

1953

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

Utah Supreme Court

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7867

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 Engineering
Commission,

Plaintiff and Respondent,

vs.

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

Defendants and Appellants.

Case No.
7867

RESPONDENT'S BRIEF

FILED

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Appellants' "Statement of Facts" contains so many extraneous matters that it is unsatisfactory as a basis for a discussion of the legal questions involved. We are not here concerned with the owner-

ship, area or state of improvement of properties or tracts owned by other persons. This case involves only certain land which belonged to appellants and, in view of the award by this court of an extraordinary writ requiring the payment to appellants of the damages fixed by the jury, the sole and only question with which we are now concerned is whether, under the law, appellants are entitled to a new trial in an effort to obtain greater damages than fixed by the jury, all other defenses being expressly waived by the filing by appellants of the receipt for the money already awarded.

The property condemned, described in plaintiff's complaint as Parcel 28, is in one body, every area of which, for whatever the same was or is suitable, is contiguous to some other area within the boundaries of said parcel. It is true that running through said parcel is State Highway 65, which furnishes ingress and egress to and from Emigration Canyon, a county road known as Kennedy Drive, and certain drives laid out by appellants within that area of Parcel 28 most suitable for residential purposes; but none of these roads or drives constituted any obstruction to passing from one part of the premises to another. The location of these roads was not regarded as important in appellants' division of the property into six parcels as shown on the map, made part of their application to sever, to which reference will hereafter be made. Furthermore, the best evidence that Parcel 28 is one parcel, and so regarded by the appellants themselves, is that the drives laid out or improved with surfacing or curb and gutter,

were so designed and located by appellants as to serve so much of the tract as was suitable for homes (approximately 50 acres being so mountainous as to be considered waste land), and the water distributing system, supplied from tanks located on the upper, or waste land, area, the telephone conduits, gas mains and electric lines were all likewise constructed to serve the property as a unit. It is also to be noted that the entire area of said Parcel 28 was vacant and unoccupied and was outside the limits of Salt Lake City. A small area of about seven acres had been platted as a county subdivision under Chapter 50, Title 78, Utah Code Annotated 1943, whereby the fee to the drives or streets laid out therein became vested in Salt Lake County, (Sec. 78-5-4).

Except for the contention of appellants that they were prejudiced by the court's order in making a division of Parcel 28 for the purpose of assessing values, it would be unnecessary to make reference to the "Motion to Sever" (R. 51) filed by appellants in the trial court, whereby they sought to have the court order that the area sought to be condemned be divided into *six* parcels as described in the affidavit of Dean F. Brayton and as exhibited by the map attached to said affidavit (R. 44, 47). In his affidavit, Mr. Brayton avers that in his opinion

"It will simplify the trial of said cause and the convenience of the parties to try separately the issues as to the values of the land comprising each of said parcels. Failure to so segregate and sever will, in affiant's opinion, tend to confuse the issues and result in an inordinately long

trial with attendant burden upon court personnel and the parties.” (R. 46.)

Respondent contended that Parcel 28 is but one parcel, but the court, in his discretion, while refusing to permit a trial as to each, entered an order dividing said parcel into *two* parcels, each to be separately assessed by one jury. Each parcel was so assessed and the jury found an aggregate value as of July 12, 1951, of \$495,875.00, to which was added \$111.40 costs, making a total of \$495,986.40 for which judgment was entered, and that amount was paid into court for appellants within the time fixed by statute.

Appellants then moved the court to amend the judgment by adding thereto interest at the legal rate from July 12, 1951, until payment of the judgment should be made (R. 127), which motion was denied. Then, after the judgment of condemnation was entered whereby respondent became entitled to possession of the property upon payment of the award, appellants filed their “Application For Payment” wherein they prayed that the court order

“the money so paid into court to be delivered to applicants upon filing a receipt therefor; such payment to be held to be an abandonment by such applicants of all defenses interposed by them excepting their claim for greater compensation, *to wit, for interest on the sum of \$495,875.00 from July 12, 1951, until date of payment.*” (R. 140.) (Italics ours.)

When this application was presented, the court

stated that he would not make the order applied for and thus leave open for litigation only the question of interest,—the only additional compensation claimed by appellants,—(the court having already denied the application to amend the judgment so as to award such interest), and His Honor three times, requested counsel for appellants to elect whether he desired an order in accordance with the statute that payment be made *upon satisfaction of the judgment or upon appellants' filing a receipt abandoning all defenses except their claim for greater compensation*. Counsel three times refused to make any such election and thereupon the court ordered the money to be paid on satisfaction of judgment. (See affidavit of Judge Van Cott in *Peek et al. v. State of Utah*, included in the Record in this case by special order of this court December 31, 1952.) The appeal is “from the judgment for damages in the sum of \$495,986.40, including costs, entered in the above action on the 10th day of May, 1952, and the 15th day of May, 1952, and from the final judgment of condemnation entered herein on the 27th day of May, 1952.” (R. 146.)

With these facts in mind, does the record show any prejudicial error committed by the trial court which entitles appellants to a new trial?

