

1967

State of Utah, by and Through Its Road
Commission v. Charles W. Taggart, Trustee, a
Partnership, First Security Bank of Utah, a Utah
Corporation, and Zions First National Bank, a Utah
Corporation, Mortgagees : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH, by and through its
ROAD COMMISSION,

Plaintiff and Respondent,

vs.

CHARLES W. TAGGART, Trustee, a
partnership, First Security Bank of Utah,
a Utah Corporation, and Zions First Na-
tional Bank, a Utah Corporation, Mort-
gagees,

Defendant and Appellant.

Case No.
10594

UNIVERSITY OF UTAH

BRIEF OF RESPONDENT

JUL 10 1967

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Appeal from Judgment of Third District Court
for Salt Lake County.
Hon. Aldon J. Anderson, District Judge

PHIL L. HANSEN,
Attorney General
JOSEPH NOVAK
Special Assistant
State Capitol Building
Salt Lake City, Utah

*Attorneys for Plaintiff
and Respondent*

ROBERT S. CAMPBELL, JR.

of

PARSONS, BEHLE, EVANS & LATIMER

520 Kearns Building
Salt Lake City, Utah

*Attorneys for Defendant
and Appellant*

FILED

MAR 24 1967

Clerk, Supreme Court, Utah

INDEX

STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
POINT I.	
THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT DEFENDANT A NEW TRIAL	18
POINT II.	
THE TRIAL COURT DID NOT ERR IN LIMITING CROSS EXAMINATION OF THE WITNESS JOHNS ON HIS PRIOR APPRAISAL OF THE CONDAS PROP- ERTY	34
POINT III.	
THE ISSUE OF SPECIAL BENEFITS WAS PROPERLY SUBMITTED TO THE JURY	42
POINT IV.	
THE INSTRUCTIONS OF THE TRIAL COURT ON BURDEN OF PROOF AND PREPONDERANCE OF EVIDENCE WERE PROPER	45
CONCLUSION	47

CASES CITED

<i>Basch v. Iowa Power And Light Co.</i> , 95 N.W. (2d) 714 (Iowa 1959)	40
<i>Bingaman v. City of Seattle</i> , 139 Wash. 68, 245 Pac. 411 (1926)	40
<i>Bodon v. Suhrmann</i> , 8 Utah (2d) 42, 327 Pac. (2d) 826 (1958)	29

INDEX Continued

<i>Campbell v. Safeway Stores, Inc.</i> , 15 Utah (2d) 113, 388 Pac. (2d) 409 (1964)	24, 29
<i>Donohue v. Rolando</i> , 16 Utah (2d) 294, 400 Pac. (2d) 12 (1965)	46
<i>Hanks v. Christensen</i> , 11 Utah (2d) 8, 354 Pac. (2d) 564 (1960)	47
<i>Jorgenson v. Gonzales</i> , 14 Utah (2d) 330, 383 Pac. (2d) 934 (1963)	29
<i>Paul v. Kirkendall</i> , 1 Utah (2d) 1, 261 Pac. (2d) 670 (1953)	28
<i>People v. Murata</i> , 326 Pac. (2d) 947 (Cal. 1958)	40
<i>Porcupine Reservoir Company v. Keller Corporation</i> , 15 Utah (2d) 318, 392 Pac. (2d) 620 (1964)	32
<i>Powers v. Taylor</i> , 14 Utah (2d) 152, 379 Pac. (2d) 380 (1963)	29
<i>Schneider v. Suhrmann</i> , 8 Utah (2d) 35, 327 Pac. (2d) 822 (1958)	28, 29
<i>Stamp v. Union Pacific Railroad Company</i> , 5 Utah (2d) 397, 303 Pac. (2d) 279 (1956)	29
<i>State v. Christensen</i> , 13 Utah (2d) 224, 371 Pac. (2d) 552 (1960)	37, 39, 42
<i>Weber Basin Water Conservancy District v. Moore</i> , 2 Utah (2d) 254, 272 Pac. (2d) 176 (1954)	32
<i>Weber Basin Water Conservancy District v. Nelson</i> , 11 Utah (2d) 253, 358 Pac. (2d) 81 (1960)	31
<i>Wellman v. Noble</i> , 12 Utah (2d) 350, 366 Pac. (2d) 701	39

TEXTS CITED

<i>Nichols On Eminent Domain</i> , Volume 5, page 274, Section 18.45(2) (supplement)	37, 38
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its
ROAD COMMISSION,

Plaintiff and Respondent,

vs.

CHARLES W. TAGGART, Trustee, a
partnership, First Security Bank of Utah,
a Utah Corporation, and Zions First Na-
tional Bank, a Utah Corporation, Mort-
gagees,

Defendant and Appellant.

Case No.
10594

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

Condemnation action to acquire real property owned by defendants in the vicinity of 2100 South and Redwood Road in Salt Lake County, Utah for use in the construction of a public highway facility known as "I-215", commonly referred to as the "Belt Route".

DISPOSITION IN LOWER COURT

The only issue in dispute was the amount of just compensation to be paid to defendants, which issue was tried to a jury. The trial commenced on January 11, 1966 and was concluded on January 22, 1966. The issue of just compensation was submitted

to the jury on special interrogatoires (R. 53), the answers to which fixed the amounts awarded as

(1) Total just compensation	\$359,877.00
(2) Value of 78.11 acres condemned	318,301.00
Difference	<hr/> \$ 41,576.00

The difference between (1) and (2) above, i.e. the sum of \$41,576.00, represented the damages to the remainder of defendant's lands not taken. Accordingly, judgment on the verdict was entered by the trial court on January 22, 1966 in favor of defendants in the sum of \$359,877.00 together with interest and costs (R. 98-99). Defendant partnership filed its Motions for additure and/or a new trial (R. 107-109) and after a full hearing thereon such Motions were denied (R. 131). Thereupon defendant partnership filed its Notice Of Appeal solely on issues of law (R. 133).

RELIEF SOUGHT ON APPEAL

On this appeal defendant seeks a reversal of the judgment of the trial court and asks for a new trial on the issue of just compensation. Plaintiff urges this court to affirm the judgment of the trial court.

STATEMENT OF FACTS

Respondent c a n n o t agree with appellant's "Statement Of Facts" for two reasons, to-wit:

(1) Defendant states the facts in the light most favorable to defendant, who lost below, and in so doing violates the basic rule

that the facts on appeal must be reviewed in the light most favorable to the verdict below; and

(2) Defendant does not confine its statement to facts, but repeatedly argues what the facts should be, and in so doing repeatedly emphasizes the opinions of defendant's experts and argues the comparative weight thereof while denouncing the opinions of plaintiff's experts.

And so plaintiff believes it not only proper but essential that a statement be made setting forth the facts of the case with the foregoing rules in mind.

At the time of the commencement of this action defendant owned or was purchasing approximately 926.7 acres of land in Salt Lake County situated generally between 2100 South and 3100 South Streets and west of Redwood Road (Exh. D-1), being the area shaded in yellow, with the exception of the pole line corridor as hereinafter noted. Within defendant's overall boundary the three unshaded areas shown in white are not owned by defendant. The pole line corridor, being a strip of land approximately 165 feet wide (Tr. 518), cuts through the westerly and southerly portion of the overall tract. The corridor is shown on Exhibit D-1 and the map attached to Appellant's Brief as two parallel lines and on the Exhibit P-11 overlay as an orange strip. It begins on the south side of 2100 South and runs due south until it makes a turn to the southeast, where it leaves the subject tract, and then follows

parallel and adjacent thereto for approximately a quarter of a mile, then back onto the tract and continues westerly along the south side of Decker Lake, then onto Redwood Road. The corridor contains two separate power lines, one supported by large steel towers and the other by wooden poles and cross arms (Exh. P-27). It is owned in fee by Utah Power And Light Company. However, defendant has a reserved right to cross the corridor at any place where there are no structures (Tr. 518, 519).

