

1955

# State of Utah v. Fred Tedesco et al : Brief of Appellant

Utah Supreme Court

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E. R. Callister; Robert B. Porter; Attorneys for Appellant;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, by and through  
its ENGINEERING COMMISSION,  
D. H. Whittenburg, Chairman,  
H. J. Corleissen and Layton  
Maxfield, Members of the ENGINEERING COMMISSION,

*Appellant,*

— vs. —

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

*Respondents.*

FILED

APR 20 1950

Clerk, Supreme Court, Utah

No. 8290

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## Brief of Appellant

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*Attorney General*

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*Assistant Attorney General*  
*Attorneys for Appellant.*

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(B) THAT THE COURT IMPROPERLY GAVE INSTRUCTION NO. 9 AND INSTRUCTED THE JURY IN EFFECT THAT THEY WERE TO DISREGARD THE EVIDENCE OF PLAINTIFF'S WITNESSES, AND ALSO THAT SAID INSTRUCTION PERMITS THE JURY TO ASSESS AS A PART OF VALUE FUTURE PROFITS NOT YET EARNED AND HIGHLY SPECULATIVE.

(C) THAT THE COURT IMPROPERLY GAVE INSTRUCTIONS NOS. 12 AND 13; THAT SAID INSTRUCTIONS IN EFFECT PERMITTED THE JURY TO ASSESS AS VALUE THE RETAIL PRICE OF THE INDIVIDUAL LOTS IN PARCEL 1.

(D) THAT THE COURT IMPROPERLY GAVE INSTRUCTION NO. 17 IN THAT AGAIN THE PURPORT OF SAID INSTRUCTION GIVES TO THE DEFENDANTS A FUTURE PROFIT HIGHLY SPECULATIVE AND NOT YET EARNED; AND THE EFFECT OF SAID INSTRUCTION IS TO UNDERWRITE AN UNEARNED PROFIT FOR THE DEFENDANTS.

(E) THAT THE COURT IMPROPERLY REFUSED TO GIVE PLAINTIFF'S REQUESTED INSTRUCTIONS NOS. 10, 11 AND 12; THAT SAID INSTRUCTIONS CORRECTLY STATE THE LAW APPLICABLE TO CONDEMNATION AND FAILURE TO GIVE SAID INSTRUCTIONS PERMITTED THE JURY TO ASSESS DAMAGES ON THE BASIS OF 60 ODD INDIVIDUAL PARCELS IN PARCEL 1 RATHER THAN ONE PARCEL.

(F) THAT THE TRIAL COURT IMPROPERLY DENIED THE MOTION OF APPELLANT TO STRIKE THE TESTIMONY OF THE WITNESSES, RALPH WRIGHT, D. MERVIN WALLACE AND JOSEPH BENEDICT, AS TO VALUATION OF PARCEL 1.

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(E) THAT THE TRIAL COURT IMPROPERLY PERMITTED THE WITNESS BRAYTON TO TESTIFY AS TO VALUES AS HE WAS NEITHER AN EXPERT NOR AN OWNER.

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STATE OF UTAH, by and through  
its ENGINEERING COMMIS-  
SION, D. H. Whittenburg, Chair-  
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Maxfield, Members of the ENGI-  
NEERING COMMISSION,

*Appellant,*

— vs. —

FRED TEDESCO, et al., and BUR-  
TON F. PEEK and CHARLES D.  
WIMAN, Trustees under the Will  
and of the Estate of CHARLES  
H. DEERE, Deceased,

*Respondents.*

No. 8290

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## Brief of Appellant

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### STATEMENT OF FACTS

This action was commenced by the State of Utah to condemn certain property for This Is The Place Monument Park. The direction of the Legislature in this respect was positive and the language of the statute

dealt not only with the end result but also with procedure and is worthy of quotation, as follows:

There is appropriated out of the emergency relief fund to the Engineering Commission the sum of three hundred thousand dollars to pay the amount of the judgment or judgments, costs, appraisal fees and other expenses incident to the condemning and acquisition of the lands referred to in Section 8 hereof. The amount to be expended under this appropriation shall not exceed the amount awarded by the court as judgment or judgments and costs and the expenses in the proceedings to be instituted for the condemning of said lands. It is further expressly provided that in the event the said judgment or judgments, costs and expenses shall exceed the amount of three hundred thousand dollars the State Board of Examiners shall allocate out of the reserve building fund to the Engineering Commission such additional amount as may be necessary to pay said judgment or judgments, costs, appraisal fees and expenses incident thereto. Provided further that any owners of any part or all of the land described in Section 8 hereof, may on or before July 15, 1951 submit in writing an offer to sell said land to the State of Utah to said Engineering Commission, together with warranty deed and Abstract of Title or suitable title insurance to said property. If said offer is approved by said Commission within 20 days after receipt thereof, the same shall be presented to the State Board of Examiners by said Commission for their consideration. If approved by said Board of Examiners, the same shall be purchased by said Engineering Commission and paid for upon approval of title, the same as herein provided, for satisfaction of judgment of condemnation. Otherwise, said deed and abstract shall be returned to

said offeror and the property condemned as herein provided. The Engineering Commission shall not delay the institution and prosecution of said action to condemn on account of the foregoing provision, but shall dismiss said action as against any property purchased by the State pursuant to its provisions. Laws of Utah, 1951, First Special Session, Chapter 13, Section 2.

All of the property within the area has been secured by the State of Utah and payment made therefor except that belonging to the respondents here; but it is notable that the property of these respondents comprises the major portion of the property ordered condemned by the Legislature (Ex. 1).

This condemnation proceeding was commenced in accord with the above statute and summonses were served and the effective date for the determination of damage became July 12, 1951, which date appears often in the record as the date upon which the appraisers estimated the damage suffered by the owners of the property involved.

It should be here noted that this action was tried to a jury in May of 1952 and a judgment rendered in favor of the respondents and that that judgment in the sum of \$495,986.40 has been paid to the respondents (R. 43). An appeal was taken by the Deere estate and resulted in this Court granting a new trial upon the question of damages only. The opinion of this Court is reported as the case of *State v. Peek*, 1 U. 2d 265, 265 P. 2d 630. The present appeal is by the State from a jury verdict and



a judgment thereon in the total additional sum of \$192,821.19 (R. 96-99).

The property of the respondent as shown by Exhibit 1 consists of all of the property within the park area except that portion shown in white on the map, (Exhibit 1) and by the pretrial order of the District Court was divided into eight parcels for convenience in presenting the case to the jury. These eight parcels are marked on Exhibit 1 and are given separate colors. Prior to the trial, counsel for the State of Utah and for the respondents, Deere Estate, agreed as to the values that could be placed on five of these parcels, but, as to Parcels 1, 2 and 3 and the value to be placed on the water distribution system, the appraisers were not in agreement and it was this phase of the case that was submitted to the jury. It might be pointed out here that the statute authorizing and directing this condemnation proceeding in effect permitted settlement of values with the various owners only if the owner agreed with the figures and amounts determined upon by the state appraisers; and it should be here noted that the amount agreed upon as to values for Parcels 4 to 8, both inclusive, were the figures of the state appraisers.

It also appears proper to note that the major difference in values between the parties concerns Parcel 1 and the water distribution system and that, as to Parcel 1, the difference lies in the approach made by the appraisers to this problem of value. This difference in approach is particularly apparent in the testimony of

the respondent's witness, Ralph Wright, commencing on page 191 of the record in this case and continuing through page 204 of the record. This difference is again reflected in the testimony of H. Mervin Wallace, a witness for respondent, from page 261 through page 267 of the record, and again in the testimony of respondent's witness, Joseph Benedict, at pages 296 through 299 of the record.

