

1952

# State of Utah et al v. Burton F. Peek and Charles D. Wiman : Brief of Appellants

Utah Supreme Court

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C. C. Parsons; A. D. Moffat; Calvin A. Behle; Attorneys for Defendants;

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

---

STATE OF UTAH, by and through its  
ENGINEERING COMMISSION, D.  
H. WHITTENBURG, Chairman, H.  
J. CORLEISSEN and LAYTON  
MAXFIELD, Members of the Engi-  
neering Commission,

*Plaintiff and Respondent,*

vs.

BURTON F. PEEK and CHARLES D.  
WIMAN, Trustees under the Will and  
of the Estate of CHARLES H.  
DEERE, Deceased,

*Defendants and Appellants.*

---

**FILED** APPELLANTS' BRIEF

SEP 9 - 1932

----- C. C. PARSONS,  
Clerk, Supreme Court, Utah. D. MOFFAT,  
CALVIN A. BEHLE,

*Attorneys for Defendants.*

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# IN THE SUPREME COURT of the STATE OF UTAH

---

STATE OF UTAH, by and through its  
ENGINEERING COMMISSION, D.  
H. WHITTENBURG, Chairman, H.  
J. CORLEISSEN and L A Y T O N  
MAXFIELD, Members of the Engin-  
eering Commission,

*Plaintiff and Respondent,*

vs.

Case No.

7867

BURTON F. PEEK and CHARLES D.  
WIMAN, Trustees under the Will and  
of the Estate of C H A R L E S H.  
DEERE, Deceased,

*Defendants and Appellants.*

---

## I.

### STATEMENT OF FACTS

Chapter 13, First Special Session, Laws of Utah  
1951, became effective June 18th of that year. (Session  
Laws, p. 17.) By that Act plaintiff was required "forth-  
with" to condemn for State Park purposes a large tract  
of land specifically described by metes and bounds. (Act,

Sec. 8a.) Pursuant thereto on July 10, 1951 the Engineering Commission passed a "Condemnation Resolution" (R. 5) and immediately thereafter filed its complaint in the District Court of Salt Lake County. (Case No. 92516.)

This complaint contains the usual averments to support the prayer for condemnation, sets forth the interests which the various defendants may have or claim, and then *ipsa dixit* allocates the land to be condemned and the interests of the various defendants into twenty-eight "parcels" and two additional "outstanding interests". (R. 1-20.) Twenty-seven of these "parcels" consist of described tracts owned by named defendants other than the appellants. (R. 6-15.) "Parcel 28" is then in effect described as the entire property exactly as set out in the legislative mandate, less the twenty-seven other described parcels and some other interests for unassigned reasons also excluded. (R. 15-17.)

The tract which the Utah Legislature at its special session commanded plaintiff "to forthwith condemn" is an area of several square miles located at the mouth of Emigration Canyon east of Salt Lake City. It includes 130.23 acres of a total of approximately 215.73 acres owned by these particular defendants and appellants in the general vicinity; the Jerry Jones tract of 5.7 acres; the Tedesco tract of 6.46 acres; the Wheelwright tract of 9.41 acres; twenty-six individual subdivided residential lots comprising a total of some 8 acres owned by various defendants, on some of which homes were in various stages of construction; and 7.66 acres of dedicated streets other than the State Highway through

Emigration Canyon with its branch to the adjacent Monument and the main County Road leading to the south. The area was in various stages of development from bare mountainside to completed residences in platted and restricted subdivisions wherein were in place dedicated streets, curb and gutter, drainage facilities, fire hydrants and the usual utilities of water, power, telephone and gas. (R. Ex. 1, p. 154.)

Because of the large extent of the area involving numerous defendants and interests, pursuant to Section 104-35-6 of the Judicial Code and Rule 42(b) Utah Rules of Civil Procedure plaintiff asked the court in its discretion to sever issues pertaining to these particular defendants (R. 51); and the court so ordered (R. 51, 82). It was also ordered pursuant to stipulation that a separate record in this case should be maintained pertaining to these parties only (R. 89-90), hereinafter referred to as the "plaintiff" and the "Deere Estate" or "defendants".

In addition to the usual prayer for condemnation the complaint prayed for an order of immediate occupancy "for the purpose of commencing such construction and improvement of a State Park." (R. 19.) However, the Legislature had enacted no plans for such construction and improvement beyond the bare condemnation mandate, and this motion was not pressed but in fact was resisted by plaintiff. (R. 82.) Summons was served on July 12, 1951, whereupon there became applicable the provisions of Section 104-34-11 of the Judicial Code, which reads as follows:

104-34-11. *When Right to Damages Deemed to Have Accrued.*

For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued *at the date of the service of summons, and its actual value at that date* shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section. *No improvements put upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages.*

By its separate answer (R. 21-42) the Deere Estate raised as an issue the necessity for the condemnation, from an adverse determination of which no appeal is taken. Defendants also raised therein the dual issues of *first*, the extent of the property to be condemned in terms of "separate parcels" and parts thereof; and *secondly*, the time of and extent of the damage resulting from the taking, for which the State and Federal Constitutions guaranteed the condemnee "just compensation".

Plaintiff's motion to strike the answer was granted as to all affirmative matters therein (R. 21, 43).

(a) More specifically, the answer (R. 12) denied the State's allegation that the Deere Estate property consisted of but a single parcel, or "the whole of an entire parcel". (R. 19.) Defendants in their answer set forth in detail their contention as to each of the parcels

involved and the fair market values thereof as of July 12, 1951 (R. 21-39). The separate answer also set forth defendants' claims for severance damages (R. 39-40).

In this connection the applicable portions of Section 104-34-10 of the Judicial Code read as follows:

104-34-10. *Compensation and damages — How Assessed.*

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

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

(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.

\* \* \*

(5) As far as practicable compensation must be assessed for each source of damages separately. (Chapter 58, Laws of Utah 1951.)

The essential physical facts as to the nature of the Deere Estate property—a total of approximately 215.73 acres in the vicinity—are not in dispute. The property is

described in detail in the separate answer (R. 21-42), the Brayton affidavit (R. 44-47), the supplemental Brayton affidavit (R. 68-77); and its characteristics are shown in the maps attached to the separate answer, the court's order of March 5, 1952 (R. 81-88) and the large maps which are Exhibits 1 and B. For a ready reference defendants suggest use of the map found at page 78 of the record reproduced herein, or that between pages 47 and 48 of the record, which is a workable reduction of the larger maps.

In barest outline the Deere Estate property north of Emigration Canyon Road included 21 of a total of 38 platted lots in Oak Hills Plat "A," a recorded residential subdivision; 41 of a total of 46 lots in the immediately adjacent unrecorded Oak Hills subdivision; and a 3.96-acre area known as I-C. All of these, together with Tract I-D a mile to the south and completely segregated, were lumped together as "Parcel 1" by the court's order of March 5, 1952. (R. 81-88.) Also on the north side of the canyon were 51 of a total of 55 partially subdivided lots in an area still further to the north and east known as IV-A; and finally all of the remaining land, largely unimproved or "raw," colored on the maps in brown and blue and known as areas II and VI. Included on the extreme east end of Tract VI was the Deere Estate water source and collecting system, with transmission and distribution lines extending to the platted lots to the west.