The south central part of the subject tract is occupied by Decker Lake (Exhs. P-11, P-24, D-5), embracing an area of approximately 180 acres when the water is one foot deep (Tr. 75). Decker Lake is surrounded by an earth fill embankment (Tr. 75) and serves as a collection basin for surface run-off and irrigation and tail water from canals to the south and west which naturally drain to the Lake (Tr. 73). In July, 1965 there were two basic inflows into Decker Lake, one coming from the south in two different sources and one coming from the west at about the center of the Lake in an open drain (Tr. 74). The outflow from Decker Lake is through an open drain running from the east end of the Lake to Jordan River, with an elevation such that the water in the Lake remains at a depth of about one foot (Tr. 75). The outflow drainage canal was constructed by three irrigation companies on the strip of land owned by them in fee, pursuant to a Decree of the court under which such companies have the

right to drain their waste water into the Lake and the duty to maintain the drainage canal from the Lake (Tr. 103, Exh. P-20).

The topography of the land is relatively flat with some depressions, natural swales and elevated banks (Exhs. P-17, P-21, P-25). The water table varies and is near the surface in places, particularly in the swales and towards the north end (Tr. 108, 109, 111, 114-119 incl.). Two large open drains enter the property from the west, one being approximately 20 feet in width and six to eight feet deep (Tr. 483) and the other being approximately 15 feet in width and six feet deep (Tr. 483, 484), which drains cut across the property then join to the west of the pole line corridor and enter Decker Lake near the center thereof (Tr. 485, Exhs. D-1, P-11, P-18 P-19). Another open drain approximately 10 to 12 feet wide and four to five feet deep connected to the foregoing drain just west of Decker Lake extends to the north, running through the property and then changes to a northeasterly direction until it leaves the property at 2100 South (Tr. 486, 487, Exhs. D-1, P-11).

The northerly portion of the property is traversed by the Brighton Canal extension which enters from Redwood Road, continuing in a northwesterly direction, changing to a southwesterly direction and again changing to a northwesterly direction until it leaves the property (Tr. 101, 102, Exhs. D-1, P-11, P-18, P-19).

The north boundary of the property fronted on the south side of 2100 South Street. There were no traveled ways directly from 2100 South Street onto the subject property along the entire 2400 feet of frontage. There existed (and presently exists) a gravel surface roadway known as Pole Line Road, sometimes referred to as 2700 West Street, which extended both north and south from 2100 South Street. The intersection of Pole Line Road and 2100 South Street is located on the property adjoining and immediately to the west of the subject property (Exhs. P-2, P-11). From that intersection Pole Line Road runs due south on the adjoining property, across the Brighton Canal by means of a timber bridge and then enters the subject property, continuing thereon almost due south to approximately the "Singleton" tract (Tr. 505, Exh. P-11). Pole Line Road has been in existence for at least 45 years (Tr. 123, 124) and has a gravel surface 32 feet in width (Tr. 597). In 1948 it was graveled by Salt Lake County for approximately one-half mile (Tr. 596) and its appearance hasn't changed materially since 1948 (Tr. 596). During at least the years 1947, 1948, 1953 through 1960 Pole Line Road was maintained by Salt Lake County, including snow removal (Tr. 598, 599). The bridge across the Brighton Canal extension has been repaired by Salt Lake County and the road has been marked with a Salt Lake County sign designating it as a "Dead

End" street. Pole Line Road does not extend through the property to 3100 South Street (Tr. 600).

At the southerly end of Pole Line Road an unimproved roadway connects therewith which runs in an easterly direction and then divides, with one segment going southerly along the west side of Decker Lake and ending at the open drain coming from the west into and at the center of the Lake. The other segment of the unimproved roadway continues around the north end of Decker Lake and down the east side, terminating near the open drainage canal owned and maintained by the three canal companies (Exh. P-11).

On the east the property is bounded by the west side of Redwood Road and has some 2750 feet of frontage on Redwood Road along three segments. On the south the subject property is bounded by the north side of 3100 South Street and has some 2700 feet of frontage thereon. There were no traveled ways directly from 3100 South Street onto the subject property along such frontage. However, 2700 West Street (Pole Line Road) has been constructed from the north line of 3100 South Street on property to the west which extends northerly to the south line of the subject property (Exhs. D-1, P-11).

As of the commencement of this action the subject property was essentially undeveloped and unimproved. The reason why it remains undeveloped and unimproved is of no moment here, whether it be for the reasons suggested by appellant on pages 4

and 5 of its Brief or because of lack of demand, financial ability or the like. Important is the fact that Mr. Haynie, one of the managing partners of defendant partnership, at the time of the initial negotiations for the acquisition of the subject property, had knowledge that the alignment of the Belt Route through defendant's property was one of the routes then being considered, except for the type of interchange with the 2100 South Expressway (Tr. 59-61, incl.). However, the salient fact is that the subject property was undeveloped and unimproved at the time of the commencement of this action.

This action was commenced on July 12, 1965 and the date of taking was fixed as July 12, 1965 (R. 53). The total area of defendant's property sought to be condemned is 78.11 acres, of which 76.65 acres are taken in fee and 1.46 acres are taken for drainage easements (R. 101-106 incl.). The highway facilities to be constructed are a part of Interstate 215, commonly referred to as the "Belt Route" and is designated as a limited access facility (R. 3). Access to and from this highway facility in the vicinity of the subject property will be limited to the interchange with 2100 South Street. That portion of the subject property fronting on 2100 South Street, being approximately 2400 feet in length, is being taken to accommodate the interchange with 2100 South Street (Exhs. D-1, P-2, P-11). Drainage facilities will be constructed adjacent to the highway facility in both the southeast

and southwest quadrants of the interchange and near the north line of 3100 South Street immediately east of the highway facility (Tr. 23-26 incl.). From the south end of the interchange to 3100 South Street the width of the property taken is approximately 260 feet (Tr. 8).

The interchange between the Belt Route and 2100 South Street will be a clover leaf design with the Belt Route overpassing 2100 South Street on an earth fill structure (Exh. P-2). There will be no interchange at 3100 South Street but the Belt Route will overpass 3100 South Street on an earth fill structure. The earth fill structure for the overpass at 3100 South Street will be approximately 22 to 25 feet high (Tr. 7), not 22 to 35 feet as stated on page 9 of Appellant's Brief, and the fill will be approximately the same height at the interchange with 2100 South Street (Tr. 18-19). From both the overpass at 3100 South Street and the interchange at 2100 South Street the highway facility has a descending slope until the height of the fill averages approximately 8 feet between those two structures through the remainder of defendant's property (Tr. 17, 18).

As to the intersection between 2100 South Street and Pole Line Road (2700 West) going south, the northerly section of Pole Line Road will be relocated approximately 350 feet to the west and there an at-grade intersection will be established as shown on Exhibit P-2 (Tr. 21, 22, 23, 39, 40, 41 and 42).

No plan exists to change the physical access existing on July 12, 1965 to and from 2100 South Street to defendant's property via Pole Line Road except for relocating the at-grade intersection 350 feet to the west.

And so with that description of the physical features of the subject property and the location and nature of the highway facility to be constructed, the parties proceeded with the trial of the case. Defendants first called as an adverse witness Jerry D. Fenn, a design engineer employed by the State Road Commission, who testified as to the nature and type of highway facility to be constructed adjacent to and through defendant's property (Tr. 1-43, incl.). Thereupon, and at the request of both parties, the jury viewed the subject property (Tr. 44-45).

Thereafter defendant called as witnesses three valuation experts, Messrs. Loll, Solomon and Kiepe; and plaintiff called as witnesses two valuation experts, Messrs. Fletcher and Johns. All five valuation experts gave as their opinions the following breakdown as to the value of the 78.11 acres of land taken and the amount of severance or consequential damages, if any, to the remaining 848.59 acres not taken. However, appraiser Solomon, witness for the defendant, actually gave two separate opinions which we number (1) and (2), the latter being the one finally adopted by him and about which we will have more to say later.