Again, with respect to Parcel 1, the three appraisers for the Deere Estate all arrived at a figure of value slightly in excess of \$300,000.00; the witnesses for the State of Utah values this same property at three different amounts, namely \$163,250.00, \$148,883.00, and \$169,000.00. The record is clear that the approach used by the two sets of appraisers was entirely different and this approach caused this disparity in the amounts. The appraisers for the respondent took each lot within this area as a separate parcel of land, valued it as such on the basis of a retail sale to the ultimate home builder and gave no allowance or consideration to any of the costs involved, to the time element or to the profit for the risk to the owner buyer. The appraisers for the State considered these items and based their appraisal upon the market value of the entire tract as one parcel in accordance with the pretrial order of the District Court.

The witness, Edward M. Ashton, testifying for the State, said:

“Ordinarily, the profits on a real estate subdivision is the last end of it. Many of them are

extended over many years, and I would say, as a rule of practice, the last twenty-five percent of the lots is that portion of the deal that is the profit." (R. 420).

This evidence is not contradicted and is again emphasized by the testimony of each of the appraisers to the effect that the subdivision business is one full of risks that the owner must take.

The jury in this case returned a verdict of \$82,927.00 for the water works and water rights owned by the respondents in connection with the Oakhills development (R. 93). The evidence as to water and its value was confined to the testimony of the witness, C. J. Ullrich, and the witness, Dean F. Brayton. The witness, Ullrich, testified as to the value of the water right itself and placed a value of \$16,500.00 on it (R. 312). The State does not contend that this was improper and we recognize that the appellants are entitled to recover for this water right reduced by the amount sold to Wheelwright as testified to by Mr. Brayton (R. 320). This places a net value of \$11,290.00 on the water right.

However, the witness, Ullrich, placed a value of \$57,200 on the water works (R. 313) and \$19,700.00 on the distribution system (R. 314). There was no evidence as to how this water works and water system could be otherwise used except as given by the witness, Ullrich (R. 311), where he stated that the water collection and transmission system had no use at the time of the condemnation except to serve the area condemned but that it could be adapted to other uses. The evidence as to

this adaptation and the cost thereof was entirely lacking, yet the evidence of value was placed before the jury over the objection of the State.

And, in addition, Mr. Brayton, over the objection of the State, was permitted to testify as to the cost of the water distribution system (R. 317-321), and Exhibit 39 was introduced, over the State's objection, showing these detailed costs, which included an item of ten percent increase in cost which admittedly was never paid or incurred by the respondents (R. 328-330).

The respondent's appraisers each testified that their valuation of the lots within Parcel 1 were based upon the utilities present or absent and each specifically stated that the presence of the water distribution system was reflected in their figures and its absence would have resulted in a lowering of their figures (R. 231, R. 261, and R. 296). Based upon this, the State moved to strike all of the evidence as to this water distribution and transmission system and this motion was denied (R. 332).

We have endeavored in this statement of facts to cover the general picture and we have purposely omitted any reference to the instructions given or the failure to give certain instructions as it is necessary to fully discuss them in the argument following. We have in a few other instances omitted in this statement of facts matters that might properly be there but they again appear necessary to fully state in the argument. This brief is rather long and it is our desire to avoid repetition where it is possible to do so.

## STATEMENT OF POINTS

### POINT I.

THAT THE TRIAL COURT IMPROPERLY HELD AND INSTRUCTED THE JURY THAT THE RESPONDENTS WERE ENTITLED TO RECOVER DAMAGES UPON SIXTY-TWO SEPARATE LOTS WITHIN PARCEL 1, EACH TO BE SEPARATELY VALUED AND THEN TOTALLED FOR THE PURPOSE OF ASSESSING DAMAGE AS TO PARCEL 1; AND ERROR IS PREDICATED UPON EACH OF THE FOLLOWING SPECIFIC POINTS IN THIS CONNECTION:

(A) THAT THIS ACTION OF THE TRIAL COURT WAS IN DIRECT CONTRADICTION TO THE PRETRIAL ORDER OF THE COURT.

(B) THAT THE COURT IMPROPERLY GAVE INSTRUCTION NO. 9 AND INSTRUCTED THE JURY IN EFFECT THAT THEY WERE TO DISREGARD THE EVIDENCE OF PLAINTIFF'S WITNESSES, AND ALSO THAT SAID INSTRUCTION PERMITS THE JURY TO ASSESS AS A PART OF VALUE FUTURE PROFITS NOT YET EARNED AND HIGHLY SPECULATIVE.

(C) THAT THE COURT IMPROPERLY GAVE INSTRUCTIONS NOS. 12 AND 13; THAT SAID INSTRUCTIONS IN EFFECT PERMITTED THE JURY TO ASSESS AS VALUE THE RETAIL PRICE OF THE INDIVIDUAL LOTS IN PARCEL 1.

(D) THAT THE COURT IMPROPERLY GAVE INSTRUCTION NO. 17 IN THAT AGAIN THE PURPORT OF SAID INSTRUCTION GIVES TO THE DEFENDANTS A FUTURE PROFIT

HIGHLY SPECULATIVE AND NOT YET EARNED; AND THE EFFECT OF SAID INSTRUCTION IS TO UNDERWRITE AN UNEARNED PROFIT FOR THE DEFENDANTS.

(E) THAT THE COURT IMPROPERLY REFUSED TO GIVE PLAINTIFF'S REQUESTED INSTRUCTIONS NOS. 10, 11 AND 12; THAT SAID INSTRUCTIONS CORRECTLY STATE THE LAW APPLICABLE TO CONDEMNATION AND FAILURE TO GIVE SAID INSTRUCTIONS PERMITTED THE JURY TO ASSESS DAMAGES ON THE BASIS OF 60 ODD INDIVIDUAL PARCELS IN PARCEL 1 RATHER THAN ONE PARCEL.

(F) THAT THE TRIAL COURT IMPROPERLY DENIED THE MOTION OF APPELLANT TO STRIKE THE TESTIMONY OF THE WITNESSES, RALPH WRIGHT, D. MERVIN WALLACE AND JOSEPH BENEDICT, AS TO VALUATION OF PARCEL 1.

(G) THAT THE COURT IMPROPERLY GAVE INSTRUCTION NO. 10 AS SAID INSTRUCTION DOES NOT CORRECTLY DEFINE A WILLING SELLER.

(H) THAT THE COURT IMPROPERLY REFUSED TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 5 AND THAT SAID INSTRUCTION CORRECTLY STATES THE LAW AS IT CONCERNS A WILLING SELLER.

## POINT II.

THAT THE TRIAL COURT IMPROPERLY PERMITTED THE JURY TO CONSIDER AND TO ASSESS DAMAGES TO THE WATER DISTRIBUTION SYSTEM IN THE FOLLOWING PARTICULARS:

(A) THE COURT IMPROPERLY PERMITTED THE WITNESS, ULLRICH, TO TESTIFY AS TO VALUES OF THE WATER DISTRIBUTION AND TRANSMISSION SYSTEM.

(B) THE COURT IMPROPERLY RECEIVED EXHIBIT 39D PERTAINING TO VALUES OF THE WATER DISTRIBUTION AND TRANSMISSION SYSTEM.

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(E) THAT THE TRIAL COURT IMPROPERLY PERMITTED THE WITNESS BRAYTON TO TESTIFY AS TO VALUES AS HE WAS NEITHER AN EXPERT NOR AN OWNER.

### POINT III.

THAT THE COURT IMPROPERLY LIMITED THE PLAINTIFF AS TO THE EVIDENCE PROFFERED BY AND PROPOSED TO BE GIVEN BY THE WITNESSES, SOLOMON AND ASHTON.

### POINT IV.

THAT THE COURT IMPROPERLY GAVE INSTRUCTION NO. 15 AND PERMITTED THE JURY TO ASSESS AS VALUE THE STREETS WITHIN THE PROPERTY; THAT THE COURT IMPROPERLY REFUSED TO GIVE PLAINTIFF'S RE-

QUESTED INSTRUCTIONS NOS. 14 AND 15 AS TO OWNERSHIP OF PLATTED STREETS.

POINT V.

THAT THE COURT GAVE NO INSTRUCTION AS TO BURDEN OF PROOF AND IMPROPERLY REFUSED TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 2 DEALING THEREWITH.

POINT VI.

