation or discontinuance of a highway or street by direct action of the public authorities is prescribed by statute, it is necessary to adhere to such procedure in order that the vacation may be effective, and there can be no estoppel to deny the vacation or discontinuance of a highway or street in the absence of substantial compliance with the procedure prescribed by statute. * * * "

In 39 C.J.S. 1073, Section 137 the following additional rule is set forth:

> "From the principle stated in the proceeding section, it regularly follows that when the highway is discontinued or abandoned the land becomes discharged of the servitude, and the absolute title to the land covered by the highway reserved reverts to the owner of the fee without any further action of the highway authorities, except where the fee to the highway has passed

to the public. The general rule governs even in cases where a new and different highway is substituted for the one abandoned. * * * "

In Stillwater vs. Lovell, (Okla. 1932) 15 P. 2d 12, the Court said:

"1. 'A municipal corporation has no inherent power to vacate a street within its limits or any part thereof. Even when specifically authorized by the legislature to vacate streets a municipal corporation cannot lawfully vacate a public street or highway for the benefit of a private individual. A street or highway cannot be vacated unless it is for the benefit of the public that such action should be taken."

"2. 'If the public interest is not the motive which prompts the vacation of a street whether partial or entire the act of vacation is an abuse of power and especially is it a gross abuse of power if it is authorized without reference to the rights of the public and merely that the convenience of a private individual may be subserved."

Defendants failed to present any evidence of any document in writing which would support their claim of title as required under the provisions of Title 25, Chapter 5, Section 1, Utah Code Annotated (1953) (Statute of Frauds), which would support their claim of title to the land with the exception of Parcels 5, 6, and 7, Exhibit P-4.

The Trial Court determined that in view of the deed issued by Summit County to the Utah State Road

Commission, two portions of land, originally claimed by the defendants, were owned by the Utah State Road Commission and would not, therefore, be considered as property of the defendants in the issue of determining just compensation (TR 266, 267). Of necessity and to justify such a ruling, the Court had to conclude that Summit County had a valid right and interest in the property in order to convey to the plaintiff an interest paramount to that of the defendants. How then can the Trial Court conclude that the remaining land standing in the name of the County is now vested or "owned" by the defendants? It is our position that the authorities cited hereinabove, applied to the testimony and evidence adduced at the trial conclusively demonstrates that the Trial Court erred in its ruling on the issue of title. The ownership of the other tracts involved likewise cannot be sustained by the defendants on the basis of the evidence and testimony presented, as nowhere in the transcript does there appear any competent evidence or testimony which would support the title asserted by the defendants and which, we believe, would at best constitute a mere possessory interest without any other indicia of ownership.

POINT I (A)

THE COURT ERRED IN ALLOWING TESTIMONY OF THE VALUE OF THE PARCEL COMPRISING 6.27 ACRES BEFORE THE

TAKE AND EVIDENCE OF VALUE OF THE REMAINING PROPERTIES COMPRISING 5.85 ACRES.

Subsection (2), Title 78, Chapter 34, Section 10 Utah Code Annotated 1953, provides:

> " * * * (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."

There can be no doubt that under certain circumstances compensation for the taking by right of eminent domain of a parcel or parcels of land may include recovery for injury to the remaining portion of the land caused from its separation from the condemned part where the parcels have been used as a single economic unit for a common purpose. However, in order to allow such severance damage plaintiff contends that there must be a unity of ownership between the part taken and the remaining property. The unity of ownership must of necessity involve something more than a "squattor's right' 'or a bare assertion of ownership without any competent indicia of title. Of significance on this point we refer the Court to the case of McIntyre vs. Board of County Commissioners, 168 Kan. 115, 211 P.2d 59. In that action, eminent domain proceedings were commenced to establish a road across

a portion of two adjoining separate tracts of land owned separately by a husband and his wife. Although the two tracts had been used jointly as a single unit for the operation of a farm, the Court rejected the theory that the husband was entitled to damages for the depreciation of the value of his tract on account of the taking of the tract belonging to his wife, there announcing the following rule:

> "The pieces of land alleged to be a single tract must be owned by the same party, and one owner is not entitled to recover compensation for land taken from him because of alleged damage resulting to that portion of land remaining on account of the taking of land belonging to him. Even though, as under the facts of this case, the two tracts have been farmed and operated as one unit."