For the defendant—

Maxwell Loll

Value of 78.11 acres taken \$357,105.00

Damage to remainder 315,415.00

Total \$672,520.00

C. Francis Solomon (1)

Value of 78.11 acres taken \$302,931.00

Damage to remainder 178,069.00

Total \$481,000.00

C. Francis Solomon (2)

Value of 78.11 acres taken \$308,289.00

Damage to remainder 251,711.00

Total \$560,000.00

Werner Kiepe

Value of 78.11 acres taken \$366,050.00

Damage to remainder 309,120.00

Total \$675,170.00

For the plaintiff—

R. S. Fletcher

Value of 78.11 acres taken \$332,120.00

Damage to remainder —0—

Total \$332,120.00

A. B. C. Johns

Value of 78.11 acres taken \$236,076.00

Damage to remainder \$44,183.00

Less special benefits 26,582.00

Net damages 17,601.00

Total \$253,677.00

And so after nine days of trial and five and one-half hours of deliberation the jury found the values as follows:

Value of 78.11 acres taken \$318,301.00

Damages to remainder 41,576.00

Total \$359,877.00

With that setting in mind, we now return to appellant's "Statement Of Facts" and note that ninety percent of what appears on the first thirty pages of Appellant's Brief is devoted not to a Statement Of Facts but to the claims, contentions and assertions of defendant as to its theory of the case, repeated emphasis of the opinions of defendant's expert witnesses, criticism of the opinions of plaintiff's expert witnesses and a lengthy argument of those opinions, the qualifications of the expert witnesses and the credibility of their testimony and the weight which should be given to that testimony. Needless to say, those were all matters for the jury to weigh and consider in reaching its verdict, and are not open to argument by appellant to this court on appeal where the appeal is solely on issues of law. Likewise such matters might well be outside of the legitimate area of comment by respondent, but since they are presented in Appellant's Brief we feel obliged to make some response thereto. And so, referring to Appellant's Brief, we note:

Pages 4 through 8 are devoted to an argument of what defendant contends to be the advantages of the property, confined to what defendant's experts had to say about it in their opinions and "informed" judgments while giving only lip service to the disadvantages of the property.

Pages 10 through 15, inclusive, and the matters set forth in sub-paragraph (a) through (i), inclu-

sive, are nothing more than an argument in support of the views and opinions expressed by defendant's witnesses and clearly are not in keeping with the time honored rule that the facts (to the extent such matters contain facts as distinguished from opinions) must be stated in the light most favorable to the verdict below. Thus, whether it is more advantageous to devlop the remaining property in several tracts as against one whole tract (a), or whether gone was this or gone was that or what Kiepe had to say about it (b), or the effect of providing no crossings through defendant's lands (c), or what effect taking the 2100 South frontage or what Solomon had to say about it (d), or what Solomon and Kiepe had to say about the industrial lands remaining west of the freeway (i), the commercial acreage east of the freeway, the residential land east of the freeway or the residential land west of the freeway (h), or the sewer and water (i) were all matters for the jury to weigh in reaching its decision as to whether and to what extent the remaining properties were depreciated in value by reason of the taking and the construction of the highway facility in this case. The jury has spoken on all of these matters through its verdict and that should end it.

Likewise the selected excerpts from the Record outlined on pages 16 to 18, inclusive, as to the reasoning of appraiser Fletcher in support of his opinion that there was no severange damage, whether consistent or inconsistent or whether he was evasive

or unresponsive, went to the credibility of his testimony, which was for the jury to weigh and not for appellant to argue in this appeal. And the same can be said for the comments on the testimony of appraiser Johns in the selected excerpts outlined on pages 19 to 21, inclusive.

Again the qualifications of the appraisers set forth on pages 23 to 26, inclusive, were matters for the jury to weigh in passing on the credibility and weight to be given to the testimony of those witnesses. Significant is the fact that defendants made no objection as to qualifications when both of plaintiff's valuation witnesses were asked for their opinions on values herein. However, since appellant has devoted only one short paragraph each to the qualifications of plaintiff's appraisers, we believe it appropriate to make the following further statement thereof:

R. S. Fletcher, M.A.I. — in the real estate business since 1947 and a fee appraiser since 1952. Since 1958 served as President of Fletcher-Lucas Investment Company, a real estate company which has existed since 1923. He has been a broker since 1957 or 1958 and has engaged in the buying and selling of residential, commercial and industrial properties principally in Salt Lake County. He holds a degree from the University of Utah in business and a Master's Degree from Harvard in business administration. Mr. Fletcher completed courses given by the American Institute in 1949 and has

since fulfilled the rest of the requirements for membership with the M.A.I. designation. He has appraised several thousand individual properties of all types and descriptions. Representatives of his clients are Federal, State, County, City, School Districts, major banks, saving and loan associations, mortgage loan companies, life insurance companies, oil companies, local investors, attorneys and other real estate companies. His appraisals for governmental bodies and individuals are about equally divided (Tr. 603-608). Also Mr. Fletcher appraised the fair market value of the subject property in 1961 for an investor who was interested in purchasing the property from the Falconaero Corporation, defendant's predecessor (Tr. 609-613).

A. B. C. Johns, Jr., M.A.I. — engaged in the vocation of real estate appraiser since 1951. He graduated from the University of Houston in business administration in 1949 and has taken post graduate studies in real estate appraising, including the courses sponsored by the American Institute, at the University of Utah and University of Southern California. Having taken an instructor's course in teaching real estate appraisal, he has taught the subject at the University of Utah Extension Division, Brigham Young University and Weber College. Mr. Johns obtained his M.A.I. designation in 1962 (either erroneously or facetiously designated M.I.A. on page 25 of Appellant's Brief), and has been a senior member of the Society of Real Estate Ap-

praisers since 1958, having served as President of the local Chapter and a director and member of the International Board of Governors of that organization. Since 1962 he has been a partner of Cook & Johns, a real estate company in Salt Lake City, Utah, and although Mr. Johns does not personally have a broker's license the company does. He is a fee appraiser and has appraised properties for federal and state agencies, oil companies, the power company, a number of large nationally known banks and insurance companies and for individuals. His work is about balanced between individuals and governmental bodies. He has appraised industrial, commercial and residential properties and has appraised a number of properties along the south leg of the Belt Route (Tr. 759-764).

As to the acreage values and comparable sales of witnesses outlined on pages 26 and 27 of Appellant's Brief, the statement that the sales of comparable properties utilized by the witnesses for defendant were probative and more relevant to the subject property is argumentative and the opinion of the appellant only and apparently one not shared by the jury in this case. In appellant's summary of the opinions of the witnesses on page 26 of Appellant's Brief the statement that Mr. Johns appraised the residential area at \$177.00 per acre is simply not true. Mr. Johns put a value of \$177.00 per acre on the land embraced within Decker Lake only, and as to the unzoned residential property outside of Deck-

er Lake Mr. Johns put a value of \$1,725.00 per acre on it. Likewise, Mr. Fletcher put a value of \$200.00 per acre on the land embraced within Decker Lake and a value of \$1,500.00 per acre on the unzoned residential land not occupied by Decker Lake.

The summary of the sales contained on page 27 of Appellant's Brief is highly selective. Needless to say, the jury had before it all of the sales offered in evidence, including those offered by plaintiff (Exh. P-11 overlay).