THAT THE COURT IMPROPERLY ASSESSED INTEREST AGAINST THE PLAINTIFF IN COMPUTING THE AMOUNT OF THE JUDGMENT ENTERED ON THE VERDICT ON NOVEMBER 5, 1954.

ARGUMENT

POINT I.

THAT THE TRIAL COURT IMPROPERLY HELD AND INSTRUCTED THE JURY THAT THE RESPONDENTS WERE ENTITLED TO RECOVER DAMAGES UPON SIXTY-TWO SEPARATE LOTS WITHIN PARCEL 1, EACH TO BE SEPARATELY VALUED AND THEN TOTALLED FOR THE PURPOSE OF ASSESSING DAMAGE AS TO PARCEL 1; AND ERROR IS PREDICATED UPON EACH OF THE FOLLOWING SPECIFIC POINTS IN THIS CONNECTION:

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We have set forth in the statement of points under Point I eight subparagraphs each dealing with a specific issue before the trial court wherein we maintain that error was committed. However, the applicable law would indicate that all eight should be combined for the purpose of argument. The specific issue can be rather briefly stated in two parts: First, is the respondent entitled to a valuation of its property based upon a mere mathematical total of the appraised retail value of each of sixty-two separate building lots, or must the appraisal be made upon the whole parcel of land as one tract for sale on the open market; and, second, as a corollary to the first question, does the respondent here meet the definition of a willing seller when it insists that the value must be based upon the individual building lot for sale to the ultimate consumer, the home owner.

It should be here pointed out that upon the first trial of this case, the entire property of the respondent was divided into only two parcels. Parcel 1 consisted of approximately the same property as Parcel 1 in this case; and Parcel 2 in the first trial comprised the remainder of the entire tract (Exhibit 1). The Deere

Estate, appellant in the first appeal, argued the propriety of this division, and this Court, in the case of *State v. Peek*, supra, said, at page 638 of the Pacific Reporter:

“The court did not err in dividing this property into only two parcels instead of six requested by appellants. Parcel I as the property was divided by the court was the same as appellants’ requested Parcel I, and the court divided the rest of appellant’s lands which were taken into Parcel II. Appellants argue that where land is platted into residential lots each lot constitutes as a matter of law a separate parcel, but they are not in a position to urge this here because they have requested no such division. Parcel I, which is the same as their proposed Parcel I, contains all of the platted residential lots. All of those lots were platted and were being used as a unit in a project to divide and sell such lots as residential property and the court was therefore justified in making the division as it did.”

The pretrial order in the present case, among other things, made the following statement:

“... 4. The primary question for determination is: What was the fair market value on the 12th day of July, 1951, of the tract of land belonging to the Deere Estate and taken by the State of Utah in this proceeding.

“5. Incident thereto, for the purposes of trial, and orderly and systematic procedure, in presenting evidence of value and avoiding confusion in the considerations and deliberation of the jury, is the question of classifying or dividing the lands in sections or parcels similar in conditions, pos-

sible uses, value standards, etc., at the time of the taking, to-wit: July 12, 1951.”

The order then describes 8 parcels and makes reference to Exhibit 25 of the previous trial. Exhibit 1 of the present trial was agreed to by the parties and each of the 8 tracts described in this pretrial order was given a special coloring on Exhibit 1.

We did not take issue with this pretrial order as the division into 8 parcels for the purpose of presenting the evidence seemed proper and within the trial court's discretion; but we urge upon this Court that the dividing of Parcel 1 into sixty-two separate building lots for purpose of valuation and instructing the jury that they should so consider them, was a direct contradiction of the pretrial order and is contrary to the law applicable to condemnation cases. At all phases of this proceeding, counsel for the State strenuously objected to this method of valuation.

Appellant objected to the giving of Instruction No. 9 (R. 517). By that instruction the trial Court told the jury that they should disregard all of the evidence proffered by the State's appraisers and that they should consider each of the sixty-two lots as a single parcel (R. 79). Appellant objected to the giving of Instructions Nos. 12 and 13 (R. 517). Again, those instructions in effect informed the jury that they could and should value each lot in Parcel 1 individually based upon the testimony of the appraisers for respondents and that their verdict should be a mathematical total of all of the sixty-

two lots in Parcel 1. We objected to the giving of Instruction No. 17 (R. 517), and again by this instruction the Court informed the jury that “you *are not* to take into consideration any speculative increase or decrease in values that may occur or have occurred in the future; nor any consideration of future tax or sale commission that might be paid for future sales, . . . nor possible future expenses that defendants be saved by selling now; nor any interest the defendants might be saved or be entitled to receive . . .” (R. 88).

The appellant requested certain instructions and those particularly pertinent here are those designated as Plaintiff’s Requested Instructions Nos. 10, 11, and 12. (R. 65, 66 and 67). The trial court has noted on each of these instructions that they were given in substance or were covered in other instructions. We most strenuously urge that they were not so covered, but on the contrary the language of the instructions given and referred to above were directly opposed to those instructions requested; and we objected to the court’s refusal to give these requested instructions (R. 518).

Specifically, in our Requested Instruction No. 10 the value of each of the Parcels involved was “to be measured by the fair market value of such parcel as an entirety as of July 12, 1951 . . .” Our Requested Instruction No. 11 reads as follows:

“You are not to consider what the land was worth to the defendants for speculation, or for merely possible uses, nor what they claim it was worth

to them, nor what it would sell for under special or extraordinary circumstances, but you are to find the fair market value of each of the Parcels 1 to 8 as of July 12, 1951, if offered in the market under ordinary circumstances; that is to say, the price at which an owner of each of said parcels, under no compulsion, would have been willing to take for it on July 12, 1951, if he desired to sell, and which a buyer, under no compulsion, who desired and was able to buy, would have been willing to pay."

And in our Requested Instruction No. 12 we most definitely asked that the jury be told that they could not separately assess each lot, in the following words:

"In assessing the value of any of the parcels you are not to value separately any platted lot or lots therein. You may take into consideration that on July 12, 1951, a plat of a portion of Parcel 1 had been filed with the county and the purposes for which said platted portion and all other portions of Parcel 1 were most suitable, but your value must be the value of the whole of Parcel 1, the platted and unplatted portions taken together as one unit. *And you are further instructed that you may not arrive at your verdict by an addition of all of the contemplated lots in said tract or tracts, but you are confined to an evaluation of the whole of each parcel of land as a unit for the highest and best purpose to which it was adaptable by these defendants on the date in question.*" (Italics ours)

The italicized part of the foregoing instruction is directly contrary to the instructions as given and particularly as to Instructions Nos. 9, 12, 13, and 17 as given. We will

hereinafter demonstrate that the requested instructions are the proper ones in condemnation proceedings.

Also, at the conclusion of the respondent's case, the State of Utah moved to strike from the record all the evidence of values submitted by the witnesses for the respondent as to Parcel 1 for the reason that such evidence was in violation of the pretrial order and was contrary to the law as it relates to evidence in condemnation cases (R. 316).

And finally it is our contention that the giving of Instruction No. 10 (R. 80) and the failure to give our Requested Instruction No. 5 (R. 60) constitutes prejudicial error. Proper objections were made (R. 517 and 518), and we contend that the instruction given does not properly define a willing seller and a willing buyer and that the instruction not given does constitute the proper definition.

We respectfully urge upon this Court that the theory of the respondents, which was adopted by the trial court and contained in his charge to the jury, did not provide for just compensation for the taking of the property involved; but this theory permitted recovery by the respondents of future speculative profits without any regard for any items of cost in connection therewith. It was conceded that the subdivision business is one of risk and there was no evidence offered that in any way contradicted the statement made by the witness, Ashton, to the effect that it was the sale of the last twenty-five per-

cen of a subdivision that constituted the profit of the promoter.