ARGUMENT

While some other points are set forth in their “Statement of Points” (R. 147-148), the only points appellants argue in their brief are that the court erred:

1. In refusing to allow interest from July 12,

1951, the date of the service of summons. (App. Br. 9.)

2. In refusing to permit appellants to cross examine plaintiff's expert witness, Edward M. Ashton, as to market value of comparable property as of July 12, 1951, including specifically the price paid for Indian Village, and in excluding evidence of such values. (App. Br. 9-10.)

3. In refusing to permit a separate valuation of the water system.

4. In ruling that the land sought to be condemned consisted of but two parcels.

5. In eliminating the issue of severance damages. (App. Br. 10.) Let us consider these assignments in their order.

Interest From Date of Service of Summons Not Allowable

As we understand appellants' argument, it is that they are entitled to interest from the date of service of summons because the property here involved was "taken" by the State by virtue of the passage of the Act (Laws, First Special Session, 1951, page 17), by which the Engineering Commission was "authorized and directed to forthwith condemn." This contention is without merit. In *City of Norwalk v. Norwalk Investment Company* (Conn.), 110 A. 557, the statute provided:

“Said bridge and park are hereby declared to be a public use and necessity, * * * and the said park is hereby established and laid out with the boundaries herein described.”

and the City of Norwalk was, by the statute, authorized to condemn. The owner claimed interest from the date of the passage of the Act, but it was held that the Act did not constitute the “taking,” and the claim of the owner was denied.

The said Act of our legislature became effective June 18, 1951. Therefore, if the passage of the Act constituted a “taking,” appellants, logically, should claim interest from June 18, 1951, instead of from July 12, 1951. However, it is scarcely worthwhile to argue that the enactment of the statute was not a “taking,” for the Act provides that the Engineering Commission shall “forthwith condemn,” which, of course, contemplated the usual judicial procedure in “taking,” that is, to establish the necessity for the taking, to fix the value of the property and establish, by decree of condemnation, the State’s right to possession thereof upon payment of such value.

The Fourteenth Amendment to the Federal Constitution which appellants quote in their Brief, gives no guaranty that appellants shall receive interest, or even any amount of damages or compensation. That provision merely guarantees that the State shall provide a proper procedure whereby compensation shall be fixed. It has been repeatedly held that

“All that is essential is that in some appropriate way, before some properly constituted tri-

bunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the federal constitution."

A. Backus, Jr. & Sons v. Fort Street, etc. Company, 169 U. S. 557, 42 L. Ed. 853; *Appleby v. Buffalo*, 221 U. S. 524, 55 L. Ed. 838.

Appellants evidently did not consider their property had been taken either by the passage of the Act or by the service of the summons for, on December 14, 1951, they filed their "Notice Re Motion For Immediate Occupancy" (Add. R. 60), calling up for disposition what they designated as plaintiff's "Motion For Immediate Occupancy." As a matter of fact, respondent had neither filed nor made any such motion; its only reference to occupancy being the second paragraph of the prayer of the complaint, to wit:

"That upon notice being given to the various defendants in the manner prescribed by law, the plaintiff be given an order authorizing the immediate occupancy of the designated premises for the purpose of commencing such construction and improvement of a state park." (R. 19.) Yet counsel state in their Brief:

"When defendants called up plaintiff's Motion For Occupancy, plaintiff resisted its own motion." (App. Br. 11.)

Respondent did resist an order of immediate occupancy because it had made no motion therefor, and no notice had been given to defendants that a request would be made for any such order.

As to whether compensation should include interest from the date of service of summons, we have only to say that, unless this court determines that its former decisions are erroneous, and should be overruled, there is no merit in appellants' contention. *Oregon Short Line Railroad Company v. Jones*, 29 Utah 147, 80 P. 732; *San Pedro Railroad v. Board of Education*, 35, Utah 13, 99 P. 263; *Salt Lake etc. Railroad v. Schramm*, 56 Utah 53, 189 P. 90. See also *State v. Danielson et al.*, — Utah —, 247 P. (2d) 900.

California, with the same statute as Utah, has declared the same rule as prevails here. (*City of Los Angeles v. Gager*, 102 P. 17; *City of Oakland v. Wheeler*, 168 P. 23.)

Appellants' contention that they should be allowed interest because their possession, after the service of summons, was "worthless" and their development operations interfered with, is answered by Judge Straup in *Oregon Short Line Railroad v. Jones*, *supra*. To quote:

"Under section 3599, appellants argue that the right to compensation accrues and is due on the date of the service of summons, and because thereof, and because no improvements put upon the property subsequent to that date shall be included in the assessment of compensation or damages, there is, when the summons is served, such an interference with the full enjoyment and ordinary benefits of the property by the owner, and such an invasion of his rights thereto, as to amount, in legal effect, in a taking, within the

meaning of the Constitution providing that 'private property shall not be taken or damaged for public use without just compensation.' And it is claimed, as the property was taken on that date, and as compensation therefor then became due, appellants were entitled to interest thereon from the date of the service of summons to verdict, less rents and other benefits of possession received by them covering the same period. When all the provisions and proceedings relating to the eminent domain act for condemnation of property are considered we are persuaded that appellants' claim cannot prevail. In determining this claim to interest, much depends upon when, in the proceedings, the taking of the property took place. While the law is most exacting that private property shall not be taken without compensation, still the condemner is not required to make that compensation until he does take, either actually or constructively."