On the south side of Emigration Canyon Road, in addition to Tract I-D in the extreme southwest corner, was the remaining "bottom land" alongside Emigration



Canyon stream, Area III; a completely isolated area to the east, Area V; the acreage north of dedicated Kennedy Drive extending to the brow of the plateau; and finally a part only of the area south of Kennedy Drive, severed from the balance of the Deere Estate's remaining property extending still further to the south by the straight line boundary of the legislative fiat. The court's order of March 5, 1952 lumped all of this into "Parcel 2", together with all of those portions on the north side of Emigration Canyon not included in "Parcel 1." (R. 81-88 and map a part of this order, and Ex. B.)

Included with the condemned land in addition to the water system were various interests in streets, water rights and other items the details of which are not involved in this appeal. Some of these interests plaintiff itself excluded from consideration in the condemnation proceeding for various reasons not here involved, and others were excluded by the court but are not involved in this appeal.

Rejecting both plaintiff's contention that defendants' land consisted of but the single "Parcel 28," and defendants' contention that many separate parcels were involved, the court initially determined on the basis of the Brayton affidavit and defendants' answer to interrogatories (R. 44-47, 57-58) that defendants' property to be condemned consisted of these two, and only two "parcels," all of each of which was to be condemned with accordingly no severance damage. (R. 81-88 and map attached to this order, par. 4 thereof, R. 92.)

An application for an interlocutory appeal from this crucial order was denied by this court. (Case No. 7839.)

The District Court thereafter consistently adhered to this "two-parcel decision" and its resultant implications when from time to time issues pertaining thereto were raised during the further proceedings, such as by defendants' proposed Instructions 6, 7, 11, 12, 13, 14, 18 and 20. (R. 100-110.) All evidence as to severance damage was excluded and eliminated from consideration by the jury; e.g., the court refused to give defendants' requested Instructions Nos. 13, 14 and 16. (R. 105-108.) These defendants duly excepted to the court's instructions, which were given consistently in accordance with its initial "two-parcel" order, e.g., Instructions 6, 8 and 9. (R. 112-114). The court rejected all evidence as to lot values, etc. (R. 95-96.) The water system was lumped in as part of "Parcel 2." (R. 97-98.)

(b) Also alleged in the answer and stricken was defendants' averment that under the circumstances of this case and the application of the special legislative mandate to this particular property, the effective date of taking for all practical purposes, and thus the time of accrual of defendants' constitutional right to damages, was July 12, 1951, the date summons was served; and the damages thus would include not only the fair market value of the property taken as of that date, *but also interest thereon from that date until payment.* (R. 40.)

As to this issue, the court likewise continued to adhere to its early decision that the time of taking of



both title and possession would not be until entry of the condemnation judgment (May 27, 1952); therefore the award of just compensation should *not* include interest from July 12, 1952 until time of payment. For example, a requested instruction to allow interest was refused (R. 111); and defendants' motion to include such interest in the judgment on the verdict (R. 127-128) was denied. (R. 129.)

Judgment on the jury's verdict was in due course made and entered May 10, 1952. (R. 117-126.) Thereafter plaintiff deposited with the court its draft for the amount of the jury's verdict and costs. (R. 130.) On May 27, 1952 the court made and entered the usual condemnation judgment whereby plaintiff took title and possession. (R. 131-139.)

From both the judgment on the verdict and the final judgment of condemnation, defendants on June 9, 1952 appealed to this court. (R. 146.)

## II.

### STATEMENT OF POINTS

1. The court improperly refused to award defendants as a part of the just compensation to be paid pursuant to state and federal Constitutions not only the fair market value of defendants' property as of the date taken, but in addition interest upon that fair market value computed at the legal rate from July 12, 1951 until May 10, 1952, when the fair market value was determined.
2. The court improperly refused to allow these de-

fendants to cross examine plaintiff's expert witnesses on the subject of the actual market values of comparable property as of July 12, 1951, and likewise excluded evidence as to the actual market values of such comparable properties.

3. The court below improperly refused to allow appellants to introduce evidence relating to the fair market value of the Deere Estate water utility system or any part thereof.

4. The court improperly ruled that the property of appellants under condemnation consisted of the whole of but two separate parcels, each to be separately assessed.

5. The court improperly eliminated the issue of severance damages.

### III.

#### ARGUMENT

##### Point.

1. The court improperly refused to award defendants as a part of the just compensation to be paid pursuant to state and federal Constitutions not only the fair market value of defendants' property as of the date taken, but in addition interest upon that fair market value computed at the legal rate from July 12, 1951 until May 10, 1952, when that fair market value was determined.

Utah took from the owners the Deere Estate property. *when pursuant to specific legislative mandate, summons was served July 12, 1951.* Possession as such became worthless the moment the special legislation was

enacted; certainly not later than the time summons was served. For practical and moral purposes this had actually occurred when Chapter 13 became effective June 18, 1951, for the owners could hardly continue their development operations in the light of an inevitable acquisition by the State.

Not only was there no value to the temporarily extended bare right of possession of this property which could no longer be sold, improved, developed or used. Actually it was a burden, for defendants were required to continue operation of its pumps to keep the water system from freezing. When defendants called up plaintiff's motion for occupancy, the plaintiff resisted its own motion. (R. 82.) Yet the court below refused to permit proof of the obvious facts showing the deprivation of defendants' property, and struck defendants' averments in their answer with respect thereto. (R. 21, 42.)

Article I of Utah's Constitution reads in part as follows:

Sec. 7. (*Due process of law.*)

No person shall be deprived of life, liberty or property, without due process of law.

Sec. 22. (*Private property for public use.*)

Private property shall not be taken or damages for public use without just compensation.

Likewise, payment of "just compensation" is required of the State of Utah by the Fourteenth Amendment of the Federal Constitution, the test being the same as is required of the Federal Government itself under the Fifth

Amendment. For example, see Orgel on Valuation under Eminent Domain, Section 5, page 17, wherein it is said:

“Since the Fourteenth Amendment of the Federal Constitution is binding on every state, this requirement (of just compensation) determines the minimum basis of compensation throughout the entire United States.”

The United States Supreme Court has phrased “just compensation” to be “the full and perfect equivalent of the property taken.” Without elaborating principles now so fundamental a part of the law of eminent domain, we invite attention to the following key cases:

Chicago, Burlington & Quincy RR. Co. v. Chicago,

166 U.S. 226, 41 L. ed. 979, 17 S. Ct. 581;

Ettor v. Tacoma,

228 U.S. 148, 57 L. ed 733, 33 S. Ct. 428;

McCoy v. Union Elevated RR. Co.,

247 U.S. 354, 62 L. ed. 1158, 38 S. Ct. 504;

Bragg v. Weaver,

251 U.S. 57, 64 L. ed. 135, 40 S. Ct. 62;

Delaware, Lackawanna & Western Ry. Co. v. Morristown,

276 U.S. 182, 72 L. ed. 523, 48 S. Ct. 276;

Olson v. United States,

292 U.S. 246, 78 L. ed. 1236, 54 S. Ct. 704;

Seaboard Air Line Ry. Co. v. United States,

261 U.S. 299, 304, 306, 43 S. Ct. 354, 256, 67 L. ed. 664.

Allowance of interest pursuant to the overriding constitutional provisions is implied in the absence of express

statutory authorization of such. Otherwise the condemnation legislation would violate the federal and usually also the applicable state constitutional provisions. *Simmons v. Dillon*, (W. Va.) 193 S.E. 331, 113 A.L.R. 787.