We have no quarrel with the summary of the market value of opinions of the witnesses as summarized on page 28 of Appellant's Brief, except that we should make mention of the C. Francis Solomon No. (1) appraisal (Tr. 307, 311, Exh. D-7), to-wit:

Value of total tract before	\$3,169,651.00
Value of remainder tract	2,689,000.00
Difference or just compensation	<hr/>
(rounded)	\$ 481,00000

As to page 29 of Appellant's Brief pertaining to the instructions of the court, we note that appellant made no request for an instruction that the verdict could be within the range of the total value testimony, if the preponderance was less than the value conclusions of the landowner but more than the government's testimony.

As to the special interrogatories returned by the jury, we note that on page 30 of Appellant's Brief the answer to No. 4 should be \$318,301.00 and not \$308,301.00. We make the further observa-

tion that all of the claims, contentions and assertions of defendant and the opinions of the experts, the credibility of their testimony and the weight thereof are summed up in capsule form and with finality in the jury's answers to the special interrogatories.

POINT I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT DEFENDANT A NEW TRIAL

Throughout appellant's "Statement Of Facts" and "Argument" it blindly assumes that as of July 12, 1965 the entire 926.7 acres was on the verge of being transformed overnight into a Utopian development of residential, commercial and industrial complexes fully integrated into a veritable "Garden of Eden" (Exh. D-4) from the raw undeveloped acreage it was, severed by a 165 foot pole line corridor, cut by several deep open drains, traversed by a large irrigation canal and approximately one-fifth covered by a lake in the bottom of a natural waste water drainage and collection basin with a high water table (Exh. P-11). Defendant looks at the property through the rose colored glasses of a promoter-speculator, seeing only the advantages and ignoring the disadvantages, apparently hoping that the latter somehow would go away. Then comes the taking. Now defendant looks at the remaining property through different glasses and sees nearly complete ruination and what was once a "Garden of Eden" now becomes a "No Man's Land".

However, the jury viewed the premises and saw the property for what it was first hand and, having heard the evidence, looked through the eyes of the reasonable man and made up its own mind as to wherein the truth lies.

Likewise, defendant places its valuation experts Solomon and Kiepe high on top of the pedestals of competency and credibility, who, as defendant argues on page 37 of Appellant's Brief, "stand head and shoulders above all other witnesses", particularly plaintiff's witness Johns, who defendant states is completely mismatched in qualifications with Solomon and Kiepe (Ibid p. 38). Defendant characterizes Solomon and Kiepe as the "believable" witnesses (Ibid p. 32) with "informed" judgments (Ibid p. 36) and repeatedly "weighs" their testimony against that of Fletcher and Johns (Ibid pp. 37-38). Our answer is that defendant apparently holds the competency and credibility of Solomon and Kiepe in much higher esteem than did the jury. And we reiterate that such comparisons were within the exclusive province of the jury and are not open for argument by defendant in this appeal.

However, defendant argues that because of the above the plain conclusion in the minds of reasonable men makes the jury award so "pitifully inadequate" as to transcend and shock the ordinary senses of justice and common sense. And so we ask, what is so shocking about an award of \$318,301.00 for the 78.11 acres of land taken when it is over \$10,000.00

more than the finally adopted value of \$308,289.00 placed thereon by defendant's own esteemed witness C. Francis Solomon? Likewise, we ask, what is so shocking about an award of \$41,576.00 in severance damages when it is \$41,576.00 more than what plaintiff's witness Fletcher placed on it and \$23,975.00 more than what plaintiff's witness Johns placed on it? What is so "pitifully inadequate" about that? Is it shocking to the ordinary sense of justice or common sense just because the jury didn't swallow hook line and sinker the final opinion of Solomon of over \$250,000.00 in severance damages or the opinion of Kiepe of over \$300,000.00 in severance damages to land which the State was not even taking? Are the severance damages somewhere between \$250,000.00 and \$300,000.00 as a matter of law just because Solomon and Kiepe said so? Of course not. And defendant should not even be heard to complain about it.

Nowhere in Appellant's Brief does it contend that the amount of \$318,301.00 awarded for the 78.11 acres of land taken is inadequate. And it would be ludicrous to so do since the amount is over \$10,000.00 more than the amount placed thereon by defendant's own witness Solomon. What defendant is complaining about is that the amount of \$41,576.00 awarded for severance damages is inadequate. And so the gist of defendant's argument is that it is entitled to a new trial simply because the jury chose not to believe Solomon or Kiepe *on the amount of severance damages only*.

To accept defendant's appraisal of the apprais-

als of Solomon and Kiepe would cause one to wonder why the jury did not believe defendant's witnesses Solomon and Kiepe and accept their testimony at face value. We need only to go to the record and the stage set at the trial to learn why.

First, Mr. Solomon took some twelve pages of transcript to state his qualifications (Tr. 243-254 incl.). While we disagree with Mr. Solomon's opinions, particularly on severance damages, we have no quarrel with his qualifications; but it is not for us to say whether he is more or less qualified than the other valuation witnesses. That was for the jury to evaluate. Such evaluation was not based solely upon his qualifications or his record. The jury's appraisal of the Solomon appraisal rested upon his performance in the witness chair and not on his laurels. And what of his performance? It is documented in 155 pages of transcript (Tr. 243-397 incl.) and Exhibits D-7 and D-9.

To begin with, on direct examination the witness Solomon was very thorough and precise. He methodically expressed his opinions as to the "before" value of the entire 926.7 acres on a per acre value basis and the resulting total for each zoning land classification and the unzoned land (Tr. 298-307 incl.), with the end result that in his opinion the total "before" value of the entire 926.7 acres of land was \$3,169,651.00 (Tr. 307; Exh. D-7). He then proceeded to state his opinions of the "after" value of each land classification of the remaining

lands, explaining which portions thereof in his opinion had been "damaged" and why (Tr. 307-321 incl.), with the end result that in his opinion the remaining 848.59 acres of land had a value of \$2,689,000.00 after condemnation (Tr. 311; Exh. D-7).

He then gave a breakdown of his opinion for the value of the land taken and the severance damages to the remaining land, which we call the Solomon No. (1) appraisal, as follows (Tr. 321-322, 352; Exh. D-7) :

Value of 49 plus or minus acres industrial taken	\$235,419.00
Value 29 acres residential taken	67,519.00
Value of land taken	<hr/> \$302,931.00
Severance damages	178,069.00
Total	<hr/> \$481,000.00

And so it developed on cross examination that Mr. Solomon became confused when pressed for a breakdown on the amount he had assigned as damage to the remaining unzoned residential property (Tr. 351-354 incl.), at which point he realized that he "goofed" on his appraisal. So a one-half hour recess was taken for him to compute it, but to no avail (Tr. 355). On re-direct counsel for defendant attempted to rehabilitate Mr. Solomon (Tr. 369-372) and when unable to do so requested a recess at 11:50 A.M. (Tr. 373).

And so upon reconvening court at 2:00 P.M. a most dramatic sequence of events followed. Mr. Solomon admitted that he, Mr. Haynie, Mr. Moyle and

defendant's counsel had worked during the noon recess from 12:00 to 2:00 o'clock P.M. with a calculator in the courtroom and re-worked Mr. Solomon's figures (Tr. 384- 385), with the end result that Mr. Solomon had changed his total figure for the value of the land taken and severance damage by approximately \$80,000.00 upwards (Tr. 388), actually \$79,000.00. Yet he steadfastly maintained that he had not changed his opinion on the amount of damage per acre over his previous testimony (Tr. 379, 380, 385, 388). However, in his final analysis he came up with an opinion of a total of \$560,000.00 for the value of the land taken and severance damages (Tr. 379; Exh. D-9).