In Williamstown vs. Wallace, (1958 Ky.) 316, S. W. 2d 373, the Court, relying upon the rule that "there must be *identical* ownership where *incidental damage* to a parcel of land other than that over which a right-of-way is condemned was claimed," held:

> " * * * Where a portion of a tract of land owned by a husband was condemned for the construction of a city reservoir, thereby separating the remaining portion of the tract from an adjoining tract which was operated by him as a unit, but was owned by his wife, and on which were located the family residence and other improvements, the husband was not entitled to damages for severance and the resulting inconvenience by the taking of a portion of his own property."

In Rath vs. Sanitary District of Landcaster County (1953) 156 Neb. 444, 56 N.W. 2d 741, a question arose as to whether or not several separate tracts constituted one contiguous unit thereby entitling the owner to claim severance damages. In addressing itself to the issue, the Court set forth the following rule:

> "One contiguous tract or unit is that which in general belongs to the same proprietor as that taken, and is continuous with it and used together for a common purpose, whether or not the same is separated by platted or existing lines, lots, blocks, streets, alleys, or like divisions."

In the case of County of San Benito vs. Copper Mountain Mining Company of California, et al (Calif. 1935) 45 P. 2d 428, Appellants were claiming severance damages to certain mining claims which were located in the vicinty of the land sought to be condemned, contending that it was essential to the operation of their mines that they have the use of certain water that originated and flowed over the land which was sought to be condemned. There was no showing that the Appellant was the owner of or had any right to acquire or use the water claimed. The property for which severance damages was claimed was owned by other than the one whose land was sought to be condemned. In rejecting the Appellant's contention that they were entitled to severance damages the Court stated:

> "Appellants cite no authorities to the effect that severance damages may be awarded to one who is not the *owner* of the land sought to be

condemned, and we have found none that uphold this doctrine." (Emphasis added).

In the case of State vs. Superior Court of Spokane County, et al. (Wash. 1941) 116 P. 2d 752, a fact situation was presented which is somewhat analogous to the instant case. In that action suit was instituted to condemn a right-of-way over a parcel of land standing in the name of a single individual which tract had been used in conjunction with two adjoining tracts and operated as a single unit. However, the title to the two adjoining tracts were in the names of two other parties. The Court in rejecting the claim of consequestial damages of the two parties owning the adjacent tracts said:

> "The fact that the three tracts were used as one farm, inasmuch as the ownership is divided, does not entitle the owners of adjacent tracts to damages. If Harry A. Morrison has, in addition to his ownership of Tract A, an interest, short of *actual ownership,* in Tracts B and C owned by the Realtors, and, vice versa, if Realtors, owners of Tracts B and C have an interest in Tract A to which Harry A. Morrison has title, that would not entitle Realtors to recovery of damages to any tract except that one over which the private way of necessity was condemned, which in the case at bar is over the tract owned by Harry A. Morrison."
>
> *"Tracts held by different titles vested in different persons cannot be considered as a whole where it is claimed that one is incidentally injured by the taking of the other for a public use. This is the rule, although the owner of the*

tract taken holds an interest in the property claimed to be damaged, and although the two tracts are used as one."

> "The damages for taking a right-of-way are based on ownership of land actually taken and are limited to lands held *under the same title.*" (Emphasis added.)

The general rule of law relative to the issue raised on this appeal is also set forth and contained in 18 Am. Jur., Eminent Domain, Section 271, at Page 912:

> "Tracts held by different titles vested in different persons cannot be considered as a whole where it is claimed that one is incidentally injured by the taking of the other for a public use. This is the rule, although the owner of the tract taken holds an interest in the property claimed to be damaged, and although the two tracts are used as one."

A case in point adopting the foregoing rule is that of McIntyre vs. Board of County Commissioners, supra, wherein the Court announced and set forth the following rule:

> "The theory of compensation in eminent domain cases is that the owner is to be compensated fully for all land taken from him, including the dimunition in value of that remaining *owned* by him, but full compensation does not include dimunition in the value of the remainder caused by the acquisition of adjoining lands of others for the same undertaking." (Emphasis added).

It has likewise been held in the case of Jonas vs.

State, 19 Wis. 2d 638, 121 N.W. 2d 235, that two distinct parcels of land may not be treated as held under a unity of ownership for the purpose of considering the taking of one parcel, a partial taking of the combined whole, obligating the condemnor to pay severance damages in addition to the value of the parcel taken, where one parcel is owned by a corporation and the other parcel by the creators of the corporation, especially where some of the corporate stock is owned by third persons.

