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State of Utah et al v. Burton F. Peek and Charles D. Wiman : Petition for Rehearing

Utah Supreme Court

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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, Chair-
man; 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, Deceased.
Defendants and Appellants.

Case No.
7867

PETITION FOR REHEARING

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STATEMENT OF FACTS

On December 23, 1953, this court rendered an opinion and judgment granting appellants a new trial. Respondents hereby respectfully apply for a rehearing upon the grounds hereinafter set forth.

POINTS RELIED UPON

This court erred:

1. In holding that the trial court should have admitted evidence of the separate value of the water system located upon the land sought to be condemned.
2. In holding that trial court erred in refusing to admit evidence of the value of other property similar to that sought to be condemned.
3. In holding that it was prejudicial error for the trial court to strike from appellant's answer certain allegations with reference to severance damages.

We shall discuss these points in their order.

ARGUMENT

Evidence of Separate Value of Water System.

The water right was appurtenant to the realty and the water system, consisting of storage tanks, conduits of the distributing system, water hydrants, etc., were, of course, improvements. The Statute, Section 104-6-1 (Utah Code Annotated 1953, Sec. 78-34-10) provides that the jury must ascertain and assess:

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

This Statute has been construed so many times by the courts that there ought to be no difference of opinion as to its meaning. In the following cases cited in respondent's brief, pages 31 and 32, it is held that

while improvements may be described in detail by the witnesses (as was done in this case), the value of improvements separate from the realty may not be shown. *Vallejo v. Home Savings Bank* (Calif.) 140 Pac. 974, *Los Angeles v. Klinger* (Calif.) 25 Pac. 2d 826. In *Shouder Creek Co. v. Harold* (W. Va.) 45 S.E. 2d 513, it is said:

“To establish the value of land, the presence of crops, trees, shrubs and timber upon it, and of coal, oil, gas, stone and other minerals and valuable deposits upon or under the surface may be shown. . . . Consideration, however, should be confined to the land and its contents and elements, together and as an entirety when there is no separate ownership with respect to any of them. . . . Compensation for land should be ascertained and determined on the basis of its value at the time it is taken or damaged. All of its components may be considered in arriving at the value of the unit, the land itself, but none of them, when not separately owned may be given an independent value from the land as land.”

In *Seattle, etc., Co. v. Roeder* (Wash.) 70 Pac. 498, the court in upholding an instruction by the trial judge uses this language:

“If a piece of land taken contains valuable improvements, those improvements apart from the land may not be considered; yet certainly the character, nature and extent of the improvements and the revenue derived therefrom are as essential to be considered in arriving at the value of the land as the land itself, or the uses to which it may be put.”

None of the authorities cited by respondent, or any others, are discussed or referred to in this court's opinion in support of its holding; but the court disposes of the matter in the following language:

“Respondents objected to this evidence on the ground that there was no showing that appellants had any water right, but the court excluded the proffered evidence without giving appellants an opportunity to make a showing of such ownership apparently on the ground that such evidence was not admissible even if such showing were made. Respondents' own witnesses treated this as a valuable property right of appellants. It undoubtedly would have aided the jury in determining the true value of appellants' property had all of these details been shown to them, for certainly they could more accurately assess the valuation of this property if they had before them the value which the experts placed on this system in arriving at their overall value of the property, and could test such valuation by comparison with the opinion of any expert on the value of that kind of property. The value of such a utility is especially one which calls for expert opinion because such property is not bought and sold every day on the open market, so expert opinion thereon is almost mandatory.”

While counsel for appellant did not include in the record before this court proof of ownership of the water right, they did offer proof thereof which was received; however, it is true, as stated by the court, that evidence of the value of the water right and water system separate and apart from the value of the land, was excluded.

