

1954

Weber Basin Water Conservancy District v. Albert N. Moore et al : Brief of Plaintiff

Utah Supreme Court

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E. J. Skeen; Howell, Stine and Olmstead; Attorneys for Plaintiff;

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IN THE SUPREME COURT
of the
STATE OF UTAH

WEBER BASIN WATER CONSERVANCY
DISTRICT,

Plaintiff and Appellant,

vs.

ALBERT N. MOORE AND ALICE V. MOORE,
HIS WIFE, ROY PEAD AND MINNIE S.
PEAD, HIS WIFE,

Defendants and Respondents.

Brief of Plaintiff

FILED

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IN THE SUPREME COURT
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STATE OF UTAH

WEBER BASIN WATER CONSERVANCY
DISTRICT,

Plaintiff and Appellant,

vs.

ALBERT N. MOORE AND ALICE V. MOORE,
HIS WIFE, ROY PEAD AND MINNIE S.
PEAD, HIS WIFE,

Defendants and Respondents.

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court of Summit County, Utah, made and entered by the Honorable Martin M. Larson, Judge, on November 20th, 1953. Notice of appeal therefrom by the plaintiff was duly filed with the Clerk of the District Court and served on defendants on December 18th, 1953. A deposit of the sum of \$300.00 as security for costs on appeal was likewise made on December 18th, 1953 (R. 94, 94A, 95). Including among other items in the record on appeal, which record was filed in this Court on January 26, 1954, are the Complaint of the plaintiff, the Answers of the defendants, the exhibits introduced

during the course of the trial, a transcript of all the evidence, the memorandum decision of the lower Court, the motion of the defendants to amend the proposed findings of fact and conclusions of law, the findings of fact, conclusions of law, and the judgment as signed and entered by the lower Court.

THE PLEADINGS, FINDINGS, CONCLUSIONS AND JUDGMENT

Plaintiff's complaint was in form than of an action to condemn certain lands and improvements thereon of the defendants for use as a dam site in connection with the construction of the Wanship Dam and Reservoir, in Summit County, Utah, as a part of the water development and conservation program embodied in the Weber Basin Project. Defendants' answers thereto created issues as to the amount of compensation to which they were entitled by reason of the lands taken, and damages to their lands not taken. These were the issues upon which the case was tried, and, accordingly we do not deem it necessary to set forth herein the complaint and answers as such.

The case was tried to the court without a jury on October 6th, 1953, and following its submission for decision by the parties, was taken under advisement. On November 12th, 1953, the court made and entered a Memorandum Decision, in writing, of the case (omitting formal parts), as follows:

MEMORANDUM DECISION

“This matter, an action in condemnation, came on before the court, sitting without a jury. The court heard the evidence adduced on behalf of the parties and the arguments of counsel, and the matter was submitted to the court for determination and decision.

“The action involves the condemnation of a considerable area of land in the center of a ranch just south of Wanship. The land is sought as a site for a reservoir to conserve the waters of Weber Basin. The ranch lies along the bottom of the canyon or draw, down which a branch of Weber River flows.

“The choice land along the bottom of the draw, and which is subject to and some of which is irrigated, is all within the part condemned. The ranch extends up on both sides of the draw, the hillside land being valuable only for grazing. 219.53 acres sought to be condemned covers all the arable land in the ranch, and takes in all of the buildings and improvements, including a house, corral, barns, sheds, machine shelters, etc., most of which are very substantially constructed and would probably stand for fifty years more.

“The dam of the proposed reservoir would be across the canyon or draw near the lower end of the ranch. The strip to be taken encompasses approximately 130 acres of hay and fine pasture lands, a considerable tract of hay land of lesser quality; and, along the stream, cottonwoods and other trees providing shade for animals in the summertime, and storm shelters and wind breaks in the winter.

“The figures and values placed upon the various parts or parcels of the property sought to be condemned by the witnesses covered a rather wide range, such as variations from \$12,000 to \$28,000 for the improvements, and from \$72,000 to \$97,000 as the total value of the ranch as it stands.

“The court finds the following values: The entire ranch, as is, \$84,000; improvements, \$20,000; value of the land included within the condemnation, \$35,750. Value of the land not taken \$28,250; or the total of \$84,000.

“The water rights in connection with the lands taken are not sought by the condemnor. They have a value, as fixed by the only witness who appraised them, and which seems reasonable to the court, of \$4,675. Since the condemnor does not seek the water right, this sum is deducted from the aforesaid value of the land taken, leaving the loss to the condemnee in land taken of \$31,025. The value of the water added to the value of the land not taken leaves in the condemnee a value of \$32,825.