In City of Walla Walla vs. Dement Brothers Company, 67 Wash. 186, 121 Pac. 63, a suit was filed to condemn certain water rights of the Appellant, and an issue arose with respect to the ownership of the water rights, and the Court there addressing itself to the question of ownership of the rights condemned stated as follows:

> 'A party seeking to condemn property as against a defendant is not bound to admit the nature or extent of the title of the defendant in such property, but may at the trial prove the nature and extent of such title or interest."

All testimony and evidence was presented on the basis of the ownership as established by the Court's ruling. Clearly the foregoing authorities do not support the same, and we believe error was committed.

POINT II

DEFENDANTS HAVE FAILED TO SUSTAIN THE BURDEN OF PROOF OF SUCH

AN INTEREST IN THE PARCEL OF LAND AS WOULD SUPPORT THE AWARD OF SEVERANCE DAMAGES.

There is no dispute that this case involves the question of damages to a remaining parcel of land. The plaintiff in its Complaint set out the land being taken by description and then alleged that it was taken from a larger parcel of land as required by Subsection (2) of 78-34-10, U.C.A. 1953, Supra. The plaintiff is not required to define the larger parcel of land which may or may not be damaged by the taking of the part for the highway enlargement. The rule is stated in 6 Nichols Eminent Domain, (3rd Ed.) 185, Section 26.112:

> "When, as usually happens, only part of a particular parcel of land is sought to be taken, it is not necessary to describe the entire parcel, but only that part of which is required for public use. Neither is it necessary to describe property which will be damaged if the proposed improvement is constructed."

The Court has concluded that Subsection 2, supra, governs the question of severance damages. Board of Education of Logan City Sch. Dist. vs. Croft, 13 Utah 2d 310, 373 P. 2d 697. The method of determining severance damages has been stated by this Court:

> "The cardinal and well-recognized rule as to the measure of damages to property not actually taken but affected by condemnation is the difference in market value of the property before and

> after the taking." Salt Lake County Cottonwood Sanitary Dist. v. Toone, 11 Utah 2d 232, 357, P. 2d 486, and 488.

"The difference in value of the remaining tract before and after the taking" Utah Commission vs Hansen, 14 Utah 2d 305, 383 P. 2d 917, 918, and further "the difference between the fair market value before and after the taking." State Road Commission v. Williams, 22 Utah 2d 301, 452 P. 2d 548, 550.

In condemnation actions the plaintiff has the burden of proof of public use and the necessity of taking, which is not contested here, then the burden shifts to the landowner to prove the amount of compensation to which he is entitled. In State vs. Howes, 20 Utah 2d 246, 436 P. 2d 803, this Court held in regards to severance damages:

> " * * * In this respect, we are in agreement with the general proposition that, in a condemnation action, before a landowner may introduce evidence relating to the amount of severance damage he must first meet the burden of proving that he is entitled to that kind of damage. * * * "

In State Road Commission vs. Utah Sugar Company, 22 Utah 2d 77, 448 P. 2d 901, this Court held:

> "Our own authoritites, clearly or by analogy, substantiate the basic rule set out in Nichols, supra, and the concept that to justify severance damages, the damage must be done to the *land itself*,—not to that on top of the land which is not a part of the realty, or what is done on top

> of the land, such as patrolling canals, as is the case here."

This Court having adopted the before and after test has recognized the concept of the requirement of unity of use of land in order to include other land.

> "The State quite properly does not challenge the principle that an award of severance damages to the remaining property is appropriate where there are two or more parcels of land, although not contiguous, are used as constituent parts of a single economic unit." State Road Commission vs. Williams, 22 Utah 2d 301, 452 P.2d 548, 549.

This Court also recognized that there may be two estates in one parcel of land, but that the land is to be valued as a whole and then the separate estates be deducted from the value of the whole. Ogden City vs. Stephens, 21 Utah 2d 336, 445 P. 2d 703.

The Court in State vs. Tedesco, 4 Utah 2d 3, 286 P. 2d 785, in a case where an adjoining owner sought to intervene and claiming to have an interest by virtue of an oral contract stated:

> "We believe and hold that to graft charges onto and create interests in real property, which is the subject of condemnation, there must be *clear and convincing evidence* establishing such charge or interest, and that the evidence in this case falls far short of that quality or proof, as the Trial Court concluded." (Emphasis added).