Thus in the *Seaboard Air Line* case cited above, the court held:

“The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Nav. Co. v. United States*, (supra) 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. (Citing cases.) He is entitled to the damages inflicted by the taking . . .

“Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a ‘palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making “just compensation” for the land as it stands, at the time of taking.’ . . .

“The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have ‘just compensa-

tion' to which he is entitled."

Again in *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 44 S. Ct. 471, 68 L. ed. 934, the court said:

"And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. *Interest at a proper rate is a good measure of the amount to be added.*" (Italics ours.)

The same rule was applied in *United States v. Rogers*, 255 U.S. 163, 41 S. Ct. 281, 65 L. ed. 566.

The Utah statute is of course silent with respect to any allowance of interest, thus requiring application of the foregoing rule.

Utah's condemnation statutes which implement these constitutional minimum requirements are neither unique nor unusual. Section 104-34-10 provides for the determination of the value of the property taken, and lays down rules for determination of that value. The section following then provides that "the right thereto shall be deemed to have accrued" to that value and is to be measured as of the date of service of summons. Counterparts of these provisions are found in California, Deering's 1941 Civil Code, §§ 1249, 1254; in the Idaho Code, §§ 7-712 and 7-717; and in Montana Revised Codes 1935, §§ 9945 and 9952.

**(a) On facts such as are here present, payment of interest is required.**

On facts similar to those pertaining to the Deere Es-



tate property, and applying the identical Idaho statute to a case where a large tract of land was condemned for purposes connected with the American Falls Reservoir, the Federal District Court squarely held that to the award of the fair market value as of the date summons was served should be added interest. *United States v. Brown*, 279 F. 168. On cross writ of error from the award of interest, the United States Supreme Court affirmed. *Brown v. United States*, 263 U.S. 78, 68 L. ed. 171. The court in part said:

“The district court, in directing the jury, followed the law of the state (Idaho Comp. Laws 1919, § 7415; Idaho Rev. Codes 1908, § 5221) in which the land lay and the court was sitting, as follows:

“For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken.

. . . No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.”

“The Idaho statute has been construed by the circuit court of appeals of the ninth circuit to justify the court in adding interest upon the value fixed by the jury from the date of the summons until the judgment. *Weiser Valley Land & Water Co. v. Ryan*, 111 C.C.A. 221, 190 Fed. 417, 424. The court said:

“Having such right to compensation at a given time, it would seem that the owner ought to

have interest on the amount ascertained until paid. In the meanwhile he can claim nothing for added improvements, nor is he entitled to any advance that might affect the value of the property.”

“\* \* \* It often happens that in the delays incident to condemnation suits the loss to the owner arising from the delay between the summons and the vesting of title by judgment is a serious one. The interest charge under the Idaho statute has the wholesome effect of stimulating the plaintiff in condemnation to prompt action. Moreover, the plaintiff may reduce to a minimum the rents and profits enjoyed by the defendant, because, under the Idaho statute, the plaintiff may have a summary preliminary hearing before commissioners to fix probable damages, and by depositing the amount so fixed with the clerk of the court, if the defendant will not accept it, the plaintiff may obtain immediate possession. Within less than a month after bringing suit, he can thus appropriate to himself the rents and profits of the land, and in enjoyment of them can await the final judgment. 2 Idaho Comp. Stat. 1919, § 7420; 2 Idaho Rev. Codes 1908, § 5226.”

A concise statement of the rule in such cases is found in *Duncan-Hood Corporation v. City of Summit*, (N.J.), 146 Atl. 182, wherein the court states :

“The final ground for reversal urged is that the trial court added to the verdicts, as returned by the jury, interest from the date of the adoption of the ordinance to the date of rendering the verdicts.

“This was not error. As before indicated, the taking of the lands of respondents was as of and from the date the ordinance in question became



effective. At that date the damage, if any, to respondents arose and accrued, and they were entitled to be compensated as of that date. Such compensation having been withheld, they were entitled to the amount thereof, together with interest for the forbearance.

“For the reasons herein set forth, the judgments under review are reversed, and a venire de novo awarded.

“For affirmance: None.

“For reversal: The CHANCELLOR, the CHIEF JUSTICE, Justices TRENCHARD, PARKER, CAMPBELL, LLOYD, and CASE, and Judges VAN BUSKIRK, McGLENNON, KAYS, HETFIELD, and DEAR.”

To these unanimous decisions of the federal district, circuit and supreme courts involving the identical statutory provisions applied to facts similar to those in this case, and to the opinion of the highest of the New Jersey courts, we add the opinion of the Michigan Supreme Court in an analogous situation. *Campau v. City of Detroit*, 196 N.W. 527, 32 A.L.R. 91. Here also land for a proposed public park was involved, to be condemned under a procedure wherein the City had one years' time within which to pay the award after it should be confirmed and thus become final. Confirmation corresponded in the present case to the date of the passage of Chapter 13, or at most the date of service of summons, at which time the injury and damages to the Deere Estate became fixed by virtue of the legislative mandate.

In the Michigan case the owner claimed interest be-

tween the date of "taking," and the date of actual payment of the award. As here, the condemnor tendered the award without such interest, which the owner refused to accept in full settlement. During the interim, as here, the owner continued in possession, and the ordinance was silent as to interest.

Interest was allowed, in view of the Federal Constitution and the similar provisions of the Michigan Constitution.

With the exception of the foregoing decisions directly or by analogy in point, we have found no other applicable determinations by courts of other jurisdictions. The reason is obvious, for almost invariably the taking in condemnation proceedings coincides with payment, or at a least payment occurs within a reasonable time of the determination of the amount of compensation due. However, general discussions and annotations on the allowability of interest, even though the owner remains in possession, may be found in connection with the Brown case at 68 L. ed. 171; in 96 A.L.R. 196, supplemented at 111 A.L.R. 1306, paragraphs VIII(b); 2 Lewis on Eminent Domain, 3d ed., § 742, p. 1319; Orgel's Valuation under Eminent Domain, § 5, p. 17; 18 Am. Jur., Eminent Domain, § 275; and 29 C.J.S., Eminent Domain, § 176, where it is noted on page 1054 that "the mere fact of delay in bringing to a hearing the determination of damage does not defeat the owner's right to interest."

It is respectfully submitted that justice, logic and reason support the authorities above which *under the*

*facts of this particular case* hold that the taking of the owner's property and the injury and damage to the Deere Estate here occurred June 18, 1951, or at least by July 12, 1951; and that accordingly interest subsequent to that date should be allowed as a part of the just compensation to make the owner whole. With respect to the wisdom of the action taken by unequivocal mandate of Utah's legislature, we are not here concerned.

(b) **Utah is in accord.**

This Court in the case of *Fell v. Union Pacific RR. Co.*, 32 Utah 101, 88 P. 1003, 28 L.R.A. 1, reviewed extensively the reason for the allowance of interest, summarizing as follows:

“The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value.