What was even more penetrating was his very positive assertion that his opinions of the value of the condemned acreage in the industrial and residential areas, per acre (D-9), had in no way changed from his opinion recorded the day before (Tr. 380; Exh. D-7). He then computed the value of the 49.11 acres of industrial land taken at \$239,605.00 and the value of the 29 acres of residential land taken at \$68,684.00 (Tr. 384). A comparison between his testimony recorded on Exhibit D-7 and Exhibit D-9 shows otherwise. Thus

	D-9	D-7
Value of 49.11 acres industrial taken	\$239,605.00	\$235,419.00
Value of 29 acres residential taken	68,684.00	67,512.00
Total	<u>\$308,289.00</u>	<u>\$302,931.00</u>

Thus within the short span of one day the opinion of Mr. Solomon had increased the value of the 49.11 acres of industrial land taken by \$4,186.00 and had increased the value of the 29 acres of residential land taken by \$1,172.00, or an increased from one day to the next of \$5,358.00 in the land taken.

It was indeed unfortunate for Mr. Solomon that such sequence of events occurred. The writer has the greatest respect for the ability and qualifications of Mr. Solomon. But that is of no moment here. Nor is defendant's evaluation of Mr. Solomon's competency or credibility of any probative value. That was solely within the province of the jury. But it does demonstrate the wisdom of the time-honored rule that the trier of the facts, be it judge or jury, who has the great advantage of a live-action, first row view of the appearance and demeanor of the witness during the course of his testimony, is by far the better judge of his credibility and the weight to be given to his testimony than does an appellate court on the basis of a cold, typewritten transcript of his testimony. *Campbell v. Safeway Stores, Inc.*, 15 Utah (2d) 113, 388 Pac. (2d) 409 (1964).

What then of the testimony of Mr. Kiepe? We have no real quarrel with the qualifications of Mr. Kiepe, but again it is not for us to say how he stacks up against the other witnesses. As with Mr. Solomon, the jury's appraisal of the Kiepe appraisal rested upon his performance in the witness chair and not on his laurels.

The real argument we have with the testimony of Mr. Kiepe relates to his opinions on the nature and extent of severance damages. For example, in his view a total of 563 acres of the remaining land have "suffered damage" as a result of the condemnation, which would be equivalent to over 56 down town Salt Lake City blocks (Tr. 508). And in his judgment the whole of the remaining unzoned land comprising 436.69 acres would be damaged anywhere from \$150.00 per acre to \$1,150.00 per acre for a total damage of \$106,943.00, including a damage of \$200.00 per acre for every acre in the bottom of Decker Lake (Tr. 515, 516; Exh. D-10). Likewise in his opinion the unzoned land as far as six to seven blocks away would be damaged by reason of the construction of the Belt Route through the defendant's property (Tr. 517).

What is more, Mr. Kiepe then assigned a damage of \$56,000.00 to the C-2 commercial property which fronts on Redwood Road and is situated some three-fourths of a mile away from the proposed Belt Route (Tr. 472; Exh. D-1). The basis of that opinion was because the C-2 property appeared to have a shopping "hinterland" which lay south and west of it (Tr. 472), including the lands outside of the subject property (Tr. 508) and after the Belt Route is completed the people from those areas (both within and without the subject property) who would shop at the fictional shopping center would have a more circuitous route to get to the fictional shopping

center (Tr. 473). For this the State should pay \$56,000.00 in his opinion. Needless to say, the jury did not share his views.

Without belaboring the point, a sampling of the many little side comments of Mr. Kiepe in giving his testimony is worthy of note. For example, he referred to Pole Line Road (2700 West) as "a trail — I say a trail but let's say a road into his property" (Tr. 427). Apparently what he did not know is that the jury had already seen Pole Line Road during its view of the premises. Throughout his testimony Mr. Kiepe was determined that he was going to impress the jury with his thoroughness. Thus, when checking for his notes on the Rowland sale he quipped, "My notes are rather voluminous in this case" (Tr. 470). But he went a little too far and in so doing didn't level with the jury. Thus, when asked on cross examination how he verified the sale to Arnold Machinery Company, Mr. Kiepe stated that he had done a number of appraisals for the Arnold family and when he called Mr. Arnold was not in. When Mr. Arnold, the president of the Company, called Mr. Kiepe's office his secretary took the message. The sales data on that sale which Mr. Kiepe testified to was given to him by his secretary in response to her telephone call with the president of Aronld Machinery Company (Tr. 501, 502). Mr. Kiepe was very positive about this. Yet later when Raymond L. Arnold, President of Arnold Machinery Company for the last twenty years, was called by

plaintiff as a witness he testified that although he knew Werner Kiepe he had never had a conversation with Mr. Kiepe with respect to the purchase or purchase price of the property and that he had never had a conversation with Mr. Kiepe's secretary with respect to the property or the price paid for it (Tr. 586). What effect that had in the minds of the jurors will never be known. However, it is obvious from the verdict that the jury did not accept Mr. Kiepe's opinion of nearly one-third of a million dollars in severance damages to the remaining property not taken.

Since we are still talking about appraisers, we note that appellant's statement on page 37 of its Brief that the witness John's appraisal of the residential lands was 800% to 1100% below any of the other witnesses', is simply not true. Nor is it true that Johns appraised the residential land at \$177.00 per acre. The fact is that Johns appraised the unzoned residential land outside of Decker Lake at \$1,725.00 per acre, which is \$225.00 per acre more than the witness Fletcher's valuation and \$75.00 per acre more than defendant's own witness Solomon's valuation. Johns did appraise the value of *only* the lands occupied by Decker Lake at \$177.00 per acre. Likewise Fletcher appraised the lands occupied by Decker Lake at \$200.00 per acre, but appellant takes no such offense to that. What is really so incredulous as to violate all rational thought is appellant's distortion of these facts on page 37 of its Brief.

All of the arguments made by appellant as to the inadequacy of the award were presented to the trial court in defendant's Motion For New Trial (R. 108). After a full hearing thereon and after briefs were submitted to the trial court on the matters contained in Point II of Appellant's Brief by both parties (R. 110-130 incl.) the trial court denied defendant's Motion For New Trial. In reviewing the trial court's ruling denying defendant's Motion For New Trial on grounds of inadequacy of the damages, this court is limited to a determination of whether such a ruling was an abuse of discretion. *Paul v. Kirkendall*, 1 Utah (2d) 1, 261 Pac. (2d) 670 (1953). The guiding principles in this area of the law are well set forth in *Schneider v. Suhrmann*, 8 Utah (2d) 35, 327 Pac. (2d) 822 (1958). Thus on pages 40 and 41 of the Utah Reports it is stated:

“Cases dealing with the review of damages, found by a jury, with invariable consistency, recite the reluctance of courts to interfere with such verdicts if there is any reasonable basis in the evidence upon which they can be sustained. . . .”

This court then went on to give the basis for the rule pointing up the advantages of the fact trier as being in immediate contact with the trial, the parties and the witnesses and the question of damages with respect to which reasonable minds are apt to differ greatly as being matters which a jury

is peculiarly adapted to determine. Then continuing on page 41 Ibid it is stated:

“... It is in order to preserve this right of trial by jury, and to afford litigants the advantages referred to above, that it has been the policy of courts to exercise forbearance in disturbing jury verdicts and to allow their deliberations to swing like a pendulum through a wide arc without interference so long as they remain within the bounds of reason. The refusal of the trial court to modify the verdict endows it with some further degree of sanctity which increases our hesitancy in disturbing it upon review. . .”

See also *Stamp v. Union Pacific Railroad Company*, 5 Utah (2d) 397, 303 Pac. (2d) 279 (1956); *Powers v. Taylor*, 14 Utah (2d) 152, 379 Pac. (2d) 380 (1963); and *Jorgenson v. Gonzales*, 14 Utah (2d) 330, 383 Pac. (2d) 934 (1963).

And in *Bodon v. Suhrmann*, 8 Utah (2d) 42, 327 Pac. (2d) 826 (1958) this court re-affirmed its responsibility to be indulgent towards the verdict of the jury and not to disturb it so long as it is within the bounds of reason, in accordance with the principles set forth in the companion case of *Schneider v. Suhrmann*, supra, and also that it is primarily the prerogative and duty of the trial court to pass upon the adequacy of the verdict and to order any necessary modifications thereof.