* * * *

"Considering again our statute, it is quite clear it excludes any claim to interest, at least such as is here made. It says in plain terms that the 'actual value at that date (service of summons) shall be the measure of compensation for all property to be actually taken,' etc.; that is, the Legislature has said the actual value of the land—no more or less—shall be the compensation to be assessed. Within thirty days after final judgment plaintiff must 'pay the sum of money assessed.' He can pay no less. The statute does not require him to pay more. He has thirty days within which to make that payment. To also allow interest to be computed on the verdict, the 'measure of compensation' is some-

thing more and in addition to the 'actual value' of the property at the date of service of summons. When the statute says the actual value of the land to be actually taken shall be the measure of compensation, and that plaintiff shall have final order of condemnation upon the payment of the sum of money assessed, it has excluded all other conditions. (San Fran. & S. J. V. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473.) To allow appellants' claim of interest to prevail, we are obliged to read something into the statute not found there."

The case of *Fell v. U. P. Railroad Company*, 32 Utah 101, 88 P. 1003, cited by appellants, has no application here. That was an action for injury to livestock and the court held that

"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 liquidated or otherwise, but whether the injury and consequent damages *are complete* * * *." (Italics ours.)

Here the damage was not complete until the question of necessity of taking the property for public use had been determined (denied by appellants in this case) and there can be no damage until there is a "taking". Besides, this court has definitely construed the eminent domain statute.

Even if any such damage for any period prior to possession, by way of interest or otherwise, were recoverable (which it is not), appellants would not be entitled to any such damage without specific proof

thereof, and no such proof was offered, which of itself would prevent the recovery of interest. (*Town of Hingman v. U. S.*, 161 Fed. 295; *U. S. v. Holden*, 268 Fed. 223.)

It is also a fact that the long period which elapsed after the service of summons and before verdict, for which period appellants claim interest, was due, in large part, to the "Request For Admission" (R. 48), "Motion For Summary Judgment" (R. 49), "Motion to Sever" (R. 51), Pre-trial order of January 22, 1952 (see paragraph 5 thereof, R. 52, 56), "Notice of Motion Re Immediate Occupancy" (Add. R. 60), "Motion For Further Hearing and Supplemental Affidavit of Dean F. Brayton" (R. 79, 68), and other dilatory proceedings by appellants themselves.

In *Brown v. U. S.*, 263 U. S. 78, 68 L. Ed. 171, the court did approve the allowance of interest from the date of service of summons until the payment of the jury's award, but the decision is not based upon any constitutional right of the owner to receive such interest, but purely upon the basis of the construction of the Idaho statute by the Federal Court for Idaho, to the effect that the date of the service of summons was the date of the "taking" and the Supreme Court declared it to be its policy to follow the construction given the statute by the court of the jurisdiction where-in the case arose. Says the court:

"It is better, when possible, to act in harmony rather than in conflict with the established policy of a state."

In *U. S. v. Rogers*, 255 U. S. 163, 65 L. Ed. 566, the United States brought an action in the United States Court for New Mexico to condemn lands for reclamation purposes. The court calls attention to the conformity act which in effect provides that practice, pleadings, forms and proceedings arising under that act shall conform to the practice of the state in which the action is brought. In due course the award of compensation was made and the owners of the land subsequently made a motion for a supplemental order requiring the government to deposit additional money equal to six per cent interest calculated from the time that the lands were taken by flooding, and the court made that order. The Supreme Court comments:

“It appears that the allowance of interest was from the time of the actual taking of the land to the time deposit was made in payment for the same. * * *

“It is unquestionably true that the United States upon claims made against it cannot, in the absence of a statute to that end, be subjected to the payment of interest (citing cases). The government was seeking for purposes authorized by statute to appropriate the lands, *and it had actually taken them*, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.

“Having taken the lands of the defendant in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property (citing authority).

“In fixing the compensation the district court and the Circuit Court of Appeals in affirming the judgment followed the New Mexico statute fixing the rate of interest at six per cent. This was in conformity with the former ruling of the Circuit Court of Appeals applying the statute of Minnesota to lands appropriated in that state. *U. S. v. Sargent*, 89 CCA 81, 162 F. 81.

“The government urges that the conformity act of August 1, 1888, does not require the United States government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. The fact that the rule is in harmony with the policy of the state where the lands are situated does not militate against, but makes for the justice and propriety of its adoption. *U. S. v. Sargent*, *supra*.”

So far as we are aware, the Supreme Court of the United States has never disapproved of the foregoing pronouncement.

The trial court did not err in refusing to amend the judgment to include interest from July 12, 1951, or refusing to order payment of the jury's award upon the filing by appellants of a receipt abandoning all defenses except their claim *for such interest, which, by their application, they declared to be the only additional compensation to which they were entitled.*

So much for the question of interest.