“The court finds the severance damage to the lands not taken by the taking, which separates the two tracts remaining so they can not be used together, and requires considerable work and attention with the animals to graze both strips effectively, since there will be no direct trail or road from the one strip to the other, in the sum of \$16,304, making the total damage to the condemnees by the condemnor in the taking of the property sought, in the sum of \$67,329.

“Plaintiff is therefore entitled to the possession of the lands sought, as described in Paragraph 7 of the complaint, and defendants to receive from the plaintiff the sum of \$67,329, and their costs herein expended. Let judgment be entered accordingly.

“Counsel for plaintiffs are to prepare Findings of Fact, Conclusions of Law, and Judgment.”

Following the entry of the Memorandum Decision plaintiff prepared proposed findings of fact, conclusions of law, and judgment, in which proposed findings was included verbatim, as Paragraph 9 thereof, the statement of the court as set forth in its Memorandum Decision as to the amount, nature and character of the lands and improvements sought to be condemned, and, as Paragraph 14, the statement of the court of its findings as to values and damages, (R. 87, 88).

Defendants thereupon moved the court to amend Paragraph 9 of the proposed findings, in certain particulars, and the court, before signing the same, did amend such paragraph in part as requested by the defendants. We do not deem it necessary to this appeal to set forth the findings, conclusions and judgment in full, but what we conceive to be the pertinent parts thereof are, omitting formal parts, as follows:

FINDINGS OF FACT

“1. Plaintiff is a Water Conservancy District created and existing under and by virtue of Chapter 9, Title 73, Utah Code Annotated, 1953, with powers of eminent domain as in said laws provided.

“2. * * * *

“3. A part of the Weber Basin Project consists of the construction of what is known as the Wanship Dam and Reservoir in Summit County, Utah. Wanship Dam is to be located on the Weber River about one and one-half miles South of Wanship, and will be an earth fill structure about 155 feet high and 1,900 feet long. The reservoir capacity is about 60,000 acre feet. Such a dam and reservoir upon the upper reaches of the Weber River above Wanship is essential to the Weber Basin Project.

“4. * * * * *

“5. The use to which the property hereinafter described and in this action sought to be condemned will be put is the location and construction of the Wanship dam, the Wanship reservoir, the dam spillway, the dam outlet works, and the relocation of a portion of U. S. Highway No. 189, made necessary by the construction of said dam and reservoir, and the providing of an area within which to do the construction work thereof. The taking of the property hereby sought to be condemned is necessary in conformity with the aforesaid contract, in the construction of the Weber Basin Project as aforesaid, in providing for the construction of the Wanship dam, the Wanship reservoir, the dam spillway, the outlet works and the relocation of a portion of Utah Highway 189, as aforesaid.

“6. * * * * *

“7. The property of the defendants, of which that portion in this action constitutes but a part, consists of 630 acres in Summit County, Utah, more particularly described as follows: (description of property).

“The portion thereof which is in this action sought to be condemned consists of 219.53 acres of the aforesaid tract, and is more particularly described as follows: (description of that taken).

“8. The estate in this action sought to be condemned is the fee simple title to the tract of land last above described.

“9. The 219.53 acres sought to be condemned covers much of the arable land in the ranch, and takes in all of the buildings and improvements, including a house, corral, barns, sheds, machine shelters, etc., most of which are very substantially constructed and would probably stand for fifty years more.

“10. * * * * *

“11. * * * * *

“12. No benefits will accrue to the portion not sought to be condemned by the construction of the improvements proposed by the plaintiff.

“13. * * * * *

“14. The court finds the following values: The entire ranch, as is, \$84,000.00; improvements, \$20,000.00; value of the land included within the condemnation, \$35,750.00. Value of the land not taken, \$28,250.00; or the total of \$84,000.00;

“The water rights in connection with the lands taken are not sought by the condemnor. They have a value, as fixed by the only witness who appraised them, and which seems reasonable to the court, of \$4,675.00. Since the condemnor does not seek the water right, this sum is deducted from the aforesaid value of the land taken, leaving the loss to the condemnee in land taken of

\$31,025.00. The value of the water added to the value of the land not taken leaves in the condemnee a value of \$32,825.00.

“The court finds the severance damage to the lands not taken by the taking, which separates the two tracts remaining so they can not be used together, and requires considerable work and attention with the animals to graze both strips effectively, since there will be no direct trail or road from the one strip to the other, in the sum of \$16,304.00, making the total damage to the condemnees by the condemnor in the taking of the property sought, in the sum of \$67,329.00.”