\* \* \*

Here it will be noted that the three factors of the “true test” were each present:

a. **The injury and consequent damage to the Deere**

Estate were complete June 18, 1951, or certainly when summons was served July 12, 1951;

b. Damages were to be determined as of that particular time; and

c. Damages were to be determined in accordance with fixed rules of evidence.

Of course where there has been no damage and hence the taking does not occur until the final condemnation judgment, the tests outlined above are not met. Thus this court has held that where the owners remain in continued enjoyment of the property with no impairment as to its use, there is no right to interest because there has been no loss to be compensated. Such cases stand on their own facts, e.g., *Oregon Short Line RR. Co. v. Jones*, 29 Utah 147, 80 P. 732, and *Salt Lake & Utah RR. Co. v. Schramm*, 56 Utah 53, 189 P. 90. Here, we again reiterate, under the facts of the peculiar legislative mandate and the applicable general statutes the Deere Estate was just as effectively deprived of its property June 18, 1951 or at least by July 12, 1951 as if the State of Utah had then physically obtained possession. The injury and the damage were then complete and the only thing remaining was to determine the extent of that damage in accordance with the fixed rules of evidence and the proceedings applicable to condemnation cases.

That no actual physical taking at all is necessary was the holding in the case of *State v. Fourth Judicial District*, 94 Utah 384, 78 P. 2d 502, the court dividing,

however, as to whether the facts in the particular case constituted a taking.

How different the facts here, where to quote from the supreme courts of Connecticut and Minnesota, the owner, effective at least by July 12, 1951, was “practically deprived of his right to dispose of the land. His possession is precarious, liable to be terminated at any time; he cannot safely rent; he cannot safely improve; if he sows, he cannot be sure that he will reap.” *Clark v. Cox*, (Conn.) 56 Atl. 2d 512; *Warren v. Railroad*, 21 Minn. 424, 427.

From the facts in this case it is obvious that possession by the Deere Estate became worse than valueless June 18, 1951 or certainly when summons was served. Not only could the estate for practical purposes neither dispose of, rent, improve, or farm the land; the owner had to terminate the various improvement contracts and then continue to maintain the utility pumps to avoid extensive damage to the water system without compensation until the State eventually should conclude the act directed “forthwith” by the legislature, by inevitably taking legal title and possession.

**(c) A new trial is not required.**

Mathematically, the interest on the fair market value of the defendants' property between the date of the injury and the time when the amount of the award was determined can readily be computed. At six per cent it amounts to \$24,799.32 for the period July 12, 1951 until

May 10, 1952.

This amount the court below could and should have included in the judgment on the verdict, no jury question being involved. *St. Louis, etc. Ry. Co. v. Oliver (Okla.)*, 87 P. 423, 2 Lewis on Eminent Domain, § 742 at page 1324.

This error can be corrected by simple direction of this court, no new trial or resubmission to the jury being required.

Thus in *Reed v. Chicago, Milwaukee & St. Paul RR. Co. (C.C.)*, 25 F. 886, Mr. Justice Shiras said:

“Until the verdict is rendered it cannot be known whether plaintiff may be entitled to interest. When this is determined by the amount of the verdict, the court can then make the proper order, and the same will form part of the adjudication, settling damages.”

Accordingly on appeal the Circuit Court determined the amount of interest to which plaintiff was entitled, added this to the amount of the verdict as returned by the jury, and rendered judgment for the aggregate amount.

Again, the case of *Alloway v. Nashville*, 88 Tenn. 510, 13 S.W. 123, 8 L.R.A. 123, was a condemnation proceeding. No instruction as to interest was given or requested and none was allowed by the jury. Before judgment was rendered Alloway moved the court to add interest, as the defendants did here for the Deere Estate; and there also the motion was rejected and on appeal such refusal was assigned as error. The Supreme Court said:



“Refusal to add interest was error. \* \* \*  
Inasmuch as the error can be readily corrected here, that will be done, instead of reversing and remanding. This court will render the judgment that should have been rendered below.”

See also *Warren v. St. Paul & Pacific RR. Co.*, 21 Minn. 424, and *Whiteacre v. St. Paul & Sioux RR. Co.*, 24 Minn. 311, where the same practice is approved by the Minnesota Supreme Court; and also 3 *Elliott on Railroads*, p. 1457, and 18 *Am. Jur.*, Sec. 277.

Finally, although the cases and authorities are numerous enunciating the principle, we refer to the recent opinion of this court in *Morris v. Russell*, 236 P. 2d 451, where the same rule was invoked. References therein were made to decisions in Oklahoma, Texas, Kentucky, Illinois, and to another recent decision of this court in *Simmons v. Wilkin*, 80 Utah 362, 15 P. 2d 321.

### **Point.**

**2. The court improperly refused to allow these defendants to cross examine plaintiff's expert witnesses on the subject of the actual market values of comparable property as of July 12, 1951, and likewise excluded direct evidence as to the actual market values of such comparable properties.**

Plaintiff's witnesses all had had extensive experience and were familiar with the property under condemnation, as well as comparable properties and their market values. They were each permitted accordingly to express their opinion as to the fair market value of the two parcels. For example, reference is made to the testimony of Witness Edward M. Ashton in this respect. (S.R. 29-37.)

On cross examination the court below absolutely excluded defendant from testing the experts' opinions on the basis of the market values of such comparable lands. For example, Witness Ashton was asked with respect to the adjacent Indian Hills Subdivision, and objections to such line of questioning were sustained.

MR. BEHLE: I assume, for the record, I am foreclosed in testing this witness in respect to comparative values on any basis; front foot, acreage, per lot, as well as asking him in regard to his subdivision?

THE COURT: Well, you may, unless there is objection, proceed the same with him as you did with Mr. Kiepe. Is that what you mean?

MR. BEHLE: Well, I thought the rulings cut me off from any of that so I wanted to be sure. In other words, I understand I can't ask the witness what land in the vicinity comparable to this land sells for, either by an acre basis or a front foot basis, or a lot basis, is that correct?

THE COURT: Well, yes. I ruled against you on that with Mr. Kiepe and I would do the same with Mr. Ashton.

MR. BEHLE: Yes, sure. In other words, I can't test on comparative sales, on comparative sales prices?

THE COURT: That is correct. You cannot. (S.R. 40-41.)

It will also be readily remembered that a large portion of the Deere Estate lands consisted of subdivided



residential lots, more than twenty of which had been sold to individual purchasers on the open market to other defendants in the condemnation proceeding. Yet the court below absolutely excluded direct evidence or cross examination as to lot or acreage values of property comparable to either the lots or acreage of the Deere Estate.

MR. BEHLE: If the Court please, I think the record is clear on our proffer of proof of comparable values. I think the door has been closed on us every time we have tried to prove and test values, and here is a specific instance.

THE COURT: Well, the only reason that the door is closed to you is that the law provides that you shall not do that and I try to follow what the law is. I am not trying to close any door on you and if you have any doubt about it I can show you the authorities on the value of a place. Well, that case Mr. Budge had the other day covers that subject. It has not been permitted and you persist in it and it is against the law.

MR. BEHLE: Well, of course, that is one of the arguments we have been having right along.

THE COURT: Well, that is right. Of course I have been ruling against you because I have been ruling it is not lawful for you to divide this property into lots, nor the price per lot, or any other property into lots or the values of them. (S.R. 42-43.)