Yet, in this present case, not only did the respondents recover for that last twenty-five percent in full but without any risk and without the necessity of spending one penny in costs, which admittedly they would have incurred if they had been permitted to proceed with the sales of the lots in the subdivision. The record reveals that Mr. Dean Brayton and Mr. A. B. Paulsen were acting for the respondents, the one as its managing agent and the other as its architect and planner; their services were continuous and certainly not free. In addition there were other employees needed from time to time. At the time a lot within the subdivision was sold, the respondents would be required to furnish abstracts of title, to place revenue stamps on the deed of conveyance, and to pay a sales commission to the realtor securing the buyer. If the selling of the subdivision extended over any period of time, there would be additional taxes; and in a transaction of this kind, interest on the investment and a profit to the promoter for his risk, for his know-how and for his time are involved. None of these items were considered by the appraisers for the Deere Estate who came up with a figure which represented a mathematical total of the retail value that they placed on each individual lot within Parcel 1. The State appraisers considered all of these items in arriving at their result, but the trial court did not even permit the jury to consider this approach and directed that they could not consider these items by Instructions No. 9 and 17.



4 Nichols on Eminent Domain, Section 12.2(1) at page 32, defines market value, as follows:

“By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.”

29 C.J.S. on Eminent Domain, Section 137 at page 974, gives this definition of market value:

“The market value of property injured or taken for public use is commonly defined as the price it will bring when offered for sale by one who desires, but is not required, to sell, and is sought by one who desires, but is not required to buy, after due consideration of all the elements reasonably affecting value.”

And in 18 Am. Jur. on Eminent Domain, Section 242 at page 875, this definition of market value is given:

“When a parcel of land is taken by eminent domain, the measure of compensation to be awarded the owner is the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy; in other words the test is the fair market value of the land.”

Ralph Wright, testifying as an expert appraiser for the respondents, at page 160 of the record, gave his definition as follows:

“Fair market value is the highest price, expressed in terms of money, which a property will bring if exposed for sale in the open market, allowing a reasonable time to find a purchaser who buys with

full knowledge of all the uses to which it is adapted and capable of being used, both buyer and seller acting intelligently and willingly without compulsion.”

Mr. Wallace in his evidence for the respondents used a very similar definition (R. 234). And Mr. Benedict stated that he used the same definition as the one that Mr. Wright did. The appraisers for the State used similar definitions, that given by Mr. Werner Kiepe (R. 339) and that used by Mr. C. Francis Solomon (R. 468-9) being almost identical with that given by Mr. Wright. Mr. Edward M. Ashton gave two definitions of market value both of which are similar in form and substance to the definitions heretofore quoted. The problem is not, therefore, to define market value as all of the appraisers used the same or similar definitions, but to apply this definition to the case at hand; and we respectfully urge upon this Court that the application by the respondents' appraisers is not correct and does violence to the definition and that the evidence in this record consistent with that definition is that given by the appraisers who testified on behalf of the State of Utah.

To demonstrate the fundamental error in the respondents' theory, may we first call attention to the ever present use of the term “willing seller” or its equivalent. It is our contention that the evidence offered on behalf of the respondent shows beyond a shadow of a doubt that they were not a willing seller on the open market, but rather that they were willing to sell only upon condition that they receive the retail value of each individual

lot and that they would refuse to sell to a willing purchaser offering to buy the entire tract under the terms of the definitions above quoted.

The question here involved as to whether it is proper to treat each building lot as a single parcel for purpose of valuation is inextricably bound up with the proper application of this definition of fair market value. The cases we have found and which are hereafter cited deal with analogous situations and we have found no case where the parcel of land is similar to the present fact, that is, one with a complete subdivision and a contemplated subdivision within the same tract. However, this is said to be immaterial; and "while the mere filing of a subdivision map has been held not to establish the potentiality of the property for building purposes, the failure to file such a map has been held not to exclude consideration of such possible use." 4 Nichols on Eminent Domain, Section 12.3142(1) at page 109.

This same section of 4 Nichols on Eminent Domain at page 107, contains this statement:

"The most characteristic illustration of the rule that market value is not limited to value for the existing use and the situation in which it is most frequently invoked, and also most frequently abused, is found in those cases where evidence is offered of what the value of a tract of land that is used for agricultural purposes or is vacant and unused would be if cut up into house-lots. It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even if it

is used as a farm or is covered with brush and boulders. The measure of compensation is not, however, the aggregate of the prices of the lots into which the tract could be best divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all the lots are disposed of cannot be ignored and is too uncertain and conjectural to be computed. The measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most available use. "The possibility for building purposes must not be entirely remote and speculative, thereby rendering evidence of such use inadmissible; however, the mere fact that there are no buildings on the land at the time of the taking does not make such potential use speculative or remote as a matter of law. While the mere filing of a subdivision map has been held not to establish the potentiality of the property for building purposes, the failure to file such a map has been held not to exclude consideration of such possible use. Nor may the potential use for sub-division purposes be excluded merely because the existing use is purely agricultural."

18 Am. Jur. on Eminent Domain, Section 244 at page 881, states:

"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."

A statement to the same effect is found in 29 C.J.S. on Eminent Domain, Section 160 at page 1027.

An early case, decided by the Supreme Court of Pennsylvania in 1909, contains a fact situation quite comparable to the present one. This case of *Catlin v. Northern Coal & Iron Co.*, 74 Atl. 56, concerned the condemnation of right of way over a tract of 30 acres, 18 of which were situated on high ground available for building lots. This 18 acre tract had been divided into such lots, and into streets and alleys, which were marked on the ground, and had offered the lots for sale. There had been no sales primarily because the asking price was somewhat greater than the best offer. The main issue in the case was in connection with admission of evidence and in the fact that the witnesses were permitted to consider that the land had been divided into lots and the specific question involved in the case at bar was not discussed. However, at page 57 of the Atlantic Reporter, the Court said:

“The test in every such case is, What was the market value of the land, at the time of the appropriation, for any available purpose? If it was then available for sale as building lots, and had a market value for such purpose at the time of the entry, it is proper to consider this element of value in determining what the property was then worth. All of our cases recognize that the use to which the land is best adapted may always be considered in estimating market value. If it has immediate value for sale as building lots, it would be a very harsh rule which would deny the owner the benefit accruing to him by reason of

having his property so favorably located. As we view the case at bar, there is no doubt that a considerable portion of the land of appellee was available for sale as building lots, and that it had a market value as such at the time of the entry. Under these circumstances it was proper to consider the present value of the land for this use at the time of the appropriation. Of course future and speculative value as a lot proposition could not be considered, and, as we read the testimony, this rule was not violated."

An earlier Pennsylvania case, *Pennsylvania S.V.R. Co. v. Cleary*, 125 Pa. 442, 17 A. 468, was quoted with approval in the case of *United States v. 3,544 Acres of Land*, 147 F. 2d 596, as follows:

"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 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 sell-

ing value of the land before and after the entry by the railroad company, in order to determine the actual damage done to its owner.”

And in this same federal case, the following charge to the jury was held proper, at page 598 of the Federal Reporter :

“On cross examination witnesses on both sides were permitted by the Court to be examined concerning the development for which the property is adapted. This, of course, was to bring out the testimony as to what this land is best adapted for, but it was also permitted to see if any witness based his estimate on the entire tract exclusively on a basis of individual lots or houses, and if so, his estimate would have to be excluded from the jury; but all the witnesses on both sides testified that their estimates were based on other proper factors, and for that reason the estimates of the four witnesses will all be submitted for your consideration, but let me again caution you that you are to value the tract of land as of April 21, 1941, and that only. You are 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. You should not inquire what a speculator might be able to realize out of a resale in the future, but you should consider what a purchaser would have been willing to pay for it on April 21, 1941, in the condition it was then in.”