If the above declaration of this court is to be the law of this State in eminent domain actions, of course, the decision must be followed, but the consequences of it, we feel, are not fully appreciated by the court for, according to our construction of the court's language, it means that if a tract on which a home is located is condemned, the court must admit evidence of the separate value of the house, of the sprinkling system, of the heating equipment, electric and gas conduits, orchard and shrubbery. They are improvements just as the water system is an improvement. No real property, so far as we are advised, whereon improvements have been placed, is valued in any such fashion. A purchaser or an appraiser goes over the property, notes the character and structure of the buildings thereon, their state of repair and what facilities are available for the enjoyment of the property; whether there is curb and gutter, and the condition of the premises generally, and then makes a valuation of the entire property as a unit, and that is the method which has been adopted in condemnation proceedings in the states where the statute reads exactly as does our statute. Of course, it is the prerogative of this court to refuse to follow the construction placed by other courts on a statute identical with our own, but if the court determines to adhere to the ruling of which we complain, we must respectfully request that it make definite and certain its intention that each and all improvements on the condemned property shall have a separate value placed thereon. This definiteness is necessary to guide the court on the re-trial. If the water system is to be valued separately, we

ought to know whether the court intends that there shall be a separate valuation of the gas and electric distributing systems, the curb and gutter, and whether or not the constituent parts of the water system shall likewise be valued separately in order to arrive at the total value of said system. For example, the water system consists of two very large storage tanks; are they to be separately valued? The water right from the spring and the pipes and conduits which were designed to convey the water to the residential area, must they be separately valued? The trial court and the parties to this action ought to know whether there are any limitations as to the details of valuation so that error will not be committed. We believe there can be no difference in principle with respect to the valuation of land together with the improvements and the value of land with mineral deposits. Improvements are as much a part of the land as the mineral within it, and it is uniformly held that where there is no separate ownership of the minerals apart from the land, minerals may not be separately valued. In the note to 156 A.L.R., page 1416, the authorities are collected in support of the following text:

“With remarkable unanimity the courts hold that in determining the compensation in eminent domain proceedings for the land to be condemned, the existence of valuable mineral deposits in the land taken constitutes an element which may be taken into consideration if and insofar as it influences the market value of the land. The reason for this rule is that the measure of

compensation in eminent domain proceedings is the market value of the land to be condemned as a whole with due consideration of all the components that make for its value. This rule has been expressed in a great number of decisions and has also been recognized by all the leading text-writers on this subject. It has been applied indiscriminately to all forms of mineral deposits, such as limestone, ore, gold, fire clay, coal, sand and gravel, and stone.

“Occasionally the rule has been expressed by the negative statement that the award may not be reached by separately evaluating the land and the deposits, since the latter, being only one element among many in determining the market value of the land, cannot be considered as an independent factor the value of which is to be simply added to the value of the land.”

EVIDENCE OF VALUE OF SIMILAR LAND

Here, again, in deciding that the value of similar land should have been received, this court has either disregarded, or rejected as unsound in principle, the authorities cited in our Brief at pages 19-23. We think the court should reconsider this question. As stated in *Watkins v. Railroad Co.* (Iowa) 113 N.W. 924, 925:

“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.”

In that case, as here, the offer of such testimony was not intended simply to show the qualification of

the witness, but was intended to adduce substantive evidence of the value of the land to be condemned.

In *Weber County v. Ritchie*, 98 Utah 276, 96 Pac. 2d 744, plaintiff offered evidence of what another land owner had received for his land *for the same project*. It appeared that the amount received was *for value, plus segregation damage*, and this court held that even if such had not been the case, it was questionable whether such evidence was proper under the definition of market value as applicable to condemnation proceedings, and in *Telluride Power Co. v. Bruneau*, 41, Utah 4, 125 Pac. 311, the court holds that it was not prejudicial error to exclude evidence of comparative values *on direct examination*, such evidence being admissible *only on cross-examination to test the qualification of a witness* who has testified to the value of the property sought to be condemned. In that case a witness had testified to the value of the land. The following is from the court's opinion:

"Then, in response to further questions propounded to him on his direct examination he further stated that he was acquainted with sales of lands similar in character to the defendant's land, and that he had knowledge of the sale of a particular tract near the defendant's land, and that he obtained such information from the agent of the parties who had purchased the tract. Thereupon the court, on its own motion, observed: "You are seeking to prove particular sales, are you? Counsel for Plaintiff: Yes, sir." The court stated: "That is not admissible under the rule on direct examination"—and observed that such things may be inquired about on cross-examina-

tion, and then on redirect, but not on the direct examination. "Counsel: Do I understand the court to rule, then, that the witness on direct examination cannot give his statement of particular values of similar property? Court: Yes; that is the uniform practice." This ruling is complained of. As stated in 1 Elliott, Ev., section 180, Jones, Ev. (2d Ed.), section 168, and 13 Ency. Ev., pp. 457-463, there is a marked conflict of opinion as to the competency of evidence on direct examination to show the sale price of other lands of general similarity in location, character, and adaptability to use of the lands sold with those the value of which is in question, and of sales made about the time the value of the latter must be established. The cases supporting the affirmative and those the negative of the proposition are there noted. Even though the conclusion should be reached that such sales may properly be shown on the direct examination, yet we are clearly of the opinion that in this instance the plaintiff was not harmed by the ruling. The witness had already stated that he had bought and sold lands; that he knew of sales of lands similar to that of the defendant; that he knew the market value of such lands and the market value of the defendant's land, and stated what that was, and the amount which in his opinion the value of the defendant's land was depreciated by reason of the construction of the power line over it. In such case the plaintiff was not prejudiced even though it be assumed that it, on the direct examination of the witness, was entitled to show sales of other lands. (Seattle & M. Ry. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 739; Teele v. Boston, 165 Mass. 88, 42 N.E. 506; Sargent v. Merrimac, 196 Mass. 171, 81 N.E. 970, 11 L.

R. A. (N.S.) 996, 124 Am. St. Rep. 528.) At any rate, it is not such an error, if there be one, as requires a reversal of the judgment.”

In the case at bar the expert witnesses had all testified that they had bought and sold lands, that they knew of the sales of numerous subdivisions in and about Salt Lake City; that they knew the market value of such lands and of appellants' land the value of which they gave, just as witnesses testified in the Telluride-Bruneau case.

If the refusal to admit evidence of the value of other lands was not prejudicial error in the Telluride-Bruneau case, why should it be prejudicial here? Were we not justified and was the trial court not justified in relying upon the former ruling of this court that such evidence might be excluded without prejudice? Are we to be obliged to re-try this case for an error which this court in its former decision declared was not an error? We again respectfully request this court to reconsider its decision and to recognize the rule that it has itself announced and to also consider the cases cited in our brief which apply not only to acreage tracts, but to subdivision lots as well. (Respondent's Brief, pages 24-28.)

The Supreme Court of Oregon gives a very cogent reason why evidence of the sale price of other lands is not admissible:

“Over the objection of the plaintiff, the court received in evidence the testimony of the

witness, B. A. Kliks, an owner of land in the vicinity of the land being condemned, that a real estate man had made him an offer of \$1,600.00 for an acre and a half of his land. The ruling is assigned as error. The assignment must be sustained. It is well settled in this and other jurisdictions that offers of sale and purchase of similar land in the vicinity are inadmissible, for the reason, among others, that such evidence places before the court or the jury an absent person's declaration or opinion as to value, while depriving the adverse party of the benefit of cross-examination. *Portland & O. C. Ry. v. Ladd Estate Co.* 79 or 517, 155 P. 1192; *Hine v. Manhattan R. Co.* 132 N.Y. 477, 30 N.E. 985, 15 L. R. A. 591; *Davis v. Charles River Branch Railroad Co.* 65 Cush, Mass. 506; *Helena Power Transmission Co. v. McLean*, 38 Mont. 388, 99 P. 1061; *Blincoe v. Choctaw, O. & W. R. Co.* 16 Okla. 286, 83 Pac. 903, 4. L. R. A. N.S. 890, 8 Ann Cas. 689; 18 Am. Jur., *Eminent Domain* 996, Para. 351; 2 *Lewis on Eminent Domain*, 1146, Para. 666. Defendants' counsel do not question the rule, but they seek to justify introduction of the otherwise incompetent evidence because of certain testimony concerning Mr. Kliks' property given by one of the witnesses for the plaintiff. This evidence, however, was brought out on cross-examination of the plaintiff's witness; and, in any event, nothing that he or any other witness testified to warranted or excused violation of the rule of evidence in question."

State v. Cerruti (Ore.) 214 Pac. (2) 346.