\* \* \*

MR. BEHLE: We also specifically tender proof with respect to Indian Village as a com-

parable subdivision purchased on an acreage basis as raw acreage and the value per acre of \$7,500.00 shortly before the date of condemnation and the characteristics of that area as being comparable.

MR. BUDGE: Same objection.

THE COURT: The objection is sustained.

MR. BEHLE: For the record only we again make a tender in connection with lot sales and prices.

MR. BUDGE: Same objection.

THE COURT: Within the area being condemned?

MR. BEHLE: Within the area and comparable to the area.

MR. BUDGE: Same objection.

THE COURT: The objection is sustained.  
(S.R. 52.)

We would have thought it clear that the best evidence of the market value of land, or for that matter almost any tangible property with a market value, would be the actual figures as to which that or comparable property was selling for on the open market at about the time of the valuation. 5 Nichols, Eminent Domain, Ch. XXI. Certainly that is how one proves the value of stocks active on the market, or one's automobile, or home.

But here all such evidence was completely excluded

—whether on a front-foot, lot, or acreage basis—under a sweeping ruling by the court that all such evidence was improper.

This court, in keeping with the Massachusetts doctrine or weight of opinion, is cited by Nichols (§ 21.3) as in accord with the weight of opinion that such evidence is admissible. *Telluride Power Co. v. Bruneau*, 41 Utah 4, 125 P. 399.

The result of Judge Van Cott's ruling, which extended also to cross examination, was to leave before the jury a naked opinion as to the value of two parcels only, and for practical purposes to cut off and restrict inquiry into just how such dollar figures were reached by the testifying experts.

Defendants respectfully submit such errors require reversal for the reasons so well expressed in *St. Louis, etc. RR. Co. v. Clark* (Mo.), 25 S.W. 192, 26 L.R.A. 751, as follows:

We think the evidence of sales of similar property to that in question, made in the neighborhood, about the same time, was admissible to aid the jury in determining the damage to which the owner was entitled. The value of property is ascertained largely from such sales, and the opinions of witnesses as to values are largely predicated upon them. It is best, when it can be done, to put the jurors in possession of all the facts from which values are ascertained, and allow them to draw the conclusion therefrom. Witnesses basing their opinion upon recent sales of like property are liable to exaggerate or underesti-

mate values; in any consideration they are no more capable of deducing fair conclusions from the known facts than the jury. The object is to ascertain the general market value, and if particular sales are made under exceptional circumstances the fact can be shown, and the jury can determine its probative force. *Certainly no more reliable method of determining the fair market values of lands can be reached than that derived from bona fide sales of similar lands in the vicinity.* The objection that such evidence raises collateral issues as to the character of the land sold, and the circumstances of such sales, is more than compensated for by its value in aiding the jury to a correct conclusion. (*Italics ours.*)

#### Point.

**3. The court below improperly refused to allow appellants to introduce evidence relating to the fair market value of the Deere Estate water utility system or any part thereof.**

To prove the value of the Deere Estate water utility system, defendants called as an expert witness Engineer C. J. Ullrich, who was intimately familiar with and exceptionally well qualified to express an opinion as to the value of that water system. This system consisted of a series of springs, an extensive collection and storage system including dual electric pumps and two large storage tanks, transmission lines to the various points of use throughout the area under condemnation, and then finally distribution lines into the residential areas and other points of use. The witness described the system in detail and testified that as an integrated water utility it had been planned for immediate use in the general Oak Hills area and for ultimate use else-

where after 1952, when Oak Hills was to be connected with the Salt Lake City municipal water system. Objections were sustained to all questions with respect to the value of that water system or of any part thereof. (S.R. 9-14.) A tender of proof was rejected as to the fair market value of that water system (exclusive of land rights) being \$74,200.00, assignable \$10,500.00 to the water rights and \$63,700.00 to the balance of the system, of which \$25,700.00 was allocated to that part of the distribution system within the streets of Parcel I, these being the fair market values as of July 15, 1951. (S.R. 16.)

No reason was assigned for this exclusion, which seems beyond comprehension when the general rule is that such a utility not only may but must be valued by witnesses who have "some peculiar means of forming an intelligent and correct judgment as to the value of the property in question." Thus it is said that the valuation by utility experts is "almost mandatory in all cases since it is obvious that values cannot be based in such cases on sales or on values at which such property is held in the vicinity." 5 Nichols on Eminent Domain, § 18.47.

Yet not only did the court exclude the opinion of the only expert on water utility values; it permitted lay real estate men to lump the utility's value in with the land on the basis of indefinite hearsay discussions "with the engineers in the City Water Department, the most logical buyers." (S.R. 45.) It violated Sec. 104-34-10.

## Point.

4. The court improperly ruled that the property of appellants under condemnation consisted of the whole of but two separate parcels, each to be separately assessed.

### a. The Statutory Mandate:

As a matter of *right*, an owner whose property is condemned is entitled under Utah law to a *separate assessment* for each different parcel of his land that is taken. He is also entitled as a matter of right to an award for any net severance damages where there is only a partial taking, in addition to the value of the part taken. The policy laid down by Utah's legislature is to assess separately for each source of damages as far as practical.

104-34-10. *Compensation and damages—How Assessed.*

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

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

(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.

\* \* \*

(5) As far as practicable compensation must be assessed for each source of damages separately. (Ch. 8, Laws of Utah 1951). (*Italics ours.*)

As pointed out in the opinions in the case of State v. Fourth District Court, 78 P. 2d 502, 94 Utah 384, the extent and measure of damages under Utah law goes beyond strict constitutional guaranties; and although these provisions have been on the statute books of Utah, California, Montana and Idaho, among other states, for many decades, their mandate is so clear and unequivocal that there have been few cases with respect thereto, especially in recent times.

#### **b. What Constitutes a "Separate Parcel":**

Decision as to what constitutes a separate parcel to be separately assessed is ordinarily a question of law for the court to determine, since the determinative physical facts are generally not in dispute. But if there is a conflict as to these facts, a question of fact is presented for determination by the jury or court, as the case may be. 2 Lewis on Eminent Domain (3d ed.) § 701; St. Paul & Sioux City RR. Co. v. Murphy, 19 Minn. 500.

The three criteria in determining what constitutes a separate parcel within the meaning of the Utah Statute seem to be (1) common ownership, (2) physical contiguity, and (3) common use. All three factors usually must

be present, and as stated in Lewis, § 698:

“In general it is so much as belongs to the same proprietor as that taken, and is continuous with it and used together for a common purpose.”

In the case of the Deere Estate, on the basis of the issues drawn and the record before the court there was no question as to ownership; the factors in question were those as to contiguity and common use. The evidence was not in conflict, as we see it, and thus the matter became a question of law. But before looking to the various parts of the entire tract taken of more than thirteen city blocks—roughly, an area equivalent to that between North Temple and 8th South, and from State Street to West Temple Street, let us review further the authorities.