The actual fact situation in the foregoing federal case is not discussed except as it appears from the testimony quoted which indicates that the property involved was in the City of Philadelphia and that a subdivision within the city was in some state of development. How-

ever, in the Virginia case of *Appalachian Electric Power Co. v. Gorman*, 61 S.E. 2d 33, at page 36, the Court describes the land involved as follows:

“The land over which the easement is taken is an irregularly shaped tract of 43½ acres on the west side of the Trents Ferry Road about ¼ of a mile from the city of Lynchburg, Virginia. It is described as the finest piece of property close to Lynchburg for a high-class subdivision for persons desiring to build expensive residences. It is located on hilly terrain and readily adapted to the highest type of subdivision for homes and residences. Immediately adjacent to it are a number of homes and estates, valued at \$25,000 to \$100,000 each. It is pictured as a natural continuation of one of the finest residential sections close to Lynchburg, suitable for a high-class subdivision for persons desiring to build expensive residences. One of the witnesses said it is ‘as fine a piece of property for subdivision as I have seen anywhere in the United States; and I have subdivided from north and south, east and west.’ It is bounded by beautiful estates to the east, and a high-class subdivision borders it on the south, with many expensive homes. It is in demand for residential subdivision and purchasers have already offered to purchase portions of it.”

“The entire 43½ acres have been held intact without buildings. In 1940 the owners employed Charles F. Gillette, an experienced landscape architect, to plat the tract into one hundred lots and streets, having the streets follow the natural contours of the property without following the usual gridiron type, in order to avoid cuts and fills. Trees were planted according to the plan, and water and sewer lines were mapped, bids being obtained therefor; but these plans were



halted with the beginning of World War II. City water is available within 200 feet. Natural gas lines run along the edge of the property. The land has been cleared so that prospective purchasers can obtain a good view of the entire subdivision. It has a right of way to United States Route 501, and residents can reach the business center of Lynchburg within fifteen minutes. It has the advantage of county taxes. A city bus service runs within 200 yards of the property, and there is a business center a short distance therefrom. The property is rural, though suburban to the city of Lynchburg, with a perfect mountain view and is free from the usual lights, noise, and dirt of a busy city. It is undisputed that it has more advantages than are common to the usual subdivision.

“The present market value of the property, as a whole, for subdivision purposes was valued from \$55,000 to \$65,250, or at \$1,250 to \$1,500 per acre. The easement sought to be taken cuts diagonally across the northernmost tip or corner of the property, runs over five lots and embraces one and three-quarters acres. The power line and tower proposed to be built stand 23 or 24 feet above the highest point on the entire tract. The construction will interfere with a direct view of the mountains from some portions of the property, and will add some hazards to the land.”

The testimony of the various appraisers in this case commenced at \$2500.00 and ran as high as \$32,200.00. The award made by the Commissioners was \$1500.00 for the property taken and \$8500.00 for severance damage, and this award was affirmed. At page 39 of the Reporter, the following statement of the Court is adaptable to the present case :

“The easement affected the size and shape of the tract for development. It rendered one and three quarters acres unavailable for use by the land-owners. It necessitated a change in the location of the streets, the shape and location of the lots different from that originally planned, and lessened the value of the component parts of the tract, thereby reducing the value of the property as a whole. It is true that the damages should not be added up lot by lot; for instance, by awarding so much for this one and so much for that. The damage should be considered from the standpoint of injury to the value of the property as a whole, taking into consideration the elements affecting its adaptability for development as a subdivision.”

An early Kansas case, *Kansas City & Topeka Ry. Co. v. Splitlog*, decided in 1890, and reported at 25 Pac. 202, contains the following statement by the Court:

“In cases like this, where the damages are limited to the value of the land appropriated, the proper inquiry is what was the market value of such land, for any present use, in the condition in which it was immediately prior to its condemnation by the company. Witnesses testifying as to the value of such land may consider any use to which the ground may be presently put in forming their opinions as to its value, and its surroundings may be shown to the jury, its nearness to or distance from a town, village, or city, or other improvements that tend to affect its value; but the jury are to value the land as a whole in the condition in which it was when taken. They have nothing to do with its subdivision into lots or blocks. They may consider its location, and the effect its location has upon its value as a whole; but the evidence as to how many lots it would make, and what they would sell for after the sub-

division, is wholly improper. If an illustration was wanted to show the impropriety of such evidence, we do not know where we could find a stronger or more apt one than the evidence this witness furnishes. The witness is asked the size of lots on Kansas avenue, the value of such lots, and how many such lots an acre would make, and then it drops out that an acre of such lots are worth \$55,000, without improvements; that the witness paid at that rate per acre. Such evidence is certainly highly improper. It furnishes no proper measure of value, so far as the land appropriated is concerned, with which alone the jury has to do, and is well calculated to mislead the jury by furnishing a false and fanciful measure of damages. Without going further into this record, for the reasons given in connection with these, the first and third assignments, it is recommended that the judgment of the district court be reversed, and the case remanded for new trial."

A most excellent statement of the law applicable to these cases is contained in the Colorado case of *Wasenich v. City and County of Denver*, 186 Pac. 533. On page 537, the Court states:

"Complaint is made because the court instructed the jury that it is the present market value at the time of the trial that is to be determined and allowed. The statute provides for a special verdict which shall contain the fair, actual cash market value of the land taken, and the direct, fair, and actual damages caused by the improvement to the remainder of the property not taken. *Defendant contends he was entitled to the highest value that he might be able to obtain in the future by waiting for a better market caused by a demand for such property, or waiting for a customer who*

would pay on the basis of the most advantageous use to which it could be put, reasonably. This is not the law. The jury are to determine and allow the present fair, cash market value at the time of the trial, and are not to allow for any speculative or prospective values. In determining the present cash value the most advantageous use to which the property may reasonably be applied may be considered. Any reasonable future use to which the land may be adapted or applied by men of ordinary prudence and judgment may be considered in so far only as it may assist the jury in arriving at the present market value. The owner is entitled to have considered the most advantageous use in the future to which the land may be reasonably applied, not with the view of allowing him for speculative or prospective damages or values, but only as such evidence may bear upon or affect or assist in arriving at the present market value. It is the duty of the jury to find and allow no more than the present market value, no matter what the future prospects may be, and this character of evidence may be considered only for the purpose of ascertaining the market value at the time of the trial. After considering any and all reasonable uses to which the property may be put in the future, the question is, taking all things into consideration, what is the present market value, not what will or may be its value later on account of some use to which it may be put in the future. Market value ordinarily means what price property would bring if sold in the open market under ordinary and usual circumstances, for cash, assuming that the owner is willing to sell and the purchaser willing to buy, but neither under any obligation to do so. So the question for the jury to answer was, considering its reasonable availability for all valuable uses, or the most advantageous use, how much would

the property bring in cash if offered now for sale by one who desired, but was not obliged, to sell, and was bought by one who was willing, but not obliged, to buy. As to the residue, the question was, how much is the present fair cash market value of the remainder of the land, not taken, decreased or diminished in value by reason of the improvement. The court fully instructed upon these matters, and we find no errors in this particular.”

We have underlined a portion of the foregoing quotation by way of emphasizing its applicability to the theory here advanced by the respondents and also because this language is characteristic of the claims of respondents. They do not want to sell upon an open market but rather they desire to wait until a sale can be made by them on their own terms.

A series of California cases have uniformly applied the rule for which we contend to the effect that the jury may consider all uses to which the property is reasonably adaptable, but the final result must be the present market value of the entire parcel and not what each lot within a subdivision may sell for at some future time. The first of these cases is *City of Los Angeles v. Hughes*, 262 Pac. 737, which was decided by the Supreme Court of California, and in it the Court said:

“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 a basis of a subdivision possibility, but also on the basis of what the owners would be able to obtain for the 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.”

In the case of *East Bay Municipal Utility Dist. v. Kieffer*, (Calif.) 278 Pac. 476, at page 480, the court said :

“Speculative and conjectural calculations of prospective receipts and expenditures and consequent profits to be derived from a prospective enterprise not only throw no light on the issue of the market value of the land to be used in the enterprise, but operate to confuse and mislead the minds of the jurors.”