*Evidence of Sale Price of Other Property, or of
Residential Lots Within Area Adjacent to Land
Condemned, Inadmissible*

The *only* portions of the Record which have to do with this question are hereafter set forth. Edward M. Ashton established, without question or objection, his qualifications as an expert on real estate values (Add. R. 29, 31), and he testified as to the value of the property in question. At the conclusion of his cross examination (Add. R. 40) the following colloquy, between the court and counsel, occurred:

“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.” (Add. R. 40, 41.)

* * * *

“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.

“Mr. Behle: But by the same token we have been absolutely foreclosed from testing these witnesses' opinions on the basis of comparable values in the area.

“The Court: No, you haven't been foreclosed, but you have been permitted to ask him to *consider* what those values are in the compa-

able values in the area. You haven't been foreclosed." (Add. R. 42-43.) (Italics ours.)

* * * *

"Mr. Behle: We also specifically tender proof with respect to Indian Village as a comparable 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." (Add. R. 52.)

In their Brief, appellants state:

"It will also be readily remembered that a large portion of the Deere Estate lands consisted of subdivided residential lots, more than 20 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 ex-*

amination as to lot or acreage values of property comparable to either the lots or acreage of the Deere Estate.” (Italics ours.) (Appellants’ Brief, 24, 25.)

* * * *

“We would have thought it clear that the best evidence of 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.” (Appellants’ Brief 26.)

It is quite apparent from these statements that counsel’s position at the trial was, and is now, that evidence of the value of other property should have been received, not for the purpose of testing the qualification of the witness Ashton, for, as before stated, his qualification was never questioned, but as substantive proof of the value of the land condemned. As to Indian Village, a subdivision, witness Ashton made it quite clear that the land within that project was not similar to the Deere Estate property. He testified that Indian Village “is not so hilly. It is more flat and right in the midst of development that is surrounding, that is pretty highly developed.” (Add. R. 42.) So, even if evidence of value of comparable property would have been admissible (which we do not concede), Indian Village was not comparable either in location or character and the court did not err in refusing to permit the following question to be answered:

“How much did you or your associates pay per acre for that raw land?” (Add. R. 42.)

There was no offer to show that any acreage (other than appellants claim with respect to Indian Village) was comparable to the Deere Estate property, or to show the value of any other acreage. Neither did the court err in rejecting appellants' offer of proof of the sale price of Indian Village (Add. R. 52).

(a) *Value of Other Property*

In *Maxwell v. Highway Com.* (Ia.) 271 N. W. 883 the court declares:

"Appellants also contend that the court erred in admitting the testimony of the witness, Joe Stratton, as to the sale price of other farms in a nearby community shortly prior to the condemnation of the land in question. These witnesses testified over proper objection as to the sale price of such other lands. The rule with reference to the admissibility of this kind of testimony seems to have been in some conflict until the decision in the case of *Watkins v. Wabash Railroad Co.*, 137 Iowa, 441, 113 N. W. 924. In that case many authorities upon this question were reviewed and a further discussion of the reasons of the rule there announced is deemed unnecessary here.

"In that case this court said, 137 Iowa, 441, loc. cit. 442, 113 N. W. 924, 925: 'It is to be conceded that under some circumstances testimony of this kind is admissible to show the knowledge of the witness and his competency to speak as an expert upon the subject concerning which he is being examined. This is especially true where the witness has assumed to express an opinion, and is being cross-examined for the pur-

pose of testing the weight and value of his testimony. *King v. Iowa Midland Railroad Co.*, 34 Iowa, 458; *Winklemans v. Des Moines N. W. Railroad Co.*, 62 Iowa, 11, 17 N. W. 82; *Cummins v. Des Moines & St. L. Railroad Co.*, 63 Iowa, 397, 19 N. W. 268; *Hollingsworth v. Des Moines & St. L. Railroad Co.*, 63 Iowa, 443, 19 N. W. 325. But the practically universal rule is to the effect that such testimony is not admissible as substantive evidence of the value of the property which is the subject of the controversy. *That the offer of the testimony * * * was not intended simply to show the qualification of the witness to give an opinion of the value of plaintiff's land can hardly be disputed from the record. * * * The witness had already shown his qualification by testifying to his ownership of land in that vicinity, and to his familiarity with land values in the neighborhood. Having thus shown his qualification, he had been allowed to give his testimony without objection. Thereafter, and apparently for no other reason than to corroborate his estimate and give it additional strength and influence with the jury, he was allowed to state that * * * after the condemnation proceedings * * * he had sold his own land at \$60 per acre. In this we think there was prejudicial error.'*" (Italics ours.)

The statement we have italicized is especially applicable here, for it appears from the record and from appellants' Brief, that the proffer of proof of comparative values of acreages (limited in this case to Indian Village) was for the purpose only of proving the value of the Deere Estate.

In *City of Los Angeles v. Deacon* (Cal.), 7 P.