STRIKING OUT ALLEGATIONS IN APPELLANTS' ANSWER AS TO SEVERANCE DAMAGES

There was no prejudicial error in striking these allegations if appellants might have offered evidence of such damage with the stricken allegations omitted. It is clearly pointed out in our brief at pages 35-36 that under the allegations of the complaint and appellants' denial in their answer, proof of severance damage might have been offered. 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 entire parcel or tract of property or interest in or to property owned by the aforesaid defendants." (R. 19.)

In their answer, appellants denied this allegation and prayed for severance damages in the sum of \$14,000.00. Appellants elected to make no proof disputing the allegation that the property sought to be condemned "is the whole of an entire parcel or tract," and in their answer they gave no description of other land not taken, claimed to have been damaged by segregation. Furthermore, they offered no proof that they had other lands that were severed from the condemned area nor did they offer to prove that they were damaged.

It was not prejudicial error to strike the allegations with reference to severance damages for the additional reason that if appellants were obliged to file

any answer (see 18 American Jurisprudence, page 970, Section 326), there was no requirement that their answer contained more than a mere appearance. Our statute, Section 78-34-7, provides:

“All persons in occupation of or having or claiming an interest in any of the property described in the complaint or in the damages for the taking thereof, though not named, *may appear, plead and defend*, if in respect to his own property or interest or that claimed by him, in the same manner as if named in the complaint.” (Italics ours.)

The Supreme Court of Montana, construing an identical statute, said:

“The only effect of a default is to shut out the defendants from participating in the proceedings. The court must nevertheless determine whether the use for which the property is sought to be appropriated is a public use, limit the amount taken to the necessities of the case and ascertain the damages under the procedure and in accordance with the standard provided for in Sections 2220, 2221 and 2224.

* * * *

“But counsel says that defendants’ claims for damages should have been set up in their answers by way of counterclaim, thus giving plaintiff notice of their character and amount so that it could be prepared to meet them. The answer to this contention is that there is no provision in the title touching condemnation proceedings, re-

quiring defendants to set up their claims for damages in their pleadings in any form."

The damages must of necessity be ascertained because under the Constitution of this State, providing that property may not be taken for public use without just compensation, the court must at all events determine what is "just compensation." In the same case, the Montana court uses this language:

"Objection was made to certain evidence tending to show damage to portions of defendants' lands not actually traversed by the railroad and not described in the petition. It is said now that the claims for damages in this behalf should have been specially pleaded, and plaintiff cites several Illinois cases in support of this contention, among them: Stetson v. C. & E. R. Co., 75 Ill. 74; Chicago & I. R. Co. v. Hopkins, 90 Ill. 316; Johnson v. Freeport & M. R. Co., 111 Ill. 413. It will be seen on examination of these cases, however, that the Illinois statute permits the defendant in such cases to file a cross-petition in order to set forth more fully and accurately his claim. But our statute contains no such provision. Besides, as we have seen, the lands of the different defendants in this case are all compact bodies, and it is clearly within the purview of the court's duty to ascertain what damages have accrued, not only as to the part described in the complaint, but also to the whole of the body, a part of which only is taken. Such damages are not special in the proper meaning of that term."

Yellowstone Park R. Co. v. Bridger Coal Co., 87 Pac. 963-966.

How then can it be said that the court committed error in striking out allegations which appellants were never under any necessity to set forth in their answer?

We respectfully submit that the court's decision is entirely erroneous in holding:

- (a) That the water system should have been valued separately;
- (b) That evidence should have been received of the value of similar lands, and
- (c) That appellants were prejudiced by the striking out of the allegations in their amended answer with reference to severance damages.

We cannot think that this court upon further reflection will desire this decision to stand. Furthermore, appellants were never really dissatisfied with the award of the jury. What they wanted was interest from the date of the service of summons, to which this court very properly holds they were not entitled. In proof of the fact that appellants were satisfied except as to the matter of interest, the court will find at pages 21 and 22 of appellants' brief the following:

"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.”

Why should this court put the parties to the great expense of a protracted retrial when appellants themselves say that it is not necessary and that all they ask is a computation of interest and when, as we have shown in the preceding pages of this argument, no prejudicial error was committed?

We respectfully submit that a rehearing should be granted for the correction of the manifest errors in the court's decision.

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