And in the case of *People v. LaMacchia*, 264 P. 2d 15, decided by the Supreme Court of California in an action to condemn property for a freeway, the following instruction was fully upheld :

“In this connection, the jury was instructed: ‘Whatever purpose the Defendants had in connection with the future use of the property, can add nothing to its market value. The fact that this purpose is defeated by condemnation, however much a disappointment, is not a matter of compensation. A use existing or contemplated on property is distinct from the market value of the property itself and is not the conclusive basis for fixing such market value, and is not to be considered as determining the value of the land. Value in use is not to be considered by you as determining the market value of the property. A plan which Defendants may or may not have had for the improvement of the property adds nothing to the market value. The fact that a plan for the improvement, if any, was affected by condemna-

tion, however much a disappointment, is not a matter of compensation.' It must be assumed that the jury understood such clear and unambiguous language and correctly applied the instructions to the evidence.'" *Nunneley v. Edgar Hotel*, 36 Cal. 2d 493, 500, 225 P. 2d 497; *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 697, 89 P. 976.

We have examined many other cases that have held that a proposed subdivision must be valued as a single parcel and among these cases are *Nantakala Power & Light Company v. Moss* (No. Car.) 17 S.E. 2d 10; *Union Exploration Co. v. Moffat Tunnel Imp. Dist.* (Colo.) 89 P. 2d 257; *City of Napa v. Navoni* (Calif.) 132 P. 2d 566; *City & County of Denver v. Tondall* (Colo.) 282 Pac. 191; and *Thornton v. Birmingham*, 250 Ala. 651, 35 So. 2d 545, 7 A.L.R. 2d 773.

Also of interest and indicative of the holdings of the courts of the various states are two cases from Oregon although it is only proper to note that in this jurisdiction separate estates in a tract of land sought to be condemned are not separately assessed but the award is made for the land and then apportioned among the respective owners as their interests may appear. This is, of course, a most literal interpretation of the common law rule followed in all the states that a proceeding in eminent domain is a taking of the land and that it is not a taking of the rights of the owners involved. This rule is relaxed by the Utah statutes and under the interpretation given our statutes in the case of *Town of Perry v. Thomas*, 82 Utah 159, 22 P. 2d 343, separate owners in a tract of

land sought to be condemned are entitled to have their respective interests separately assessed.

The first case from Oregon is *State v. Cerruti*, 214 P. 2d 346, where the land to be condemned was used as a celery farm and the owner sought to show anticipated profits. The court held that it was error to instruct the jury that in determining market value they might “consider the profits which a person in the defendants’ position could normally anticipate from the best possible use of the land.”

And in *State v. Deal*, an Oregon case, 233 P. 2d 242, the state highway condemned certain property, which had been prepared for a subdivision and a plat actually submitted for recording although rejected by the county officials. In that case the following instruction was requested by the State:

“I instruct you that in determining the fair cash market value of the real property described in the complaint as Parcel No. 1, should you find from the evidence that the highest and best use of Parcel No. 1 is for subdivision purposes then Parcel No. 1 may be valued according to its use for subdivision purposes, *but, in no event, in determining the fair cash market value of Parcel No.1 shall you consider the number of lots that Parcel No. 1 might be divided into or the value of such lots as separate parcels.*”

The portion of the foregoing instruction that we have underlined was refused by the trial court and this was held to be reversible error. Our Requested Instruc-



tion No. 12 in the present case is similar in form and substance and we most strenuously contend that it was a proper statement of the law and that failure to give that instruction was highly prejudicial to the State of Utah.

At this juncture, it is necessary to emphasize the theory adopted by the State appraisers and is referred to in the record in some instances and specifically by Mr. Kiepe as the income approach (R. 343). And, in answer to the question as to what is the income approach, Mr. Kiepe responded:

“The income approach is an analysis of the value of the property based upon what it can produce in dollars. The income approach sometimes involves the property which has a continuing income such as an apartment house. An apartment house would have a constant income. In case of a subdivision of sand and gravel deposit, we have an income approach, but we have a gradually diminishing or liquid asset, but it is still the income approach. The income approach is used in all properties where the ownership is expressly for profit. It is the prime and elementary and the final important approach where the purpose of the ownership of that property is to obtain a profit. That is true of a duplex. It is true of a store property. It is true of an office building. It is true of a sand and gravel deposit. It is true of a subdivision.” (R. 344-345).

And in the application of this income approach to the properties here involved, Mr. Kiepe commenced with a figure that in his opinion represented the final gross

selling price of the lots within a particular area; and, by way of a paranthetical remark, this is the place where the appraisers for the Deere Estate stopped. From this gross sales price, Mr. Kiepe subtracted the necessary selling costs stated as advertising, abstracts, revenue stamps, sales commissions, taxes and general overhead based on the length of time required to dispose of the property; and also from this gross sales price and, in each instance depending upon the risk and time involved, a deduction was made for the risk profit that an owner would be entitled to which represented interest on the money invested and a return for the management of the property and for the services that he necessarily would render. The final figure arrived at was the fair market value and it is crystal clear that a buyer of this property will pay no more than this figure. The evidence of Mr. Kiepe that has been summarized in this respect is contained on pages 362 to 366 of the record.

We contend that the evidence of Mr. Kiepe and that of Mr. Ashton and Mr. Solomon, the two other state appraisers, was the only competent evidence of value introduced in this trial as to Parcel 1. However, the trial court not only failed to grant our motion to strike the evidence of value as to this parcel presented by respondents, but directed the jury to ignore and give no consideration to the evidence above summarized (R. 79 and 88). We again urge upon this Court that we at least had the right to have the jury consider our evidence on an equal basis with that of the respondents.

In the recent California case of *Redwood City Elementary School District v. Gregoire*, 276 P. 2d 78, the School District sought to condemn a parcel of land used as a summer home and for the sale and shipment of cut flowers. However, the expert appraisers all agreed that the highest and best use was for subdivision purposes and that the land could be divided into approximately sixty lots. The two appraisers for the school district gave figures of \$78,750.00 and \$78,400.00, while the two appraisers for the owner gave \$153,000.00 and \$146,750.00; and this last figure was demonstrated as a mathematical total of the value of each of the sixty lots. A jury returned a verdict of \$83,500.00 and the owner appealed. The appellate court affirmed hold that it was proper to submit both sets of values to the jury and that the following instruction was a correct statement of the applicable law:

“You are instructed that you are to determine the market value of the 12.23 acre parcel of land as a whole as of November 14th, 1952, and not as if it had been divided into small parcels.

“Evidence, if any, of what an owner might plan to do with the property is not to be considered by you as enhancing its market value.”

Referring again to page 18 of this brief, we feel that we have conclusively demonstrated that Instruction No. 10, as given, and particularly the last sentence thereof, cannot be upheld. This last sentence says:

“Also as a willing seller, he has the right and it must be assumed that he may exercise that right, to dispose of the property in such manner as

would result in obtaining its fair market value for the highest and best use to which the property or any of its parts can be adapted.”

We submit that this is improper, that there is no time limitation placed upon it, that the condemnee under the law has no such right, and that it does violence to the definition of a willing seller upon an open market to a willing buyer; and we also submit that failure to give our Requested Instruction No. 5, under the circumstances of this case, was error and prejudicial to the State of Utah.

## POINT II.

THAT THE TRIAL COURT IMPROPERLY PERMITTED THE JURY TO CONSIDER AND TO ASSESS DAMAGES TO THE WATER DISTRIBUTION SYSTEM IN THE FOLLOWING PARTICULARS:

(A) THE COURT IMPROPERLY PERMITTED THE WITNESS, ULLRICH, TO TESTIFY AS TO VALUES OF THE WATER DISTRIBUTION AND TRANSMISSION SYSTEM.

(B) THE COURT IMPROPERLY RECEIVED EXHIBIT 39D PERTAINING TO VALUES OF THE WATER DISTRIBUTION AND TRANSMISSION SYSTEM.

(C) THAT THE COURT IMPROPERLY DENIED THE PLAINTIFF'S MOTION TO STRIKE THE EVIDENCE OF THE WITNESSES, BRAYTON AND ULLRICH AS TO VALUES OF THE WATER DISTRIBUTION SYSTEM AND TRANSMISSION SYSTEM.

(D) THAT THE COURT IMPROPERLY REFUSED TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 19.

(E) THAT THE TRIAL COURT IMPROPERLY PERMITTED THE WITNESS BRAYTON TO TESTIFY AS TO VALUES AS HE WAS NEITHER AN EXPERT NOR AN OWNER.