(2d) 378, the court, after stating that the question in eminent domain is, what is the market value of the property being condemned, states:

“In arriving at an answer to this question for himself, a person of ordinary business judgment would want to know the answer to a number of preliminary inquiries. It is just possible he would want to know at what figure the property was assessed by the county assessor. He might find it of interest to know what value was put upon it by the appraisers when it was recently involved in a probate proceeding. He certainly would be interested, if it was the market value he sought to determine, in any offers that had been made for the property, and in the price at which it and property similarly situated had recently been sold. He would, most likely, be interested in the amount of profit that had been made in the use to which the property had been put.

“But conceding that all these facts would be taken into consideration by one endeavoring to determine the market value of a piece of property, it is nevertheless the settled law of this state that none of them may be proven for the purpose of establishing the market value. The procedure which is recognized as proper is, for the witness when found to be qualified to give an opinion as an expert, to state, first, what is, in his judgment, the market value of the property. (Citing authority.) On this, the examination in chief, it may not be shown: For what sum the property was assessed (citing authority); nor the value placed upon it by the appraisers in a probate proceeding (citing cases); nor the price offered for the property being condemned (citing

cases); nor yet that offered or paid for lands in the neighborhood (Spring Valley Water-Works v. Drinkhouse (1891) 92 Cal. 528, 28 P. 681; City of San Luis Obispo v. Brizzolara (1893) 100 Cal. 434, 34 P. 1083; In re Estate of Ross (1915) 171 Cal. 64, 151 P. 1138; City of Los Angeles v. Hughes (1927) 202 Cal. 731, 262 P. 737; Reclamation Dist. No. 730 v. Inglin (1916) 31 Cal. App. 495, 160 P. 1098; Palladine v. Imperial Valley F. L. Ass'n (1924) 65 Cal. App. 727, 225 P. 291; Dickey v. Dunn (1927) 80 Cal. App. 724, 252 P. 770; Fishel v. F. M. Ball & Co., Inc. (1927) 83 Cal. App. 128, 256 P. 493; Merchants' Trust Co. v. Hopkins, *supra*; and see leading case of Central Pac. R. R. Co. v. Pearson, *supra*). 'He should not be asked regarding specific facts in the examination in chief.' De Freitas v. Town of Suisun City, *supra*. On cross-examination, however, questions may be asked about these various matters: * * * prices offered and paid for other properties (citing authorities). When evidence of sales, etc., is received on cross-examination, however, it is solely for the purpose of testing the value of the witnesses' testimony; it is not in itself evidence of value of the property. (Citing cases.) Nor is the rule any different on redirect examination than it is on the opening examination in chief, even though some specific sales may have been gone into during the cross-examination. Reclamation Dist. No. 730 v. Inglin, *supra*."

In *Chicago, etc. Co. v. Muller*, (Kan.) 25 P. 210, the following is from the opinion:

"In the cross-examination of the plaintiff, the question was asked as to what sales had been

made in the neighborhood, upon which he based his judgment as to values, and, without being asked, he volunteered this statement: 'A neighbor of mine right north of me has one hundred and twenty acres, and was offered six thousand dollars.' The defendant in error moved that this statement of the witness be stricken out. The request was denied, and a proper exception made. This, we think, was error, and the court should have withdrawn the statement from the jury."

See also:

Stinson v. R. R. Co. (Minn.), 6 N. W. 784.
Helena etc. Co. v. McLean (Mont.), 99 P. 1061.
Portland etc. Co. v. Penny (Ore.), 158 P. 404.
Portland etc. Co. v. Ladd Est. Co. (Ore.), 155 P. 1192.

This court, in *Telluride P. Co. v. Bruneau*, 41 P. 4, 125 P. 399, did not hold, as appellants claim (App. Br. 27), that evidence of comparative values is admissible. It holds that it was not *prejudicial error* to *exclude* such evidence on *direct examination*. It is not, therefore, likely that the court will now hold it to be error to exclude such evidence on *cross-examination* when it is not offered to test the qualification of the witness.

(b) *Value of Subdivision Lots*

The following offer by appellants was refused:

"Mr. Behle: For the record only we again make a tender in connection with lot sales and prices." (Add. R. 52.)

Concerning this ruling, appellants state:

“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.” (App. Br. 24-25.)

It is likewise not permissible to introduce evidence of the sales price of subdivision or other lots in the vicinity of the property to be condemned.

In *City of Los Angeles v. Hughes* (Cal.), 262 P. 737, it is said:

“A number of times during the trial the court asked questions as to whether the subdivision possibilities had been taken into consideration by the witness in arriving at his estimate of the market value and was assured that this had been done. The court also personally viewed the land and had an opportunity to see its character as well as the development of the surrounding property.

“If the argument of counsel for these appellants is intended to go one step further, and it is sought to establish that the value of the land must be estimated not only on the basis of what the owners would be able to obtain for lots after subdivision had actually taken place (and the argument is open to that interpretation), we are unable to agree, nor do the cases

relied upon by these appellants support this contention.”