Lewis at Section 699, discussing residential areas, states (*italics ours*):

If two or more contiguous city or village lots are improved and used as one tract, and any part of any one is taken, the owner may recover the damage to all; so, where a tract is subdivided into lots and blocks, but continues to be used as before for agricultural purposes, the subdivision being a mere paper one. In the last case it is intimated that a different rule might prevail if the lots were merely held for sale. *Contiguous lots improved for separate use are not one tract. \* \* \** *Where a block is divided by a street*, the parts become distinct tracts as to each other where they are merely held for sale or use as building lots. It is held that the subdivision of land into lots, makes each lot, *prima facie*, a



separate and distinct tract, and if the owner claims damages to all or more than the lot taken, he must produce evidence to overcome this presumption. The true rule would seem to be that lots and blocks improved or used for a common purpose should be regarded as one tract, though divided by a street or alley; *that contiguous lots in the same block or square should be regarded as one tract*, though vacant and held for sale or speculation; *that lots improved for separate use should in general be regarded as separate tracts*; but that if contiguous lots devoted to a separate use are more valuable for a common use they might properly be regarded as one tract; *and that vacant lots and blocks, held for sale or speculation and separated by streets or alleys should be regarded as distinct tracts.*

The foregoing text is amply annotated by cases from various jurisdictions. The statements are substantially the same as those found in other standard works. For example, it is said in 18 Am. Jur. "Eminent Domain", Sec. 270:

\* \* \* In determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, unity of use is the principal test, and if a tract of land, no part of which is taken, is used in connection with the same farm, or the same manufacturing establishment, or the same enterprise of any other character as the tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time, and separated by an imaginary line, or even if the two tracts are separated by a highway, railroad or canal. \* \* \*

\* \* \*

When parts of the same establishment are

separated by intervening private land, they are considered as independent parcels, unless they are so inseparably connected in the use to which they are applied that the injury or destruction of one must necessarily and permanently injure the other. So also, contiguous tracts owned by the same person, but used for different purposes and rented to different tenants, should be considered as separate tracts. If both are injured by the taking, it is proper to permit the jury to consider the reasonable market value of each tract. Even if two tracts are contiguous and owned by the same owner and used for the same purpose, if they are not used in connection with each other, they must be considered as separate tracts, as, for example, a block of city houses rented to different tenants for residential purposes. Vacant and unoccupied land is considered to be separated into independent parcels by a public street, whatever the intention of the owner in regard to future use. A mere platting into blocks and lots has been held sufficient in the case of vacant land to show, *prima facie*, at least, a division into separate and independent parcels; although as to this there is authority to the contrary.

See also *Corpus Juris*, Eminent Domain, Section 395; the annotation in 57 L.R.A. 937, at page 940; and the cases and comment in 2 American Railroad & Corporation Reports 184.

Somewhat the same problem is presented in connection with the requirements that real property be assessed for ad valorem tax purposes by "parcels or subdivisions not exceeding six hundred forty acres each \* \* \* ." Utah Code, §80-5-8. The following case applies

the rule quoted above in connection with such tax statutes :

Generally, several lots in the same block, contiguous to each other and owned by the same person, are deemed one "parcel" of land within contemplation of statute requiring full cash value of each "parcel" of land attached to be set down in assessment roll. Code 1930, § 69-242, subd. 4. Guthrie v. Haun, Or., 76 P. 2d 292, 294.

The same problem also is presented where in mortgage or execution sales, and in order to realize a higher amount for the debtor, real property consisting of several known lots or "parcels" is to be sold "separately and not as a unit."

The recent Utah case of Commercial Bank v. Madsen, 236 P. 2d 343, again applies the same rule set forth above as to condemnation and tax assessment. In that case two contiguous lots owned by the same debtor and in use as a "unified parcel" were held to be the proper subject of a single sale. In that case, as the court pointed out,—

The bank prepared and accepted a mortgage of this property as one parcel; in its pleadings, judgment, notice of sale and throughout the entire proceeding it was treated by the bank as one parcel of property. The sheriff and two other witnesses all testified that they considered the land as a single parcel of property. The judgment debtor testified to the effect that he did not object to the sale as a unit and that he had no reason to think more money could be raised if the lots were sold separately. The fact that the land is described as "Lots 1 and 2 of block 28, Plat A Manti City

Survey" does not serve to make separate tracts of an otherwise unified parcel. For a discussion to the effect that description of property by lots does not serve to make it separate parcels, see: 33 C.J.S., Executions, § 210, p. 449.

Finally, we quote from Volume 4 of Nichols' work on Eminent Domain, the third edition of which has just been published:

§ 14.31. *What constitutes a separate parcel.*

Difficult questions sometimes arise in determining what constitutes a separate or independent parcel or tract of land. *There are a few definite rules of law that can be laid down.* In many cases the court can, as a matter of law, determine that lots are distinct or otherwise, but *ordinarily it is a practical question to be decided by the jury or other similar tribunal which passes upon matters of fact*, which should consider evidence on the use and appearance of the land, its legal divisions and the intent of its owner and conclude whether on the whole the lots are separate or not. In such cases the land itself rather than the map should be looked at, and one part of a parcel is not to be considered separate and independent merely because it was bought at a different time from the rest and is separated from it by an imaginary line.

(1) *Physical contiguity.*

Actual contiguity between two separate parcels is ordinarily essential to merit consideration as a unified tract. Actual physical separation by an intervening space between two parcels belonging to the same owner is ordinarily ground for holding that the parcels are to be treated as independent of each other, but it is not necessarily a

conclusive test. If the land is actually occupied or in use the unity of the use is the chief criterion. When two parcels are physically distinct there must be such a connection or relation of adaptation, convenience and actual and permanent use as to make the enjoyment of one reasonably necessary to the enjoyment of the other in the most advantageous manner in the business for which it is used, to constitute a single parcel within the meaning of the rule. Accordingly, a public highway actually wrought and travelled, a railroad, a canal, or a creek running through a large tract devoted to one purpose does not necessarily divide it into independent parcels, provided the owner has the legal right to cross the intervening strip of land or water. *But a public highway will ordinarily divide the land of a single owner into separate parcels, even if both parcels are used for the same purpose, if the use upon each parcel is separate and independent of that upon the other.*

\* \* \*

*When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law.*  
\* \* \* (Italics ours.)

**c. Appellants have not Waived their Right for Separate Assessments.**

Throughout the trial and also by its application to this court for an interlocutory appeal, appellants asserted their right to separate assessments for each parcel. Thus the right has not been waived, as did occur in Idaho under an identical statute where likewise a large area of land was condemned for reservoir purposes. In the



case of Big Lost River Irr. Co. v. Davidson (Ida.), 121 P. 88, 92, it was said:

Under the provisions of the statute it was not necessary that the jury should find the value of each legal subdivision of the tract sought to be condemned. If, however, there is more than one parcel of land, or several separate parcels or tracts, each separated from the other, then it is necessary for the jury to determine the value of each separate tract or parcel. But where the tract is a single or consolidated tract, the value then may be fixed as a single parcel or tract. "Parcel" or "tract" of land, as used in this section, does not mean legal subdivision, but a consolidated body of land, and the finding of the jury may be upon each single parcel or tract of land.