CONCLUSIONS OF LAW

“A. That the use to which the property herein sought to be condemned is to be applied is a use authorized by law.

“B. That the taking by plaintiff of the property, and the whole thereof, is necessary to such use.

“C. That the plaintiff is entitled to the relief prayed for in its complaint, and the property described in plaintiff's Complaint and hereinafter particularly described should be taken and condemned for public use and for the uses and purposes described in plaintiff's Complaint, reference to which is hereby made, upon payment being made by plaintiff to defendants jointly, within thirty (30) days from the date of final judgment, of the sums, assessed as follows:

(1) The sum of \$51,025.00, being the value of the property condemned, together with all improvements thereon, and the sum of \$16,304.00, being the damages accruing to the portion of defendants' property not sought to

be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff, or a total of \$67,-329.00.

“D. Upon the payment of the sums assessed as aforesaid, the plaintiff should receive, and the court shall make, a final judgment of condemnation in the manner provided by law, which final judgment of condemnation shall describe the property condemned and the purposes of such condemnation. The following is a description of the property herein condemned. The fee simple title in and to: (here follows the description of the 219.53 acres taken).”

JUDGMENT

“ * * * * *

“NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:-

“1. That the use to which the property herein sought to be condemned is to be applied is a use authorized by law, to wit: for the location and construction of the Wanship Dam, a portion of the Wanship Reservoir, the dam spillway, the dam outlet works and the relocation of a portion of U. S. Highway 189, made necessary by the construction of the said dam and reservoir and the providing of an area within which to do the construction work thereof, which dam and reservoir are for the diversion, storage and distribution of water of the Weber River for irrigation, municipal and industrial use, generation of electric power, flood control and recreation.

"2. That the taking by the plaintiff of said property and the whole thereof, is necessary to such use.

"3. That the property described in plaintiff's Complaint and hereinafter particularly described, be taken and condemned for the public use and for the uses and purposes hereinabove described upon payment being made by plaintiff to defendants jointly within thirty (30) days from the date hereof, of the sums assessed as follows:

(1) The sum of \$51,025.00, being the value of the property condemned, together with all improvements thereon, and the sum of \$16,304.00, being the damages accruing to the portion of defendants' property not sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff, or a total of \$67,329.00.

"4. Upon the payment of the sums assessed as aforesaid, the court shall make and enter a final judgment of condemnation in the manner provided by law which final judgment of condemnation shall describe the property condemned and the purposes of such condemnation. The following is a description of the property herein condemned. The fee simple title in and to (description of 219.53 acres described).

"5. The plaintiff is entitled to possession of the property hereof, and no interest shall accrue upon the sums assessed as aforesaid and paid within thirty (30) days from the date hereof.

"6. The defendants shall have and recover their costs herein expended in the sum of \$36.60.

“7. No water or water rights of defendants shall be included in the judgment of condemnation.

“8. At the time of commencing construction of the relocated highway upon the lands herein condemned, plaintiff shall construct substantial fences upon the perimeter of the lands taken which border upon the lands of defendants not taken.”

STATEMENT OF POINTS RELIED UPON FOR REVERSAL OF THE JUDGMENT

Plaintiff asserts that the findings of the lower court as to the value of the property condemned, which findings of value were incorporated into and became the basis for the conclusions of law and judgment, are without support in the evidence.

REVIEW OF THE EVIDENCE

As plaintiff's appeal is grounded upon the sole point that the lower court's findings as to the value of the property condemned is without support in the evidence, we will at this point confine our review of the evidence to only so much of the testimony of the witnesses, and to the exhibits, that have a bearing on this matter. Four witnesses in all testified upon the subject of value and damages, two for defendants, and two for plaintiff. As this burden was on defendants, their witnesses were the first to testify.

Defendants' first witness upon the subject of values and damages was Marcellus Palmer (R. 163). This witness did not purport to have any experience in the buying and selling of land of the type involved, or any other type, but as he described himself (R. 165)

“A. I have a private business in Salt Lake dealing with land utilization, and I am a consultant.