The court then quotes with approval certain authorities giving the correct rule for the determination of the value of the land sought to be condemned, and then observes:

“Under all of the authorities, both in this state and elsewhere, the true basis for computing the market value of land sought to be condemned, in view of evidence of its suitability for subdivision purposes, is its value as it stood on the date when, under the law, its value was to be determined, plus any increased value which it may have had on the market by reason of its suitability for subdivision into city lots.

“During the trial a witness was asked: ‘Q. Now you have a list of any sales made there that your figures are based on?’ Objection was made to this evidence on direct examination of any specific sales, but the court stated that Mr. Smith ‘could tell what he knows about sales out there.’ This the witness proceeded to do. The ruling was erroneous and objection should have been sustained.”

In 18 *Am. Jur.*, p. 881, the general rule is stated as follows:

“* * * For example, when a tract taken by eminent domain is used as a farm, the owner is entitled to have its possible value for building purposes considered; but the jury or other tribunal is not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per

lot. As a rule, projects of the owner in regard to the land are too remote and speculative.
* * *

In *Nichols on Eminent Domain*, 2d ed. at page 1170, it is stated:

“The owner cannot, for example, introduce evidence of the return that he would derive from cutting up a vacant tract of land into building lots, since this would involve pure conjecture as to how fast the lots would be sold and the price that each would bring; and the details of the possible improvement of the land, and its value, or the expected profits, or rentals after such improvement was completed, are equally inadmissible, for the same reason. The trial court cannot be too careful in excluding evidence of this character. * * *

In *Pennsylvania S. V. R. Co. v. Cleary*, 123 Pa. 442 (1889), 17 Atl. 468, the court considered the value of a tract of land which was being condemned and for which the owner claimed damage on the basis of individual building lots. The court stated:

“* * * It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, and not the lots into which it might be divided, that is to be valued. * * *

* * * *

“We do not agree with the learned judge that there was any such question for the jury in this case. The jury are to value the tract of land and that only. They are not to determine

how it could best be divided into building lots, nor to conjecture how fast they could be sold, nor at what price per lot. A speculator or investor, in deciding what price he could afford to pay, would consider the chances and probabilities of the situation as then actually existing. A jury should do the same thing. They are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in. This is a rule that is well settled, and the court should have drawn the attention of the jury to it, so as to have left no room for uncertainty on their part. They should have been told that they had nothing to do with the subdivision of this tract, the price of the lots, or the probability of their sale; but that they were to ascertain the fair selling value of the land before and after the entry by the railroad company, in order to determine the actual damage done to its owner.”

In the case of *James L. Thornton v. City of Birmingham*, 250 Ala. 651 (1940), 35 So. (2d) 545, the court held generally that while the value of property for subdivision purposes may be considered in the condemnation proceedings in ascertaining its fair market value, it is not permissible to show the prospective selling price of individual lots. The court stated:

“An analogous principle also condemns the effort of the appellant to introduce a tentative plan of a subdivision of the property, showing the prospective selling price of the individual lots therein. Evidence of value of the property for any use to which it is reasonably adapted is,

as already stated, admissible, but the proof must be so limited and the testimony restricted to its value for such purpose. Of probative tendency on this issue is the offer of a proposed plan or a possible scheme of development, and the trial court so held, but it was not permissible to incorporate in such a plan the speculative price of the individual lots.”

In accord with the foregoing authorities, it clearly appears that witness Ashton based his values of the two parcels upon a consideration of the location and character thereof, with due regard to the topography and to the highest possible use for which each parcel was suitable. He had laid out fifty subdivisions in and about Salt Lake City. He had been familiar with the Deere Estate property for 40 years and recently had made a thorough examination of it. He was familiar with the improvements on each parcel and it was upon the basis of all these facts that his valuation was based (Add. R. 31-37). The court was right in excluding evidence of the price received for separate lots in the vicinity of the residential area of the Deere Estate property.

Evidence of Separate Value of Water Right and Water System, Inadmissible.

Appellants complain that the court rejected evidence of the separate value of the water right and water system. The following is shown by the record:

“Mr. Behle: If the Court please, if we had been permitted through the witness, Ullrich, we would have proved that the water right was

worth \$10,500.00 and the distribution system \$63,700.00; of which \$25,700.00 was allocated to the distribution system within Parcel 1, the balance being the collecting works and reservoirs and the transmission lines. These are fair market values as of July 15, 1951.

“We also make a tender of proof from Mr. Ray Christensen, the City Attorney of Salt Lake City, that such distribution systems—and I am speaking of that part within Parcel 1—have an independent value of their own and that in the event of annexation it is usual for the City to acquire that system as a part of its own water system, depending, of course, on the individual circumstances, and that it does comply with specifications and upon determining its value.

“Mr. Budge: Well, of course, we object to that proof upon the ground that it is improper and incompetent and that the land has been already valued with the improvements thereon included, and for the further reason that there has been no proof of ownership of water, no evidence of ownership, and therefore that any evidence of value would be incompetent and no evidence particularly of any quantity of water that was owned or that there is any ownership of any water. It would be impossible to have any value fixed without having first established the quantity of water that was owned and used, and there is no evidence at all of that, of the area.” (Add. R. 16.)