The above principles are well summed up in the case of *Campbell v. Safeway Stores, Incorporated*, 15 Utah (2d) 113, 388 Pac. (2d) 409 (1964)

wherein on page 116 of the Utah Reports it is stated:

“Due to their advantaged position in close proximity to the trial, the parties and the witnesses; and their practical knowledge of the affairs of life as a background against which to weigh the evidence, the assessment of damages is something peculiarly within the prerogative of the jury to determine, and the court is extremely reluctant to interfere with their judgment in that regard. From the plaintiff’s point of view, her insistence that the award is inadequate to her needs and desires is understandable. But we are obliged to look at the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the verdict. In doing so, we do not see it as so entirely beyond reason as to require that we upset it.

“Under our system it is contemplated that the right to trial by jury be assured. This is something more than a high-sounding phrase to be declaimed on patriotic occasions. It is the duty of courts to honor it in the observance. Whenever there is genuine dispute as to issues of fact upon which the parties’ rights depend, they are entitled to have them submitted to and settled by a jury. When the parties have had a full and fair opportunity to present their cause, and the jury has rendered its verdict, it should not be interfered with unless there appears some compelling reason why justice demands that it be done . . .”

Defendant’s whole argument is centered around its claimed inadequacy of the damages to the re-

mainder of the land not taken and as such comes squarely within the principles of law applicable to the jury assessment of damages outlined above. Defendant attacks the validity of the award on the basis of what the jury determined the “before” value of the entire 926.7 acres to be, and says it was on this Interrogatory that all other Interrogatories depended. This, of course, does not follow. The special interrogatories couched in terms of the “before” and “after” values were simply the means to the end, i.e. to determine the amount of just compensation to which defendants are entitled. Nor can we go behind the answers to the special interrogatories and analyze or speculate as to the process by which the jury arrived at them. *Weber Basin Water Conservancy District v. Nelson*, 11 Utah (2d) 253, 358 Pac. (2d) 81 (1960). In that case this court affirmed an award based upon answers to special interrogatories where the jury chose the “before” value of the plaintiff’s appraiser and the “after” value of defendant’s appraiser. Under the rationale of that case the jury here could well have found the “before” value of defendant’s witness Solomon and the “after” value of defendant’s witness Loll, to-wit:

Solomon “before” value	\$3,169,651.00
Loll “after” value	2,844,070.00
	<hr/>
Difference	\$ 325,581.00

And so an award of \$325,581.00 based thereon would have been within the range of the evidence in this case. Thus for defendant to say that without the testimony of plaintiff's witness Johns the jury's answer to Interrogatory No. 1 would be contrary to law is nonsense.

Nor do the cases of *Weber Basin Water Conservancy District v. Moore*, 2 Utah (2d) 254, 272 Pac. (2d) 176 (1954) or *Porcupine Reservoir Company v. Keller Corporation*, 15 Utah (2d) 318, 392 Pac. (2d) 620 (1964) so hold. Thus in the *Moore* case, supra, the award was based upon 233 acres of land whereas only 219.3 acres were taken; and since the award was based on an erroneous acreage it could not stand. And in the *Porcupine* case, supra, the trial court by granting an additure indicated that in its opinion the verdict was less than the lowest amounts which the jury could reasonably award under the evidence. Noting this and after carefully studying the record, this court concluded that the jury verdicts were unusually small, suggesting passion or prejudice or a misunderstanding of the law or facts presented.

While an award which is below the lowest valuation evidence or above the highest valuation would require a close look at the evidence to determine whether there was passion, bias or prejudice or a misunderstanding of the law or facts presented, it is the latter and not the former, standing by itself,

which would warrant a trial court or this court on appeal to grant a new trial.

This case is a classical example of the great divergence which can exist among the opinions of the experts where the real issue is the somewhat evasive element of severance damages. It is based entirely on the opinion of the experts and depending upon how they look at it they can vary as here from zero to \$315,415.00. In determining the value of the lands taken the experts can at least use comparable sales as a guide line. But not so with severance damage. And so that is all the more reason why the jury is better adapted to decide it.

Looking to the jury's award in this case of \$359,877.00 we find that it is \$27,757.00 above plaintiff's highest valuation witness Fletcher and \$200,123.00 below defendant's lowest valuation witness Solomon. Needless to say it is clearly within the range of the evidence. Looking further at the breakdown of the total award the amount of \$318,301.00 for the value of the land taken is \$10,012.00 above defendant's own witness Solomon's final valuation. Likewise the award of \$41,576.00 in severance damages is \$41,576.00 higher than plaintiff's lowest valuation witness on severance damages, Fletcher, who found none; \$23,975.00 more than plaintiff's highest valuation witness on severance damages, Johns; and is \$210,135.00 lower than defendant's lowest valuation witness on severance damages, Solomon. Again the award for severance damages

is clearly within the range of the evidence. That being so, how can it be said that the trial court abused its discretion in refusing to grant defendant a new trial? Accordingly, the trial court did not err, and its order denying defendant a new trial must be affirmed by this court.

POINT II.

THE TRIAL COURT DID NOT ERR IN LIMITING CROSS EXAMINATION OF THE WITNESS JOHNS ON HIS PRIOR APPRAISAL OF THE CONDAS PROPERTY

At the outset it should be noted that the Point here raised by defendant was presented to the trial court in defendant's Motion For New Trial (paragraph 3(a), R. 108). After a full hearing thereon both parties submitted Briefs to the trial court in support of their respective positions (R. 110-130 incl.). Thereupon the trial court denied defendant's Motion For New Trial (R. 131).

It should also be noted that the question was asked late on the last day of trial at approximately 5:30 p.m., after the court advised the jury that we would finish the evidence that day and on that basis left to the jury as to whether they wanted to come back the next day, on Saturday, rather than the following Monday (Tr. 817-819).

Throughout defendant's argument it assumes that sufficient similarity existed between the Condas property and the subject property to warrant the

inquiry in this case into the prior appraisal of the witness Johns of the Condas property. The fact is that a foundation had not been laid for this inquiry. The only foundation laid was that the Condas property was in the county, had "M-1" zoning, had access to 2100 South and to Redwood Road (Tr. 828), probably abutted upon the Gedge tract and was in the same proximity of the subject "M-2" property (Tr. 842-843). However, no foundation was laid to show *when* the witness Johns appraised the Condas property, its size or shape, whether it was improved or unimproved with buildings, roadways, hard surfaced and the like, whether it was level or undulating, filled or unfilled, drained or undrained, etc. or whether it fronted on 2100 South Street or on Redwood Road in whole or in part. In fact the Condas property cornered in the southwest intersection of Redwood Road at 2100 South Street, which in itself made it dissimilar to any of the subject property.

What is even more revealing is the manner in which the question was asked (Tr. 843):

"(BY MR. CAMPBELL) Q. You recall the — you testified the fair market value of \$10,000 —

"MR. NOVAK: Objection, your Honor.

"MR. CAMPBELL: I have the right, I think, to state my question — that you appraised that Condas piece for the landowner for \$10,000 an acre?"

Defendant's counsel was determined to, and he did get before the jury the figure of \$10,000.00 per acre. What is more, defendant argues here that the whole purpose of the inquiry was to test the credibility of the witness Johns. However, the inquiry as made had the dual effect of also tending to establish the value of the subject property and if permitted to stand could well have had that result. Thus no inquiry was made to show that in the opinion of the witness Johns the value of the Condas property and any part of the subject property was comparable as a foundation to show prior inconsistent statements or opinions. Nor did defendant's counsel state to the court that such was his purpose so the jury could be instructed accordingly.