His process, as he further described it, (R. 166-178), was to go upon the land and analyze the grasses and crops it produced, and from that analysis arrive at a conclusion of its value. Despite objections of the plaintiff as to his patent lack of qualifications to testify as to values of the property in question, as those values are contemplated by our laws of eminent domain, he was nevertheless permitted to give his opinions. His testimony as to value of the lands and improvements taken, and damages to the lands not taken, is as follows:

Total damages, \$80,941.00—R. 177

Value of Improvements Taken—\$27,000.00—R.
168

Severance damages—\$20,000.00—R. 177

Thus it becomes a matter of simple arithmetic as to the value of the lands taken, namely, \$80,941.00, minus the value of the improvements, and minus the severance damages, or \$33,941.00. This is further confirmed by his testimony on cross examination (R. 179), that the value of the lands and improvements was \$60,941.00. Deducting the value of \$27,000.00 he assigned to the improvements, leaves \$33,941.00 as the value of the land taken, exclusive of improvements.

On cross examination, he further testified, however, that the value of the whole ranch, before taking, was \$90,000.00 (R. 179, 185). That after the taking the portion left had a value of \$37,100.00 (R. 185). It is thus to be seen that by deducting the value left after

the taking from the value of the whole ranch before the taking (\$90,000.00—\$37,100.00), there was left \$52,900.00, as defendants' total damage—land, buildings and severance—not \$80,941.00 as he had testified to on direct examination. Deducting severance damages and improvement values from this figure of \$52,900.00, leaves \$5,900.00 as the value of the land taken.

Further, he testified (R. 190) that his land values included the value of water rights, and he did not have an opinion of the value of the water rights independent of the value of the land.

To summarize Mr. Palmer's testimony as to value of the land taken with the water rights, but without the improvements, it was \$33,941.00 when testifying on direct examination, and \$5,900.00 when testifying on cross examination

The next witness to testify was Alden S. Adams, a real estate salesman and fee appraiser (R. 198). His testimony on the value of the land taken, value of improvements taken, and damages to the remainder, was as follows:

Value of improvements—\$28,000.00—(R. 203)
Severance damages—\$20,000.00—(R. 206)
Total value of lands and
improvements taken, and
severance damages—\$81,750.00—(R. 206)

Thus, in his opinion, the value of the land taken, not including improvements, was \$81,750.00 minus \$28,000.00, and minus \$20,000.00, or \$33,750.00. This latter figure was further arrived at by him by breaking down the land taken at varying values. Thus he testified there were 65

acres of meadow land taken at \$400.00 an acre, or a total of \$26,000.00 (R. 204); 150 acres of foothill grazing land at \$18.00 an acre, or \$2,700 (R. 205); 18 acres of pasture at \$272.00 an acre, or \$4,900.00 (R. 204); and a strip of roadway worth \$150.00 (R.205). These items total \$33,750.00, as the value of the land taken, with the water rights, but exclusive of improvements (R. 219).

Now, before proceeding to the evidence of the plaintiff as to values, we would probably be remiss if we did not invite the court's attention to the testimony of the witness, Fay Bates, a neighbor, who was subpoenaed by the defendants. As disclosed by the record (R. 158-163), sometime prior to the trial, Mr. Gibson and Mr. Faust, defendant's attorneys, called on Mr. Bates. Without disclosing their identity they inquired of him if he would sell his land, and he replied it wasn't for sale. They then asked him if he could be "induced to sell it" (R. 161) and he replied he probably would if he could get enough money for it. When pressed for a price he finally put a figure of \$750.00 an acre for his meadow land, and \$30.00 an acre for his range land. On cross examination he was asked if Mr. Gibson and Mr. Faust then offered to buy it, and he replied they had not (R. 163).

Now for plaintiff's witnesses. The first was Mr. Carl A. Torgeson, a real estate broker. His testimony as to value of land taken, value of improvements taken, and damages to lands not taken, was as follows:

Value of improvements—	\$13,555.00—R.	229
Value of land—	20,785.45—R.	229
Severance damages—	9,470.65—R.	229
Total	\$43,806.10	—R. 229

These values as to the lands taken also included the water rights. He testified that the value of the land without the water rights would be \$75.00 an acre less for 65 acres (R. 230). Multiplying this out it amounts to \$4,875.00 to be deducted from the value of the land taken as noted above, which would reduce that figure from \$20,785.45 to \$15,910.45.

The other witness who testified for plaintiff on the matter of values was Fred Froerer, a realtor. His testimony as to value of land taken, value of improvements taken, and damages to lands not taken, was as follows:

Value of land taken—	\$26,585.00—R. 254
Value of improvements	
taken—	12,000.00—R. 254
Severance damages—	8,352.00—R. 253
Total	\$46,937.00 —R. 254

His value of the land taken included the water rights, and he did not attempt to value the land independent of the water.