The objection was well taken upon all grounds stated. At the time of the offer no evidence had been introduced of ownership of any water right *and none now appears in the record before this court.* However,

it will be observed from appellants' brief that their objection to the court's ruling is, that separate value was proper not only because the water system was designed to serve the Deere Estate property, but because of its value for "ultimate use elsewhere after 1952, when Oak Hills was to be connected with Salt Lake City municipal water system" (App. Br. 28-29). Oak Hills was not, on July 12, 1951, the date as of which value was to be determined, within Salt Lake City and no application for its annexation had been filed. When would it become a city subdivision? When would it be connected with the municipal water system? Where or for what purpose could the water right and system be ultimately used elsewhere than on Oak Hills, or to whom could it be sold for such ultimate use? The most that counsel claimed was that

"the distribution systems * * * have an independent value of their own *and that in the event of annexation it is usual for the city to acquire that system as part of its own water system, depending, of course, on the individual circumstances, and that it does comply with specifications and upon determining its value*" (Add. R. 16.) (Italics ours.)

Appellants offered to show a separate present value based on all manner of conjectures as to what might or might not occur in the future; without any proof that the system complied with city specifications and based upon a future determination of value. It is quite apparent that the court properly denied such offer of proof. The ruling of the court was proper

for the further reason that the water right (if there was a water right) was appurtenant to the land and the water system an "improvement". The statute, Section 104-6-1, provides that the jury must ascertain and assess

"The value of the property condemned and all improvements thereon appertaining to the realty," etc.

The California statute is identical with our own, and in *Vallejo v. Home Savings Bank*, 140 Pac. 974, it is said:

"Appellants sought by the same witness to show the market value of the improvements as separate from the realty; but the court held 'that the testimony must go to the market value of the property as a whole.' Complaint is made of this ruling, but it was strictly in accordance with the course prescribed by the Code of Civil Procedure, Sec. 1248, subd. 1, as follows: 'The court, jury or referee * * * must ascertain and assess: (1) the value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed.' It thus expressly appears that separate assessments are to be made when there are different parcels of land, and, under the familiar rule of construction, the present case is excluded by implication."

In *Los Angeles v. Klinker* (Cal.), 25 P. (2d) 826, the court quotes with approval the following

from the New York case of *Banner Milling Co. v. State*, 148 N. E. 668, 672:

“ ‘The claimant is entitled to recover the value of its physical property as it existed at the time of the appropriation. That does not mean that its value is to be arrived at by taking the value of the various elements and items making up the property separately, and considering them without reference to each other, and then adding together these sums. The claimant is entitled to compensation, not merely for so much land, so much brick, lumber, materials, and machinery, considered separately; but, if they have been combined, adjusted, synchronized, and perfected into an efficient functioning unit of property, then it must be paid for that unit, so combined, adjusted, synchronized, and perfected, as it existed at the moment of appropriation. In that limited sense, it is entitled to the ‘going value’—if such a term is permissible—of its physical property. In fixing the amount of award we will be guided by that principle.’ ”

See also *Dept. of Public Works v. Hubbard* (Ill.) 1 N. E. (2d) 383.

No Error in Dividing Parcel 28 Into Only Two Parcels for Trial

The records of this court will show that appellants on or about April 1, 1952, applied for an intermediate appeal from the trial court's order dividing Parcel 28, as described in the complaint, into two parcels for the purposes of the trial and such application was denied. Whether or not this decision was

tantamount to an approval of the trial court's order, or is *res judicata* of that question, it is nevertheless true that the trial court committed no error. As a matter of fact, Parcel 28 was, and is, only one parcel. It was in one ownership. It consists of one body of unoccupied land regarded by appellants themselves as a unit when they installed the water system, drives and other improvements to serve so much of the area as was usable. However, we made no objection to the segregation made by the court.

The authorities cited by appellants are mostly quotations from texts, but, in general, are not against our contention under the facts in this case.

How unwise and expensive it would have been for the court to order a division into six parcels as arbitrarily marked off on a plat exhibited by appellants. And appellants insisted upon a separate trial as to each parcel. Such procedure would have made it necessary to rehash all of the evidence at each trial and there would, of course, have been six verdicts and six judgments, with the possibility of six appeals. How would such procedure contribute to avoiding "an inordinately long trial with attendant burden upon court personnel and parties" as claimed by Mr. Brayton in his affidavit (R. 46)?

We always conceded that it was not only permissible, but proper, for appellants to present evidence of the location, character and condition of the property and the highest use for which any and all areas of the land were suitable, and that, based on such evidence, the jury should determine the value of the

land as a whole; but it would have been a foolish procedure to hold a separate trial for fixing the value of each of the six arbitrarily platted areas simply because one area was, in the sole opinion of Mr. Brayton, suitable for commercial purposes, another or others for residential purpose and another "of no potential commercial or residential value," but had located on it a spring as shown on said map.