In the decision of this Court in the former appeal of this case, *State v. Peek*, supra, the question of the water system was raised and discussed on page 638 of the Pacific Reporter; and it was held that it was error for the trial court to exclude the evidence offered as to this water system and as to its value because this evidence would have aided the jury "in arriving at their overall value of the property." But we do not believe that this Court intended that this water system was to be valued separately from the property condemned and, under the facts as presented, we contend that it was absolutely impossible to give it a separate valuation and that it was error to submit that question to the jury.

At this juncture, we are required to call the Court's attention to the fact that Plaintiff's Requested Instruction No. 19 does not appear in the record; this instruction reads as follows:

"You are further instructed that the only evidence of value as it pertains to the water works and water rights of the defendant is that value of the water rights given by the witness, Ullrich, and reduced by the witness, Brayton, to the sum of \$11,290.00; and that all other evidence of value produced by the defendant is incompetent and

may not be considered by you in arriving at your verdict.”

We excepted to the Court's refusal to give this instruction (R. 518).

The trial court did give an Instruction No. 19 (R. 90), which was satisfactory as far as it went; but we earnestly urge that the remainder of the requested instruction should also have been given.

Appellant's main contention concerning this question of water distribution and transmission is that the evidence clearly shows that its value is included within the values placed by the appraisers upon the land itself and that to permit the jury to place a separate value upon it requires the State of Utah to pay for it twice. In our statement of facts on page 7 of this brief, we referred briefly to this statement of values made by the appraisers. Because of its importance in connection with the present phase of our argument, we feel compelled to quote the cross-examination of respondents' witness, Ralph Wright, commencing at the top of page 231 of the record in this case:

“Q. In connection with the water lines that were within the Deere Estate property, and, particularly I believe within Parcel 1, you knew, of course, that that belonged to the Deere Estate, did you not?

A. Yes sir.

Q. And did the cost— and did the actual fact that they were there reflect in your figures for those lots?

A. Yes, their presence there did.

Q. And if they had not—

A. (Continued) Was reflected in the values.

Q. And if they had not been there, your figures would have been lower?

A. That's correct."

The other two expert appraisers for the respondents made similar statements (R. 261 and R. 296). And in order to emphasize this picture, we again repeat the statement of respondents' witness, Ullrich, when he stated that at the time of the condemnation this water collection distribution system had no utility except to serve the property and lands subject to the condemnation suit. This witness did state that it could be adapted for other uses but the respondent offered no evidence as to what the cost of adaptation would be; and there was, therefore, no foundation upon which the questions of value could be propounded to either the witness, Ullrich, or the witness, Brayton. We objected to the questions asked Mr. Brayton (R. 317) and we objected to the introduction of Exhibit 39 (R. 321). And we moved to strike all of the evidence of values as to this water distribution system (R. 321). All of our objections and motions were overruled and denied.

The cases we have cited under Point I of this brief are applicable here and in addition we desire to cite the case of *Kinter v. United States*, 156 F. 2d 5, 172 A.L.R. 232, as peculiarly applicable to the problem presented

here. In that case the court held that evidence of cost of improvements was inadmissible and said:

“As stated by Mr. Justice Reed in *United States v. Petty Motor Co.*, 327 U.S. 372, 90 L. Ed. 729, 66 S. Ct. 596, 599, ‘The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called “market value.” It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory.’

“It has been said that ‘sales at arm’s length of similar property are the best evidence of market value.’ *Welch v. Tennessee Valley Authority*, 6 Cir. 1939, 108 F. 2d 95, 101, certiorari denied 1939, 309 U.S. 688, 60 S. Ct. 889, 84 L. Ed. 1030. Even where there have been no sales of similar property in the vicinity upon which a basis of valuation might be predicated, the quest is still for ‘market value.’ This may be more or less than the owner’s investment in his property. The government may neither confiscate his bargain nor be required to assume his loss. But, it is the ‘value of the interest’ that is guaranteed; not the investment.

“The owner may, because of his personal knowledge of the property, the uses to which it may be put, the condition of the improvements erected thereon, testify as to its market value. May he also, in the first instance, state as a lump sum the total of all costs incurred by him over a period of years for repairs and improvements as bearing upon the question of fair market value? We think



not. Admittedly, cost is not synonymous with market value. A fortiori, cost of land and cost of improvements taken separately and added are not to be equalized with fair market value: cf. *United States v. Certain Parcels of Land*, 5 Cir, 1945, 149 F. 2d 81; *McSorley v. Avalon Borough School District*, 1927, 291 Pa. 252, 255, 139 A. 848."

Also, the annotation in *American Law Reports* following the above cited case discuss at some length the question of the competency of evidence of cost as evidence of value in eminent domain proceedings, and fully support the position we have taken. And, in addition, the case of *Provo River Water Users Assoc. v. Carlow*, 103 Utah 93, 133 P. 2d 777, suggests that the evidence offered by Mr. Brayton should have been received with caution and the jury so instructed.

In another case, *A. D. Graham & Co. v. Pennsylvania Turnpike Comm.* (Pa.) 33 A. 2d 22, the court held that evidence of value could not be sustained by showing cost when there was no evidence of any market for the property for the purpose for which the cost was offered. The Court said:

"For example, a certain kind of timber might be useful in the making of bows and arrows but if there was no market for those implements, the timber's value for such use could not be shown."

It should be specifically stated that we do recognize the right of the respondents to recover for the value of their right to the use of the water from Wagner Spring and this does not appear to us to be open to question as

it has long been the law in this state that water and land may be separated. But we strenuously contend that the water transmission and distribution system, as far as this record is concerned, had no market value except with the property condemned and that its value is included within the values placed upon the land.

### POINT III.

THAT THE COURT IMPROPERLY LIMITED THE PLAINTIFF AS TO THE EVIDENCE PROFFERED BY AND PROPOSED TO BE GIVEN BY THE WITNESSES, SOLOMON AND ASHTON.

Mr. Werner Kiepe, an expert appraiser testifying on behalf of appellant, gave a very thorough and comprehensive report as to his appraisal detailing the many steps he took and the many analysis he made in arriving at his opinion as to the fair market values of the property here involved. Appellant sought to elicit from Mr. Edward M. Ashton and from Mr. C. Francis Solomon their detailed analysis of how they arrived at fair market value and the steps they took, though similar in some respects, were also different in other respects from those taken by Mr. Kiepe.

We were prevented from so doing by the objection of counsel for respondent and the ruling of the trial court. The colloquy between court and counsel, as shown commencing on page 430 of the record and continuing through page 436, not only shows the ruling with respect to this point but clearly shows the difference in concept

and theory between the court and counsel for the respondent on the one hand and counsel for the State of Utah on the other hand.

During the former appeal of this case, *State v. Peek*, supra, the same counsel represented the Deere Estate and he strenuously contended before this Court that he had been severely limited in both his direct examination of his own witnesses and in his cross-examination of the other witnesses. This Court upheld that contention saying:

“It (the trial court) excluded on both direct and cross-examination evidence of the value of the various elements, items and parts of appellants’ property being condemned in this action. . . . This was prejudicial error.”

We now make the same contention before this Court and submit that it was prejudicial error for the trial court to have so curtailed the presentation of the evidence of values on behalf of the State of Utah.

#### POINT IV.

THAT THE COURT IMPROPERLY GAVE INSTRUCTION NO. 15 AND PERMITTED THE JURY TO ASSESS AS VALUE THE STREETS WITHIN THE PROPERTY; THAT THE COURT IMPROPERLY REFUSED TO GIVE PLAINTIFF’S REQUESTED INSTRUCTIONS NOS. 14 AND 15 AS TO OWNERSHIP OF PLATTED STREETS.