Thereupon, after a conference with counsel at the bench, the trial court sustained the objection and instructed the jury to disregard the question and answer (Tr. 843-844). In the trial court's explanation to the jury it was clear that the trial court had carefully considered defendant's right to cross examine but was of the judgment that its value was outweighed by the risks involved in introducing other issues which we did not have time to resolve in this case. The dual aspects of the inquiry made it a collateral matter, and to permit it would have required time consuming re-direct examination to explain all factors that went into Johns' prior appraisal of the Condas property, which in effect would be to re-try the Condas case and the factors there involved.

Defendant's suggestion on pages 40 and 41 of Appellant's Brief that the trial court understood the question to ask for the "price" paid the abutting owner by the State is wholly distorted and unfounded. The price of the adjoining property referred to was the figure of \$10,000.00 per acre in counsel's question which the jury heard.

As noted on page 43 of Appellant's Brief, *Nichols On Eminent Domain*, Volume 5, page 274, Section 18.45(2) (supplement) states that on cross examination an expert may be questioned as to his appraisals of other property in the area which he has made, *but only if a foundation has been laid for comparison of the different tracts appraised*. And as noted above a proper foundation had not been laid here.

The case of *State v. Christensen*, 13 Utah (2d) 224, 371 Pac. (2d) 552 (1960) appears to be the closest Utah case to the case at hand. While the first two questions set forth on page 228 of the Utah Reports were directed to what the State paid the owner of adjoining land for proximity and severance damages and were sustained by the trial court, the questions were then asked as to whether the witness had appraised the adjoining property for the State. When asked, "What was your appraisal to the property on the west?" an objection thereto was again sustained. And then when asked if there was any severance damage to the property on the west an objection thereto was sustained. In passing on

the propriety of those questions and after noting that cross examination is admissible to test the good faith, knowledge, credibility and the like of a witness this court stated on page 229 of the Utah Reports as follows:

“ . . . The answers to the questions above quoted, especially the first one, would not have been admissible in evidence even under cross-examination; and although the witness did not know or was not allowed to give the answers, the questions were improper . . . ”

We do not quarrel with defendant's notion of the above case that the first and last questions were clearly improper. However, neither can defendant quarrel with the holding of this court that it was improper to ask the witness what was his appraisal of the adjoining property.

The same argument can be made that such inquiry goes only to test the credibility of the witness, as defendant argues here. But it is the dual aspect of the question which creates the problem and where, as here, the necessary foundation has not been laid to put it in the light of attacking the credibility of the witness more harm than good can come of it and it becomes a collateral matter which is and should be within the discretion of the trial court to limit. Thus in *Nihcols On Eminent Domain*, Volume 5, Section 18.45(2), pages 277-278 it is stated:

“ . . . The extent to which cross-examination will be permitted is largely in the discretion of the trial court, and the rulings

of the court upon this point are not subject to exception unless wholly arbitrary and unreasonable. The extent of the examination need not be extended to permit interrogation about collateral, immaterial or irrelevant matters.”

Here the trial court sustained the objection to the question after a conference at the bench with counsel and after carefully weighing defendant's right of cross examination, evidenced by his explanation to the jury. And it should be noted that defendant did not move for a mistrial or press its claim of prejudicial error until after the verdict was returned.

The trial court again carefully reconsidered the matter on defendant's Motion For New Trial and after a full hearing and considering the Briefs submitted by the respective parties was clearly of the opinion that defendant was not prejudiced thereby in denying defendant's Motion For New Trial. This puts us squarely within the holding of *State v. Christensen*, supra, where on page 229 it is stated:

“ . . . The trial court by denying a motion for a new trial clearly indicated that he considered that the State was not prejudiced by these questions. As previously pointed out, the State did not move for a mistrial or press its claim of prejudicial error until after the verdict was returned. We overrule the trial court's decision on a motion for a new trial only if we find an abuse of its discretion . . . ”

Citing *Wellman v. Noble*, 12 Utah (2d) Utah 350, 366 Pac. (2d) 701.

On page 43 of Appellant's Brief defendant cites the case of *Bingaman v. City of Seattle*, 139 Wash. 68, 245 Pac. 411 (9126) as clear authority supporting defendant's position, and in so doing states that the Washington court found prejudicial error in the refusal to permit cross examination in a condemnation suit on a prior inconsistent opinion given by the expert witness on the value of neighboring land. Defendant then quotes at length from that case. A careful reading of that case reveals that the quoted material was dictum. The Washington court reversed because of inadequacy of the award of \$1.00 nominal damages and remanded, ordering that judgment be entered for plaintiff in the amount of \$1,000.00, *being the lowest estimate of the City's witness*, or, if refused, a new trial.

In *Basch v. Iowa Power And Light Co.*, 95 N.W. (2d) 714 (Iowa 1959) cited on page 45 of Appellant's Brief, the three questions referred to related to (1) the prior statement of the opinion of the witness of a proper formula for determining the value of the powerline easement on the subject property; (2) whether payment to him for the same easement on his adjacent lands on the basis of the same formula was fair and (3) whether the same formula was used as the basis for his executing the easement. Needless to say, an entirely different situation there than here.

Likewise the facts in *People v. Murata*, 326 Pac. (2d) 947 (Cal. 1958) cited on page 46 of Ap-

pellant's Brief are entirely different than here. There the witness had given his opinion of value of the *same* lands there being condemned in a prior flood damage suit. Thus all three cases cited and relied upon by defendant are simply not applicable to the situation here.

Defendant argues that the alleged prejudice flows from the fact that the witness Johns' opinion of the "before" value was substantially less than the opinions of the other witnesses which changed the entire atmosphere of the trial and defendant was prevented from showing that Johns was grossly misinformed, or he was a fraud or an advocate or a combination of all three. Defendant's argument points up the intended dual purpose of the question, i.e. not necessarily to test credibility but to show that the "before" value of the subject property was more than what Johns appraised it at. Whether the question asked was all important is subject to great debate. And to say we don't know the answer when the answer obviously was couched in the question for the jury to hear is being somewhat naive. Likewise, the probability that the answer would have dealt a devastating blow to the credibility of Johns' opinion is moot considering the form of the question.

To say that this was the pivotal point of the trial is nonsense. This occurred within the last hour of the evidence. If there was such a point it occurred many days earlier when defendant's witness

Solomon dropped the ball and when defendant's witness Kiepe failed to level with the jury.

We submit that it was within the discretion of the trial court to limit the inquiry. This the trial court wisely did, and after reconsideration concluded that defendant was not prejudiced thereby. Defendant's argument falls far short of showing any abuse of discretion, and that being so the judgment of the trial court denying defendant's Motion For New Trial must be affirmed. *State v. Christensen*, 13 Utah (2d) 224, 371 Pac. (2d) 552 (1962).

POINT III.

THE ISSUE OF SPECIAL BENEFITS WAS PROPERLY SUBMITTED TO THE JURY

The witness Johns stated that in his opinion a total of 46.23 acres of defendant's remaining lands surrounding the proposed interchange would be specially benefited by reason of the construction of the Belt Route and interchange facility (Tr. 814-815). The only objections made by defendant went to general benefits, which were properly sustained, and no objection was made when the witness confined his opinion to special benefits (Tr. 815). He gave as the reason for such special benefits the interchange of the two major traffic arterials which gave the benefited property what he found generally to be considered by the market as desirable location and that such relationship indicated to him an additional value of twenty-five percent (Tr.

816). He took into consideration studies which he made in other areas of land similarly situated with respect to interchange facilities which had been constructed (Tr. 816). He used two sales in formulating his opinions on special benefits (Tr. 862) and took into consideration one sale of a property similarly situated which sold after that interchange had been completed (Tr. 866-867).

In Mr. Johns' opinion the special benefits amounted to \$575.00 per acre for the 46.32 acres specially benefited (Tr. 815; Exh. P-15-A) for a total of \$26,582.00 in special benefits (Tr. 816). He subtracted that amount from his opinion of the gross damage of \$44,183.00 for a net damage in his opinion of \$17,601.00 (Tr. 815-816; Exh. 12).