\* \* \*

#### **d. The Physical Facts in this Case:**

Applying the foregoing law to the physical facts of the Deere Estate, we find that in the tract—more than thirteen large city blocks in area—there are not only recorded plats of lots and blocks, and the actual physical improvements constituting a subdivision, namely, streets, curb and gutter, drainage, fire hydrants, utilities, etc. Here we have further physical barriers such as mountain streams and the steep slopes and cliffs of Emigration Canyon. Sections of the Deere Estate property are more than a mile apart. Specifically:

(1) There is an area of 50.60 acres described on the map as Tracts II, IV-C and VI, which is essentially hillside land. As to this area there are the required

requisites of common ownership, use and contiguity. In connection with this area will be involved the value. Together this would constitute one "parcel", the land and the water utility system to be each separately assessed.

(2) There is an area of 5.81 acres known as Tract V which is completely segregated from the other property owned by these defendants and wherein there is both common ownership and use. This area is more than half the size of Temple Square, and is a separate "parcel."

(3) There is a third separate parcel of 7.35 acres known as Tract III which has been developed and is zoned for commercial purposes. It is segregated from other areas by other ownerships on the east, by the state and county roads on the north and west, and by Emigration Canyon and Creek on the south.

(4) South of Emigration Creek Canyon are Tracts I-D and IV-B, each of which is divided roughly east and west by a dedicated street—Kennedy Drive.

(a) Tract I-D consists of a total of 6.65 acres. Of this, 1.5 acres is in the extreme southwest corner of the entire tract to be condemned. Obviously severance damages are involved. The same situation pertains to the south part of Tract IV-B. This consists of 5.43 acres arbitrarily cut out by a straight line division from the heart of a tier of proposed residential lots. It is suggested that each of these two is part of a larger parcel extending to the south wherein severance damages would be involved, and that each should be segregated from the



balance of the other land of these defendants which has been taken.

(b) The remaining area of Tract I-D north of Kennedy Drive consists of 5.51 acres. The remaining area of Tract IV-B north of Kennedy Drive consists of 10.33 acres—slightly in excess of the area of a large city block. If treated as separate parcels, no severance damages would be involved. It will be recalled that this part of I-D comprises ten potential residential lots for which all utilities have been installed to the extent planned by the subdividers; while this part of area IV-B consists of 10.33 acres suitable and planned for residential development, but wherein no utilities or other improvements have been constructed except for Kennedy Drive. Under the authorities, together this entire contiguous area constituted another “parcel.”

(5) Tract IV-A is an area equal to nearly two city blocks—19.62 acres—on the extreme north of the entire tract herein condemned. As in the case of IV-B, it is suitable for and had been planned for residential development. However no utilities had yet been installed and the only actual development on the ground had been construction of a dividing access road in place—Oakhills Road, and an access road to the Jerry Jones property extending north from Oakhills Road opposite Lot 62 owned by W. E. Graham.

(a) The property to the east of the Jerry Jones road consists of a total of 7.77 acres divided into twenty-one lots and streets actually constructed and existing

but not yet dedicated. Of this area Lots 62, 63, 64 and 65 had been sold to other defendants prior July 12, 1951, the area so sold involving 1.13 acres and road access rights. These defendants owned the remaining lots and the roads comprising a total of 6.64 acres, constituting another "separate parcel."

(b) The tract west of the Jerry Jones road consists of 34 lots and streets actually in place although not dedicated. This area which we submit constitutes a separate and different parcel comprises a total of 11.85 acres—more than a large city block in extent, all of which is owned by these defendants.

6. Finally, there is the balance of the areas denominated in the Brayton affidavits, the answer and by the various maps as Tracts I-A, I-B and I-C. Here all utilities are in, and the property *actually existed* as a number of separate residential lots. The law seems clear that a separate parcel is involved *prima facie* for each lot, and at least for each group of contiguous lots.

The total acreage owned by these defendants in Tract I-A is 7.51; in Tract I-B, 14.1; and in Tract I-C, 3.96. Tract I-C is a separate parcel because there the subdivision was not physically complete; but in I-A were 19 separate lots, and 41 separate lots in I-B. Grouping the contiguous lots as was done in requested Instruction No. 12 (R. 103), there would be 12 "separate parcels" in I-A and I-B as follows:

a. Lots 1 and 2, Block 1, Oak Hills Plat A.

- b. Lot 1, Block 2, Oak Hills Plat A.
- c. Lots 5, 6, 7 and 8, Block 2, Oak Hills Plat A.
- d. Lots 2, 3, 4, 6, 7 and 8, Block 3, Oak Hills Plat A.
- e. Lots 1, 2 and 3, Block 4, Oak Hills Plat A.
- f. Lot 6, Block 4, Oak Hills Plat A.
- g. Lots 8 and 9, Block 4, Oak Hills Plat A.
- h. Lot 11, Block 4, Oak Hills Plat A.
- i. Lots 5 and 6, Oak Hills Plat B.
- j. Lots 10, 11 and 12, Oak Hills Plat B.
- k. Lots 69 to 82, Oak Hills Plat B.
- l. Lots 85 to 106, inclusive, Oak Hills Plat B.

In summary then, as a matter of law under Section 104-34-10, the property of these defendants under condemnation consisted of *nineteen* separate parcels, each to be separately assessed under mandate of Utah's legislature; and in addition the north parts of *two additional* separate parcels. In these last two cases the statutory mandate was that each of the parts taken was to be separately assessed; and then there was also to be determined the extent of any severance damages to the remaining parts of the two parcels involved.

**e. The effect of the two-parcel decision.**

At the oral hearing on the application for an interlocutory appeal from the two-parcel order, Mr. Justice Crockett inquired as to just how condemnees were being prejudiced by the claimed violation of the statutory requirements, and why we should assume that Judge Van Cott would commit prejudicial error in the course of the trial. These questions were difficult if not impossible then to answer, but appellants' fears were fully justified by subsequent rulings of the court below as a consequence of the early decision.

For example, plaintiff's witnesses were permitted to assume that since only two sales were to be made of the two parcels each as a whole, necessarily from the nature of the parcels the purchasers would be buying wholesale at a discount in order to obtain profits by resale of the individual lots and tracts. Thus, for example, Witness Ashton's opinion started with an assumption that normal fair market values of the various components of the entire property totaled some \$667,000.00. (Supp. R. 39.) Then by applying these assumptions he reduced this total for the two parcels to \$491,250.00. (S.R. 33.) This was substantially the figure adopted by the jury. (R. 118.)

Also as a consequence of the two-parcel decision, the court excluded either on direct or cross examination all evidence as to lot values or evidence of any comparable values at all. (S.R. 17, and Point 2 above.) The defendants were simply unable to support the figures claimed in their stricken separate answer as to the fair market values of the individual tracts or parcels con-

stituting their land which was being condemned. The effect was to condemn not the property taken, but the *owners* because of the large extent of their holdings. To illustrate, a defendant owning a single lot in Oak Hills is afforded compensation to the extent of its full market value. The Deere Estate, owning the identical adjacent lot, is cut in two by reason of the application of the wholesale discounts, etc. If the ownership of the two lots were to be reversed, by reason of this change alone the values would reverse and the former individually owned lot would be reduced to half its value, while the Deere Estate lot would be doubled.

Likewise as to land suitable for subdivision but not yet so subdivided. Mr. Ashton would pay \$7500.00 per acre for a 6-acre tract, but because the Deere Estate owned many more times that acreage, the value of its land by virtue of wholesale discounts and a single sale, etc., would be diminished to \$2500.00 per acre.