A good discussion of the reason for the rule of

unity of use and unity of ownership is contained in the landmark case of United States vs. Honolulu Plantation Co. (9th Cir. 1950) 182 Fed. 2d 172. See also Ketchum Coal Co. vs. District Court of Carbon County, 48 Utah 342, 159 Pac. 737.

The above cases and statute establish that there must be a larger parcel of land having a unity of use and of ownership. The ownership of Parcels 5, 6 and 7, Exhibit P-4 is conceded to be in the defendants Davies and Le Sourd. While plaintiff concedes the ownership of the above parcels of land, it does not admit that the parcels have been used in a manner to satisfy the requirement of unity of use of all of the parcels as one unit. Parcel 7 was separated from the other two parcels and was lying idle at the time of the taking, and there is a lack of testimony that the taking of the land from Parcel 5 and 6 adversely affected the value of Parcel 7. The testimony at the compensation phase of the trial fails to establish the unity requirement of use of this property as part of an economic unit and as a part of the commercial establishment. (TR 383, 384, 502, 503, 575, 576, 631).

The defendants, Davies and LeSourd, failed to establish ownership to the balance of the land included in the 6.27 acre unit, upon which testimony was admitted at the compensation trial. The allowance of severage damages is to compensate for the decrease in the fair market value that the remaining land could be sold for on the open market. If a claimant does not

own a part of the land in the unit, then he has nothing which can be sold on the open market, and hence cannot sustain any damages to something he does not own. The defendants, Davies and LeSourd, have failed to establish ownership of the land in the 6.27 acre unit, except Parcel 5, 6 and 7, Exhibit P-4, and have failed to meet the required burden of proof that they are entitled to severance damages to the land not owned and are thus not entitled to offer evidence of severance damages except as to parcels 5 and 6, Exhibit P-4.

CONCLUSION

In conclusion, the following facts may be conceded:

1. Defendants were, on the date of taking, the owners of 1.33 acres of land, being Parcels 5 and 6, Exhibit P-4.

2. .37 acre of said Parcels 5 and 6 were taken in fee for highway purposes (Parcels 28 and 28:H).

3. The improvements were constructed upon said Parcels 5 and 6, Exhibit P-5, P-4.

4. Defendants were the owners of Parcel 7 as shown upon Exhibit P-4.

To conclude that the defendants were the owners of 6.27 acres effected and involved in the take, as the Trial Court did, it was necessary to find that old U.S.

Highway 30-40, which separated Parcels 5 and 6 from Parcel 7, Exhibit P-4, no longer reposed in the Grantee, Summit County; further, that the record owners of the remaining parcels in dispute were likewise divested of ownership in said tracts of land notwithstanding the evidence and testimony presented of their record ownership in fee simple, and that the defendants were the "owners of said properties" within the meaning of that term as applied to eminent domain actions.

The evidence and testimony presented by the defendants was void of any substantive or probative proof of such ownership.

Counsel for defendants has argued that defendants are entitled to compensation for consequential damage because plaintiff did not produce claimants who would assert title to the disputed lands, and further that having named the defendants as owners of the land in the Complaints, the plaintiff is estopped to raise an issue of title or challenge the validity of defendants' asserted title. With these contentions we disagree and do not believe the same to be supported by the law or the evidence. To entitle defendants to consequential damages to the remaining 5.85 acres, as determined by the Trial Court, we believe that it was necessary for them to first show:

1. Unity of title.

2. Unity of use.

Furthermore, as this Court has heretofore an-

nounced, the quantum of proof to establish a claim of ownership must be by clear and convincing evidence, and in this regard we believe that the defendants have totally failed with respect to the disputed ownership.

If defendants' title or claim of ownership is to be sustained, it must rest upon title by adverse possession with respect to the properties held in individual ownership and upon vacation and/or abandonment with respect to the old U.S. Highway 30-40. Nowhere in the record of the proceedings do we find the evidence or testimony sufficient to meet the requirement of the applicable law favorable to the defendants.

In view of the foregoing, it is our position and contention that the Trial Court committed error and that this Honorable Court should reverse the Judgment and Decision of the Lower Court and order a new trial of the issues involved in this matter.

Respectively submitted,

VERNON B. ROMNEY
Attorney General
State of Utah

Attorney for Plaintiff-Appellant

By: Brant H. Wall

Special Assistant Attorney General
State Capitol Building
Salt Lake City, Utah