The trial court gave Instruction No. 15 (R. 86) to which appellant duly excepted (R. 517). By this instruc-

tion the jury was directed to value the interest of respondents in Kennedy Drive. We contend that this was error first by reason of the fact that Kennedy Drive is not the subject of, nor included within, the property sought to be condemned. The 1953 Utah Legislature by Chapter 122 amended Section 63-11-10, Utah Code Annotated 1953, and by that amendment removed Kennedy Drive from the property they had theretofore directed to be condemned. This action of the Legislature was upheld in the case of *State v. Bird & Evans, Inc.*, 1 Utah 2d 276, 265 P. 2d 639.

Also, it is to be noted that the trial court gave no further instructions as to streets within the area and did not give Plaintiff's Requested Instructions Nos. 14 and 15. There is a note attached to each instruction by the trial judge stating that each of these instructions were given in substance but we have carefully examined each of the instructions given and cannot agree with this notation; and, in addition, Instruction No. 15 as given is clearly in conflict with those requested. We duly excepted to the failure to give each of the requested instructions (R. 518).

We respectfully submit that the instruction given was in error and that the instructions requested correctly state the law both because Kennedy Drive was not a part of this condemnation action and because the streets within the platted section of Parcel 1 belonged either to the city or the county. The two Utah cases of *White v. Salt Lake City*, 239 P. 2d 210, and *Boskovich v. Midvale*

*City*, 243 P. 2d 435, both uphold our contention that a platted street vests title thereto in either the city or the county and that the respondents had thereafter no further interest therein.

## POINT V.

THAT THE COURT GAVE NO INSTRUCTION AS TO BURDEN OF PROOF AND IMPROPERLY REFUSED TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 2 DEALING THEREWITH.

The appellants duly excepted to the trial court's refusal to give Plaintiff's Requested Instruction No. 2 (R. 517). That instruction reads as follows:

“You are instructed that the burden of proving value, and the burden of proving damages, are burdens which the law puts upon the defendant, Deere Estate. These burdens of proof are successfully carried by defendant only if you find that it has established the truth of its contentions by a preponderance of the evidence. A ‘preponderance of the evidence’ is defined as that amount of evidence which is more convincing as to its truth, or which convinces the mind of the jury that a proposition is more probably true than not true. Therefore, if you believe that all the evidence is evenly balanced, you will reject the propositions advanced by defendant as to value, and as to damages, and will accept those advanced by plaintiff.”

We should also call this Court's attention to the fact that no other instruction concerning the burden of proof was given by the trial court and may we also note that the respondents were permitted the right to open and

close in connection with the trial. We submit that failure to give the requested instruction was fundamental error in this cause.

5 Nichols on Eminent Domain, Section 18.5 at page 198, states the rule as follows:

“From the rule that an award is vacated by appeal and cannot be considered by the jury in determining damages, it follows that the burden of proof of establishing his right to substantial compensation is upon the owner, even if he is defendant or respondent in the proceedings, since it is clear (except in the states in which the jury or other tribunal are entitled to use their own knowledge of values, or a view of the premises is considered as evidence) that if no evidence were introduced by either party, the jury would have no basis upon which to fix the compensation and would be bound to award nominal damages only. Accordingly, it is the law in most jurisdictions that the burden of proof is upon the owner to establish his right to recover more than nominal damages even when his land is taken; and, when no land of his is taken, if he fails to prove that the fair market value of his land is perceptibly decreased by the laying out and construction of the improvement, he is not entitled even to nominal damages. When there is a partial taking of land, in the absence of proof by the owner of diminution in value of the remainder area, he is limited in his recovery to the value of the land actually taken.”

This rule was explicitly followed in the case of *Tanner v. Provo Bench Canal & Irrigation Co.*, 40 Utah 105, 121 Pac. 584, wherein the Court said:

“It is also contended that the burden of establishing the amount of damages was upon respondent, and that in any event the court erred in permitting him to enter upon appellants’ property before he had established what was just compensation for appellants’ property taken or affected by his proposed improvement. We think, however, that, under the practice in force in this jurisdiction, the burden of establishing the quantum of damages was upon the appellants. Such has always been, and continues to be, the practice in the district courts of this state. Moreover, such is the great weight of authority under statutes similar to ours. In 15 Cyc. 898, the prevailing rule upon this question is stated as follows: ‘The burden of showing necessity and public use is upon petitioner. The burden of showing the damages which the owner will suffer rests on him.’ In 2 Lewis, Eminent Domain (3d Ed.) § 645, the rule is stated to be in accordance with the text quoted from Cyc., and the author of Lewis’ Eminent Domain, in part at least, collates the cases both for and against the rule as there stated. In addition to the numerous cases cited by Mr. Lewis, see, also, Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700; Los Angeles County v. Reyes (Cal.) 32 Pac. 233, and cases there cited.”

This case was affirmed by the Supreme Court of the United States in 239 U.S. 323, 60 L.Ed. 307, and has ever since been the law in this jurisdiction and has been followed without question in every condemnation case that we have been able to examine. We submit that the requested instruction should have been given.

## POINT VI.

THAT THE COURT IMPROPERLY ASSESSED INTEREST AGAINST THE PLAINTIFF IN COMPUTING THE AMOUNT OF THE JUDGMENT ENTERED ON THE VERDICT ON NOVEMBER 5, 1954.

And finally we contend that the trial court erred in assessing interest in this cause. It will be remembered that this Court, in the case of *State v. Peek*, supra, held that interest was not recoverable in this type of condemnation proceeding until date of judgment and it is necessary to also note that the first judgment in this cause in the sum of \$495,875.00 was entered on May 27, 1952, but was not paid to the respondents until January 5, 1953.

Therefore, in the Judgment on the Verdict entered by the trial court on November 5, 1954 (R. 97-99) the following steps were taken by respondents with respect to interest. First, the verdict and judgment in this cause rendered by the jury on November 5, 1954, in the total sum of \$632,145.00, is related back to May 27, 1952, and interest on this full amount is charged to January 5, 1953, at the rate of 8 percent per annum, or the sum of \$31,888.09, and this is then added to the judgment. This total of \$664,033.09 is then credited with the payment of \$495,875.00, leaving a balance of \$168,158.09; and this amount is then charged with 8 percent per annum interest computed to November 5, 1954, totalling \$24,663.10, and this added to the remainder of \$168,158.09 above, makes the total of \$192,821.19 for which judgment has now been taken and entered.



Two questions present themselves: first, is it proper to relate the second judgment back to the first for the purpose of charging and collecting interest; and second if it is proper to so relate the second judgment back, is it proper to charge interest at the rate of 8 percent per annum.

The answer to the first question requires a further interpretation of this Court's ruling in *State v. Peek* supra, and of our statutes. It is true that following the judgment entered on the first trial and its payment, a final order of condemnation was made and entered in favor of the State of Utah and it would be most difficult to now argue that this did not constitute "the actual taking" of the property. However, in view of the complex nature of this judgment, the positive and mandatory language of the statute that we have quoted on the first page of this brief and the fact that a state agency is involved, we have felt it to be the better practice to call the matter to this Court's attention for their ruling on the matter.

However, with respect to the second question, we are of the firm opinion that the Utah case of *State v. Danielson*, 247 P. 2d 900, is controlling and that the interest on this second judgment as it exceeds the first judgment must be limited to 6 percent per annum until the actual entry of that judgment on November 5, 1954. That case held that interest at 6 percent per annum from the date of an order for immediate occupancy to the entry of final judgment was proper and we contend that the present situation is no different in principal.

## CONCLUSION

By way of summation, we are desirous of emphasizing that the verdict and judgment from which this appeal is taken gave to the Deere Estate the market value of their property, insured to them all of the profit they could possibly hope to realize from the individual sale of each lot in Parcel 1 thereof, no matter how long it might have taken to make those sales, and all of this without any cost or expense to them and assuredly there would have been some cost; and in addition they are also entitled to interest on the judgment, albeit that interest did not commence to run for a period of slightly more than nine months after the commencement of the original condemnation action. Certainly the statutes do not contemplate in eminent domain proceedings that the State of Utah shall underwrite for each defendant an unearned profit.

We respectfully submit that the appellant, State of Utah, is entitled to, and should be granted, a new trial of this cause.

Respectfully submitted,

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