In addition to the testimony of the foregoing witnesses, there was received as Exhibit "E" (R. 195) the written contract whereby the defendants Pead purchased from the defendants Moore the ranch in question, including all of the improvements, large numbers of livestock, and machinery and other personal property. The contract bears date of May 1, 1952, which was fifteen (15) months prior to the commencement of the action, and less than eighteen (18) months prior to the time of trial. The over all price as shown by the contract was \$96,600.-

00, of which amount \$53,158.00 represented the value of the lands, buildings and water rights, and \$43,442.00 represented the value of the livestock, machinery and other personal property.

POINTS TO BE ARGUED

The points to be argued by plaintiff are, as follows:

- I. The findings of the lower court as to the value of the property condemned are without support in the evidence.
- II. The relief to which the plaintiff is entitled:
 - a. To a retrial upon the issues of the value of the property condemned—both land and improvements.
 - b. To a retrial upon the issues of severance damages.

ARGUMENT

I

THE FINDINGS OF THE LOWER COURT ON THE VALUE OF THE LAND TAKEN DO NOT FIND SUPPORT IN THE EVIDENCE.

As heretofore stated, this appeal is grounded upon the sole point that the evidence does not support the lower courts findings of fact insofar as they relate to value of the land taken by the condemnation.

We again refer to Paragraph 14 of the Findings of Fact made and entered by the court. This finding is as follows:

“The court finds the following values: The entire ranch, as is, \$84,000.00; improvements, \$20,000.00; value of the land included within the condemnation, \$35,750.00. Value of the land not taken, \$28,250; or the total of \$84,000.00.”

Section 78—34—10, U. C. A., 1953, provides in part, as follows:

“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, * * * * .

“(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 improvements in the manner proposed by the plaintiff.

“(3) * * * * .

“(4) * * * * .

“(5) * * * * .”

Thus, under the statute, the court is obliged to find two items in a case such as this, first, the value of the property sought to be condemned and the improvements thereon, and second, the so-called severance damages.

The second of these two items, namely, the severance damages, we will consider at a later place in the brief.

The first, namely, the finding as to the value of the land and improvements taken, has no support in the evidence, as we will demonstrate.

As reflected in Paragraph 14 of the findings, the court found that the value of the improvements was \$20,000.00, and the value of the land taken with the water was \$35,750.00, but where is the evidence to support this latter figure? The witness Palmer testified such value was \$33,941.00 (R. 177,179); the witness Adams that it was \$33,750.00 (R. 204, 205, 206); the witness Torgeson that it was \$20,785.45 (R. 229); and the witness Froerer that it was \$26,585.00. In other words, the top value, insofar as any witness is concerned, was \$33,941.00, yet the court found the value to be \$35,750.00, or an increase of \$1,809.00.

Now what is the situation as to the water? All of the witnesses valued the land plus water rights as above. The witness Torgeson valued the water at \$75.00 an acre for 65 acres, or \$4,875.00, and he is the only witness who testified thereon. On this point the court found, and Torgeson's evidence supports the finding:

“The water rights in connection with the lands taken are not sought by the condemnor. They have a value, as fixed by the only witness who appraised them, and which seems reasonable to the court of \$4,675.00 (an obvious error in arithmetic since it actually figures at \$4,875.00). Since the condemnor does not seek the water right, this sum is deducted from the aforesaid value of the land taken, leaving the loss to the condemnee in land taken of \$31,025.00.”

Thus, the court in its findings of value of the land without the water, deducted \$4,675.00 from its previous

figure of \$35,750.00, and reached the figure of \$31,025.00. To make the figures of the witness analagous, that is, reflect the value of the land without the water, a like deduction must be made from their figures. Thus we have

Mr. Palmer	—	\$29,266.00
Mr. Adams	—	\$29,075.00
Mr. Torgeson	—	\$16,110.45
Mr. Froerer	—	\$21,910.00

and the court still some \$1,800.00 higher than any of the witnesses.

We have, accordingly, a situation where the court found a value on the lands condemned some \$1,800.00 higher than any evidence supports.

True it is that the court, under the law, was not required to find separately as to value of land taken and value of improvements, but could have made the blanket finding that the two together were of the value of \$51,025.00—in which case the error in over-valuing the land as such would have been concealed in the total figure. This, however, it did not do, and having elected to find separately on the two items, evidence to support each must be found in the record, and, as we have demonstrated, the value found by the court as to the land taken exceeds by \$1,800.00 the highest value assigned thereto by any witness.

What, then, is the result where a finding by the lower court is wholly without support in the evidence? This court in the case of *Evona Investment Co., v. Brummitt*, 66 *Utah* 82, 240 *P.* 1105, held,

“There is no evidence to support such finding, and hence it must be disregarded.”