Whether the trial court might have fixed different boundaries to the two parcels is not important. After all the purpose was to arrive at the market value of each parcel with all improvements, considering the highest purpose for which it was adaptable.

Severance Damages

Appellants complain of the court's ruling in striking from their "Separate Answer" (R. 21) the following averments:

"4. That by taking from these defendants a part only of the two different and separate parcels described above as Area I-D and IV-B south of Kennedy Drive, damages have accrued to the portion of said parcels owned by these defendants not sought to be condemned by reason of severance from the portions sought to be condemned by plaintiff in the sum of \$14,000.00." (R. 39.)

Please note that there is no description of the land not taken and no allegation as to how or in what manner it was damaged by the segregation. (*Tillamook County v. Johnson*, 190 P. 159.)

What do appellants claim was severed from what? They say in the above allegation that plaintiff took only parts of two parcels they designate as Area I-D and Area IV-B (see map R. 78).

Area I-D is described in the Answer (R. 29) as consisting of two parcels, one of which is north of Kennedy Drive and the other south of the Drive (both colored in yellow), which latter area, it is alleged (R. 30), is part of a parcel lying south of Kennedy Drive owned by appellants.

Area IV-B (see map) consists of one tract of 10.33 acres north of Kennedy Drive and the remainder, 5.43 acres south of Kennedy Drive, which, it is alleged, is part of another separate and different parcel owned by appellant and not sought to be condemned, extending south of Kennedy Drive.

The parcels referred to in I-D and IV-B, not sought to be condemned, are one and the same.

Counsel asserts that by striking the said allegation (par. 4, R. 39) the court *eliminated the issue* of damage to the property not taken. Such is not the fact, for the reason that in the Complaint it is alleged:

“10. That each of the parcels or tracts sought to be condemned as hereinabove referred to and set forth *is the whole of an enetire parcel or tract of property or interest in or to property owned by the aforesaid defendants.*” (R. 19.)

(This was proved by the maps "Ex. A" and "Ex. 1" and other evidence.)

This allegation is denied by appellants, and in the prayer of the Answer (which was not stricken) appellants ask:

"For severance damages to the property owned by these defendants south of the general area sought to be condemned, \$14,000.00." (R. 41.)

Under this state of the pleadings (respondent having made prima facie proof that the land was "the whole of an entire tract") the issue of whether the tract to be condemned was the whole or merely a part of appellants' holdings was just as effectively raised as by the allegation stricken by the court, which, if it had remained in the Answer, would have been deemed denied. The land referred to, not sought to be taken, is not described, ~~and~~ in appellants' denial of paragraph 10 of the complaint, (neither is it described in the stricken paragraphs), but by such denial, whether there was other land, not taken, was before the court. Appellants had the burden of proving their damages (*Tanner v. Canal etc. Co.* 40 Utah 105, 121 P. 584; *Minneapolis Dist. v. Fitzpatrick* (Minn.) 277 N. W. 394) and therefore it was their duty, in making proof of damage, to show, if such were the fact, that the property sought to be condemned was not the whole of their property, and theirs was also the obligation, if they made such proof, to prove their damage, if any, to the part of their property not taken. However, this question of severance damage was entirely ignored by

appellants. They made no proof in support of their denial, or in response to respondents' affirmative proof. Appellants assumed throughout the trial that there was no other land of which the land taken was a part, and made no offer of proof ~~of such fact~~, ^{to the contrary,} or of damage to any such land.

"Damage to land not taken will not be presumed, and unless the owner shows by competent evidence that the value of his remaining land has been diminished by the taking, compensation will be limited to the value of the land taken." 18 Am. Jur. pp. 985-6, and cases cited.

As to this final point relied upon by appellants for reversal, we contend that, like the others, it is without merit.

CONCLUSION

This case has traveled a rough road. Much time has been consumed and much expense incurred because of numerous motions filed by appellants in the court below, by their application for intermediate appeal, proceedings for an extraordinary writ and by this appeal. Following the trial there never was any objection to the amount of the verdict, or to any proceedings by which the amount of compensation was determined, until the court refused to amend the judgment so as to award interest from July 12, 1951.

In their Application For Payment they asked for nothing more than to leave open for future litigation the question of such interest, but because their

claim for interest was denied (and no court could properly have done otherwise), they appeal to this court for a reversal based upon the particular "points" set forth in their Brief and which we have discussed. But, even here, they really abandon all such points except the one relating to interest, for in their Brief, pp. 21-22, they say:

"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, S 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, Illi-

nois, and to another recent decision of this court in *Simmons v. Wilkin*, 80 Utah 362, 15 P. 2d 321."

Assuming such an attitude, can this court be expected to consider any assignments of error other than the one relating to interest? Why bother about other points if appellants' grievance is really predicated upon the refusal of the court to allow interest? Is the State to be put to the expense of re-litigating all the questions covered by the "Points Relied On" when appellants, in effect, confess that the award of the jury is quite satisfactory to them if only they can have interest on it?

We have endeavored to be of assistance to the court in the foregoing discussion and can only say in conclusion that the judgment should be affirmed.

Respectfully submitted,

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