Even defendant's witness Solomon was of the opinion that the remaining property of defendant would have added visibility, at least in part by reason of the interchange connecting the Belt Route with the 2100 South Expressway; that this added visibility would confer a special benefit on defendant's remaining property (Tr. 366); and all of which he took into consideration in arriving at his opinion of the "after" value of the defendant's remaining property (Tr. 367). In view thereof defendant should not be heard to complain about lack of special benefits.

As to defendant's argument that it was prevented in the cross examination of the witness Johns from inquiring into the nature of the special bene-

fits, we submit that the questions asked were directed to loss of traffic flow on Redwood Road (Tr. 864). The trial court properly sustained the objection since the direct implication was a damage to defendant's remaining property resulting from taking traffic off Redwood Road and putting it on the freeway. Defendant concedes on page 51 of Appellant's Brief that it has no right to the flow of traffic. To say the question was directed solely to impeachment of the witness John's opinion on special benefits is simply to obscure that aspect and the harm which could result therefrom. In any event, defendant's argument is moot because the jury was specifically instructed that it could not consider the traffic flowing by defendant's remaining property on the new highway system after the taking as adding a special benefit (Instruction No. 21; R. 44).

Furthermore, the jury was instructed that the burden of establishing special benefits, if any, is the plaintiff's burden and the plaintiff must prove the same by a preponderance of the evidence (Instruction No. 3; R. 53). Likewise the jury was carefully instructed on the nature and extent of special benefits (Instruction No. 15; R. 37). Thus the jury was instructed that if it found that the remaining property had been specially benefited by the construction of the freeway on the property condemned it could consider such special benefits as an offset against severance damage, if any. The fore-

going Instruction clearly defined special benefits, distinguished between special and general benefits, and that such special benefits, if any, could not be offset against the value of the land taken. The foregoing Instruction was requested by defendant (R. 60) and is in keeping with the principles of law pertaining to special benefits as set forth on page 49 of Appellant's Brief. That being so, and under the evidence in this case, the issue of special benefits was properly submitted to the jury under the testimony of both plaintiff's witness Johns and defendant's witness Solomon.

POINT IV.

THE INSTRUCTIONS OF THE TRIAL COURT ON BURDEN OF PROOF AND PREPONDER- ANCE OF EVIDENCE WERE PROPER

At the outset it should be noted that defendant did not except to Instruction No. 30 (Supp. R. 2-4, incl.). Furthermore, defendant's challenge to Instruction No. 30 on page 55 as being wholly erroneous because it implies that defendant had the burden of proving special benefits or the lack thereof is not well taken. Instruction No. 30 (R. 53) specifically charges the jury that

“ . . . The burden of establishing special benefits, if any, is the plaintiff's and the plaintiff must prove the same by a preponderance of the evidence . . . ”

On page 52 defendant acknowledges that the rule adopted in Utah and followed since early days

places the burden of proving the value of the land taken and the damages to the remainder on the landowner. However, defendant asserts that it is a harsh rule and should be changed prospectively because defendant is of the view that it imposes an unreasonable burden upon the citizen. That was the substance of the exception taken by the defendant to Instruction No. 18 (Supp. R. 2). Our answer is that it takes more than a mere assertion to change a rule of evidence so firmly imbedded as this rule is in Utah. However, defendant apparently only makes that assertion in passing since on page 53 of Appellant's Brief defendant makes no claim of prejudicial error therefor.

Defendant's main attack directed to Instructions Nos. 18 and 19 is that they unduly focus on the same subject matter. What defendant ignores is that Instruction No. 18 is directed to proving the *contentions* of the defendant and Instruction No. 19 is directed to proving the *facts* in issue. Furthermore Instruction No. 19 is but a further explanation of the meaning of burden of proof and preponderance of evidence couched in different and more specific language. Thus those Instructions are not cumulative or repetitive as argued by defendant and taken together give a clear meaning of the terms defined. *Donohue v. Rolando*, 16 Utah (2d) 294, 400 Pac. (2d) 12 (1965).

Defendant then argues that the effect of the two Instructions is to direct a verdict against defen-

dant if defendant does not meet its full preponderance. Those Instructions simply charge the jury with the true meaning of the burden of proof, i.e. first, if defendant did not prove its contentions by a preponderance of the evidence the jury shall reject such contentions; and, secondly, if defendant did not prove the facts which it alleges the jury shall find against defendant on such facts. If both charges are incorrect then the burden of proof is meaningless.

Next defendant argues that the trial court did not instruct the jury that its verdict could be within the range of the testimony where the weight fairly preponderated. Yet defendant did not request such an Instruction, nor did it request any Instruction on either burden of proof or preponderance of the evidence at all. That being so, the defendant cannot be heard to complain on this appeal about the trial court's Instructions on either burden of proof or preponderance of the evidence. *Hanks v. Christensen*, 11 Utah (2d) 8, 354 Pac (2d) 564 (1960). We submit that the Instructions thereon as given by the trial court were wholly proper and correct.

CONCLUSION

The primary issue in this case was the amount of damages, if any, to the remaining property of defendant not taken. The trial by jury spanned the period from January 11, 1966 to January 22, 1966 and the evidence, being primarily opinion in nature, was voluminous. No serious contention is made by

defendant that the award of \$318,301.00 for the land taken is inadequate. The opinion evidence on severance damages ranged from zero to \$315,415.00 and the jury, being more liberal than plaintiff's valuation witnesses and more conservative than defendant's valuation witnesses, resolved that issue by awarding \$41,576.00 in severance damages, being well within the range of the evidence.

The argument of defendant of inadequacy of the award would require the complete discard of the testimony of plaintiff's witnesses Fletcher and Johns. Yet no objection was made to either of their qualifications when asked for their opinions on value. It then resolves itself down to the matter of the weight to be given the opinions of the valuation witnesses. This was within the exclusive province of the jury and the jury did its job well. And the trial court having reviewed the same on defendant's Motion For New Trial gave further sanctity to the verdict in denying such motion. That being so, this court should not change it absent a clear showing of an abuse of discretion on the part of the trial court. Appellant's Brief falls far short of that, as does the record before this court.

Likewise the trial court wisely and within its discretion limited the cross-examination of the witness Johns as to his prior appraisal of the Condas property. In so doing it carefully weighed defendant's right of cross-examination against the harm which could result from the dual aspect of the in-

quiry by introducing collateral matters which could not be resolved in this case save and except to re-try the Condas case and the factors there involved. Defendant did not move for a mistrial or press its claim of prejudicial error until after the verdict was returned. The trial court carefully reviewed its ruling after a full hearing, submission of briefs and in denying defendant's Motion For New Trial concluded that defendant was not prejudiced thereby. Neither Appellant's Brief nor the record before this court show that the trial court abused its discretion or that defendant was in any manner prejudiced thereby.

The issue of special benefits was properly submitted to the jury in the court's Instructions under the testimony of both plaintiff's witness Johns and defendant's witness Solomon. Instructions Nos. 18, 19 and 30 relating to burden of proof and preponderance of the evidence were correct and proper. Defendant requested no Instruction on either burden of proof or preponderance of the evidence, nor did defendant except to Instruction No. 30. That being so, defendant cannot be heard to complain about those Instructions on this appeal.

We submit that defendant was well represented at the trial of this case by able counsel as the record shows throughout, and likewise defendant received a full and fair trial. And the jury, having

fixed the award of just compensation, which was well within the range of the evidence, and the award having received the approval of the trial court, it must stand. Accordingly, we respectfully submit that the judgment of the lower court must in all respects be affirmed.

Respectfully submitted,

PHIL L. HANSEN,
Attorney General

JOSEPH NOVAK
Special Assistant
State Capitol Building
Salt Lake City, Utah

*Attorneys for Plaintiff
and Respondent*