Similarly in the case of *American Smelting & Refining Co. v. Ind. Com. of Utah*, 76 Utah 503, 290 P. 770, Mr. Justice Straup stated:

“It is the rule that findings not supported by the evidence, must be disregarded.”

Applying the rule thus stated to this case results in the disregarding of the finding of the lower court that the value of the land taken was in the amount of \$35,750.-00. With this finding gone, there is nothing whatever to support either the conclusion of the court, or that portion of the judgment, assessing the sum of \$51,025.00 “as the value of the property condemned, together with all improvements thereon.”

THE RELIEF TO WHICH PLAINTIFF IS ENTITLED

What now is the relief to which the plaintiff is entitled in this court? Is it limited simply to a remission of the amount by which the judgment as granted exceeds any evidence? Or is the plaintiff entitled to a new trial upon some or all of the issues, and if the latter, to what extent is it entitled to a new trial We submit our views to the consideration of the court.

- (a) *A retrial upon the issue of the value of the property condemned - both land and improvements.*

Rule 76 (a), Utah Rules of Civil Procedure, provides as follows:

“The Supreme Court may reverse, affirm or modify any order or judgment appealed from, and may, in case the findings in any case are incomplete in any respect, order the court from which

the appeal was taken to add to, modify or complete the findings so as to make the same conform to the issues presented and the facts as the same may be found to be by the trial court from the evidence, and may direct the trial court to enter judgment in accordance with the findings when corrected as aforesaid, or may direct a new trial in any case, or further proceedings to be had. If a new trial is granted, the court shall pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case."

Under this rule there is no doubt but that the court may in a proper case modify the judgment of a lower court by requiring a remittitur of what it conceives to be excessive damages. To do so in this case, however, will necessitate an express finding by this court of "the value of the property sought to be condemned and all improvements thereon", because, as noted, *supra*, Section 78—34—10, U. C. A., 1953, requires the ascertainment of such value in every condemnation suit in which land is actually taken. In other words, this does not involve the simple matter of the remission of excessive damages, but an express finding of a particular amount, namely, the value of the lands and buildings taken, and this amount can only be determined by the weighing of the evidence.

It is not our purpose here to suggest that this court is without jurisdiction as a matter of law to make this finding, although question might well be raised as to whether under Article VIII, Section 9 of the Constitution of Utah, such power does exist. We do suggest, however, that to make such finding would do violence to

what we understand to be the rule long established, that this court will not, in a law case, examine the evidence beyond a point necessary to enable it to determine the sufficiency thereof to support the findings or judgment, and will affirm or reverse upon the basis thereof.

Thus, in *Whittaker v. Ferguson*, 16 *Utah* 240, 51 *P.* 980, it was held:

“It is urged for the appellant that the evidence is insufficient to justify these findings. This, however, is a question of fact in a case at law, and therefore we have no power to consider the justness of the findings. The only province of this court in such a case is to ascertain whether there is any legitimate proof which supports them, and, if there is, then we are conclusively bound by them, regardless of whether or not the findings are supported by a preponderance of the testimony, or whether, in our judgment, on all the evidence, they are justified. It is only when there is no competent evidence in a law case to warrant a finding of fact which materially affects the rights of a litigant that this court will interfere, and hold the finding nugatory and void. In such event, the question as to the proof to sustain the finding becomes one of law, and falls within the jurisdiction of the appellate court. Likewise, where a case at law, in this state is tried before a jury, the appellate court is powerless to disturb the verdict on the ground of the insufficiency of the evidence, if there is any legitimate proof to support it, because in no case, whether tried by the court with or without a jury, can we determine questions of fact. This is so by virtue of the constitution, which provides in section 9, art. 8, as follows: ‘In equity cases the appeal may be on questions of

both law and fact; in cases at law the appeal shall be on questions of law alone.' Under this provision, it will be observed, an appeal may be taken in equity cases on questions of fact as well as of law. The appellate court, therefore, by necessary intendment and implication, has the same jurisdiction and power in equity cases to determine questions of fact as of law, and may go behind the findings and decree of the trial court, consider all the evidence, decide on which side the preponderance thereof is, ascertain whether or not the proof justifies the findings and decree, and enter or direct such findings and decree to be entered as the evidence, in the judgment of the appellate tribunal, may justify. The constitutional provision, however, confers no such jurisdiction and power upon the appellate court in cases at law, for in such cases the appeal is expressly limited to 'questions of law alone', and hence the jurisdiction and power in law cases are limited to the determination of questions of law. We can, therefore, in cases at law, examine the evidence only so far as may be necessary to determine questions of law, and have nothing to do with the sufficiency of the evidence to justify a finding or judgment, unless there is no proof to support it. *Mangum v. Mining Co.*, 15 Utah 534; *Nelson v. Railroad Co.*, 15 Utah 325; *Anderson v. Mining Co.*, Id. 126; *Bacon v. Thorton*, 16 Utah 138."