Finally, the court excluded the entire issue of severance damages, since under its ruling the whole of only two parcels was to be condemned and there was no room for severance damages for a partial taking as provided by the statute. (R. 39, 43.)

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Appellants can now answer the questions of the court at the hearing on the interlocutory appeal by stating categorically that the failure of the court below to follow the statutory provisions with respect to the mandatory assessment of each separate parcel and the

determination of severance damages in the case of partial takings reduced the amount of the award of damages by perhaps \$200,000.00.

**f. Utah Cases:**

We find no Utah cases in point except by inference on the reverse of the facts here, the cases of *Commercial Bank v. Madsen*, *supra*, and *Provo River Water Users Association v. Carlson*, 133 P. 2d 777, 103 Utah 93. In this latter case condemnee urged that by reason of his ownership and common use of two non-contiguous tracts, severance damages to the tract not condemned were involved in connection with a taking of but part of a single parcel. However, on the facts of that case and in view of the non-contiguity the majority of this court reversed the decision of the court below, holding that two separate parcels were involved with a complete taking of one and no severance damages allowable as to the other.

The difference between these cases, it is respectfully submitted, is readily apparent from a glance at the maps and a cursory knowledge of the supporting facts. Here there were many separate parcels involved. The effect of the court's two-parcel decision, let alone plaintiff's claim that all was a single parcel, was to deprive the owners of their right to just compensation. The rulings of the court, it is respectfully submitted, were in violation of the well-known due process and equal protection clauses of Utah's Constitution, Article I, Sections 7, 22, 24, 26 and 27, as well as a flagrant violation of Section 103-34-10.

Likewise was violated the Fourteenth Amendment of the Federal Constitution requiring payment of just compensation for the property taken. This has been held to be "the full and perfect equivalent of the property taken." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 43 S. Ct. 354, 67 L. ed. 664. But no such compensation is being paid in this instance.

### Point.

#### **5. The court improperly eliminated the issue of severance damages.**

The issue of severance damages, as in the case of interest as a part of just compensation, is a matter separate and apart from that of the proper determination of the fair market value of the land actually taken.

As discussed at length under Point 4, the court determined that the whole of each of two separate parcels was being condemned. Hence it ruled that under Section 104-34-10 of the Judicial Code there was no place for the allowance of any severance damages. The issue was stricken from the pleadings by eliminating defendants' averments as to such severance damages set forth in their answer (R. 39, 41, 43), and the issue was not submitted to the jury (R. 102).

Apart from the court's determination on other points in this appeal, it is respectfully submitted that this case should be remanded to the trial court with instructions to reinstate the pleadings as to the issue of severance damages, and to proceed to hear and determine such



issue.

#### IV.

### CONCLUSION

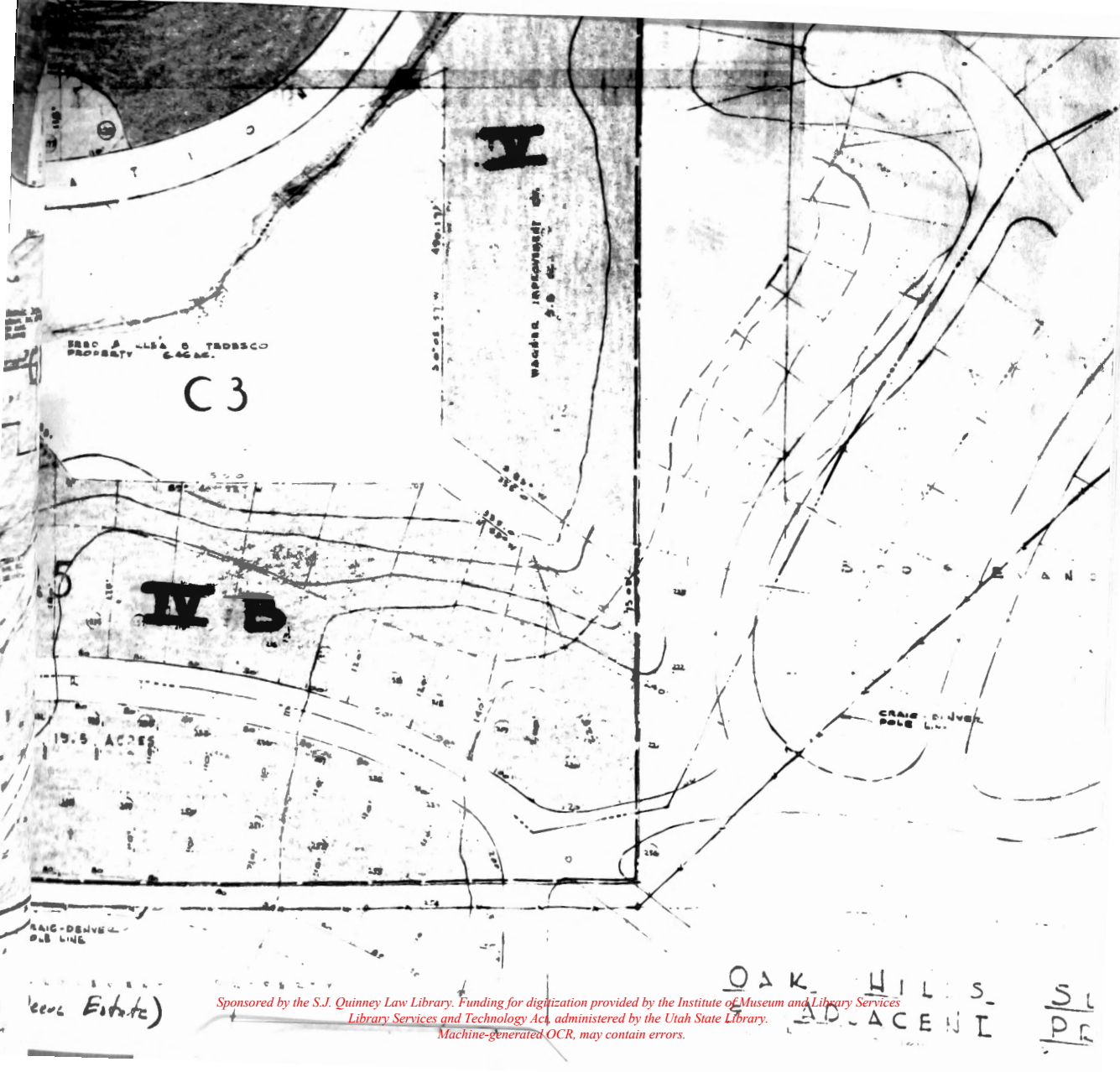
It is respectfully submitted that under the requirement of the Federal and State Constitutions the just compensation to be paid these defendants under the facts of this particular case require payment of not only the fair market value of the property taken, but also interest computed at the legal rate in order to compensate the owner for his damage from July 12, 1951 when his injury occurred, until May 10, 1952 when the amount became payable.

It is further submitted that the foregoing constitutional requirements as well as statutory directives have also been violated by reason of the outlined prejudicial errors committed by the trial court, resulting in depriving the owners from an award of just compensation for their property. Accordingly, in this respect the judgments of the lower court should be reversed and a new trial ordered.

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and Defendants.*





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