And in the later case of *Lyman v. Town of Price*, 63 Utah 90, 222 P. 599, it was held:

"The rule is laid down in *Whittaker v. Ferguson*, 16 Utah 40, 51 Pac. 980, as follows:

"Under section 9, art. 8, Const. (Utah), the Supreme Court, in cases at law tried before a court without a jury, will examine the evidence

only so far as may be necessary to determine questions of law, and will not pass upon the sufficiency of the evidence to justify a finding or judgment, unless there is no legitimate proof to support it. In no case at law, whether tried with or without a jury, can the appellate court determine questions of fact.'

"This rule has been reiterated and applied in subsequent cases too numerous to mention."

We submit, accordingly, that by reason of the fact that the ultimate determination of this cause requires the ascertainment of the value of lands and improvements taken, that the relief to which the plaintiff is entitled is a re-trial upon that issue, as well as that of severance damages. This latter issue we will discuss presently, and for the moment confine ourselves to the question of re-trial of the issue of land and improvements.

As we have previously pointed out, Section 78—34—10, requires the determination by the court of "the value of the property sought to be condemned *and* the improvements thereon." The statute contemplates this value as being an amount representing *both* land and improvements. True it is, that in arriving at this ultimate amount, the value of the land and value of the improvements may be determined, and the two added together to reach the sum total. However, neither can be determined except in its relationship to the other. The value of the land is of necessity to some extent related to the nature, character and value of the improvements, and conversely, the value of the improvements is related to the nature, character and value of the land upon which they are located. Thus, while it is possible to assign

separate values to each, when each is considered in its relationship to the other, it is impossible properly to evaluate either in the sense of determining "just compensation" without evaluating the other.

An example will demonstrate the point. A valuable house on a valuable lot has a certain market value. This same house on a lot which because of surface contours, sub-surface composition, or general location, is less valuable, will have a lesser market value. Conversely, land with improvements thereon which render it impracticable of highest utilization is of lesser market value than the same land with suitable and practical improvements.

It is for this reason, we submit the legislature provided for the evaluation of land taken and improvements thereon as a unit. One whose property is taken from him cannot be assured of just compensation except as his land and improvements are considered together. There is no provision in the law for the determination of the issue of value of land taken without a contemporaneous determination of the value of improvements thereon. As plaintiff is entitled to a re-trial of the land values, it necessitates a trial in accordance with the statute upon the issue of "the value of the property sought to be condemned and all improvements thereon."

(b) *A re-trial upon the issues of severance damages.*

The plaintiff is likewise entitled to a re-trial of the issues of severance damages. In this regard we concede that the problem is somewhat different from that just discussed, because the legislature has provided for the separate ascertainment of the issue of damages to lands

not actually taken. However, the court in this case patently misconstrued the evidence relating to the amount and nature of the land actually taken, else it would not have fallen into the error of valuing the same in excess of the evidence in relation thereto, and as the matter of severance damages is predicated upon the question of what has been severed, the finding of the amount of severance damages is patently in error.

To be more specific, it will be conceded that the lands condemned constituted but a portion of the entire tract of the defendants, namely 219.53 acres out of a total of 630 acres (Finding R. 86). The taking includes a portion of the total hay and meadow lands, a portion of the river bottom tree land, and a portion of the grazing and range lands. The acreage breakdown of the different types of land taken was established by the evidence with little variations as among the witnesses. In this connection the defendant Pead, the owner in possession, testified that comprising the 219.53 acres taken were 65 acres of meadow land and 18 acres of river mottom tree land, or a total of these two types of 83 acres (R. 154). The balance of the 219.53 acres taken was hill pasture or high lands. He gave this balance as 149 and a fraction acres, which was an error in arithmetic, but the error is not here material. (R. 155-156). He further testified that the taking of the 65 acres of meadow land and 18 acres of river bottom tree lands *left him with 64 acres and 20 acres of each of these types respectively*. Thus he had by his testimony a total of 129 acres of so called meadow or hay land to start with.

The witness Palmer confirmed Pead's figures. He testified there were 65 acres of meadow hay land taken

and 64 acres not taken (R.183), and 18 acres of river bottom tree land taken and 20 acres left (R. 182). Also that after the taking there were 304 acres of hill side range land left (R. 184).

The witness Adams testified there were 65 acres of meadow hay land taken (R. 203), and 18 acres of river bottom tree lands (R. 204). Also that there were 149 and a fraction acres of the range land taken (R. 204). That the taking represented roughly one-half of the meadow land, one half of the tree land, and one-third of the range land and that there were left 64 acres, 20 acres and 325 acres of each respectively (R. 207-208).

The witness Torgeson testified there was taken 65 acres of what he described as "A" and "B" lands (that is the better lands), 18 acres of wooded river land, 7.5 acres of highway right of way, and 129.03 acres of range land (R. 27).

The witness Froerer did not attempt to give a complete breakdown on the acreages comprising the various types of land.

The point we are making by the resume of this evidence is that all of the witnesses who testified as to the acreage comprising the various types of land agreed that there were 65 acres of the best type of land taken (variously described as hay land, meadow land and fine pasture land), with 64 acres left, for a total of 129 acres; that there were 18 acres of river bottom tree lands taken, and 20 acres left.

Now what did the court do in making its findings as to value of land taken and severance damages? We refer

first to its Memorandum Decision, not to the end of contradicting the findings, but for the purpose of explaining them. *Christensen v. Nielson*, 73 Utah 603, 276 P. 645.

In such memorandum decision the trial court said (R. 79):

“219.53 acres sought to be condemned covers all the arable land in the ranch, * * * .” (emphasis added)

And further,

“The strip to be taken encompasses approximately 130 acres of hay and fine pasture lands, a considerable tract of hay land of lesser quality; and along the stream, cottonwoods and other trees providing shade for animals in summertime, and storm shelters and windbreaks in the winter.”

These recitals were incorporated into Paragraph 9 of the proposed findings of fact. Defendants moved to amend this paragraph of the proposed findings (R. 83) and the court did amend by interlineation to change the word “all” in the first quote to “much of”, and the second quote above to read as follows (Finding 9, R. 87):

“The dam of the proposed reservoir would be across the canyon or draw near the middle of the ranch. The strip to be taken encompasses approximately 130 acres of hay, fine pasture lands, a considerable tract of hay land of lesser quality, and, along the stream, cottonwoods and other trees providing shade for animals in the summer-time, and storm shelters and wind breaks in the winter.”

Of significance, however, is that the defendants sought to have the words “and grazing” inserted between

the words "pasture" and "lands" in the second sentence (R.83), so that that phrase would read "fine pasture *and grazing* lands", but this the court refused to do, leaving it as it appears above.

Thus the court found that insofar as the hay and pasture lands are concerned, there were "approximately 130 acres" taken. The evidence as above set out is that in the ranch as a whole there were approximately 130 acres of this type of land (actually 129 acres), but only 65 acres were taken, leaving 64 acres with the defendants. It is obvious, accordingly, that in the six weeks or so that elapsed between the time of trial and the making of the decision and findings, the trial court lost sight of the fact that the full 129 acres were not taken, but only 65 acres thereof.

Thus in its findings as to value of the lands taken, and severance damages to those not taken, the court went upon the mistaken belief that these full 129 acres were taken, *with no lands of that type left for the remaining ranching operation*. This of course resulted in not only the over valuation of the lands actually taken, but, in the view of the court, an aggravation of the severance damage, because it left the defendants with no hay or meadow land.

We submit, accordingly, that there is error on the face of the record as to the amount of severance damages, as well as in the value of the lands taken, and plaintiff is entitled to a re-trial of that issue as well as the other.

Actually, there is no resolving the extremely high award, on any other basis. In the light of the proof that

but a little over a year prior to the condemnation, the entire ranch of 630 acres were bought, exclusive of live-stock, machinery, etc., for the sum of \$53,158.00 (Exhibit "E"), and that after the taking there was left one-half of the meadow hay land, one-half of the river bottom tree land, and two-thirds of the range land, a determination that the lands and improvements taken, *exclusive of water*, were of the value of \$51,025.00 can be explained only upon the basis of mistake, or total disregard of the evidence.

CONCLUSION

We submit, accordingly, that as there is no competent evidence in the record to support the finding of the lower court as to the value of the land taken, and that as the finding of the amount of severance damages was predicated upon a mistake of fact, the conclusions and judgment of the lower court as to the compensation to which the defendants are entitled for the lands and improvements taken, and the damages to the lands not taken, are erroneous as a matter of law. We further submit that under the law the judgment of the lower court should be reversed with directions that a new trial be granted upon these issues.

Respectfully submitted,

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