

1955

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

Utah Supreme Court

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Keith E. Taylor; Of Counsel;

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Case No. 8290

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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 and Plaintiff,*

**VS.**

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

*Respondents and Defendants.*

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**RESPONDENTS' BRIEF**

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**FILED**  
JUN 27 1956  
Clerk, Supreme Court

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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  
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*Appellant and Plaintiff,*

Case No. 8290

**vs.**

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

*Respondents and Defendants.*

---

## RESPONDENTS' BRIEF

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### I.

#### STATEMENT OF FACTS

This action was commenced by the State of Utah to  
condemn property for "This Is The Place" Monument

Park. (R. 1-20) Respondents' property was "actually taken" by Final Judgment of Condemnation duly made, entered and recorded May 27, 1952. (R. 43-51)

On appeal by respondents from the money judgment first entered determining the value of respondents' property so taken, the Supreme Court reversed the trial court with direction to grant a new trial in a decision by Wade, J., reported as *State v. Peek*, 1 U. 2d 263, 265 P. 2d 630.

On re-trial, the judgment from which appeal is now taken was entered November 5, 1954 (R. 97-99) on the jury's verdict as to the only issues of fact presented below, that is, as to the fair market values of the items of respondents' property taken by the Final Judgment of Condemnation. On this appeal the State now raises two major questions of law pertaining to the trial court's rulings as to evidence and instructions, asserting the alleged errors to be fatal to the verdict and judgment entered thereon.

The first of these major contentions concerns the fair market value of Parcel 1 (Ex. 1). This was the completed subdivision described in the court's Pre-trial Order. (R. 52) At the second trial, experts for appellant valued Parcel 1 at \$163,250.00, \$148,883.00, and \$169,000.00. (R. 366, 437, 474) Those for respondents valued it as \$310,000.00, \$302,000.00, and \$309,700.00, re-

spectively. (R. 182, 238, 270.) The jury found the fair market value of Parcel 1 on July 12, 1951 to be \$260,-100.00. (R. 93)

As stated in Appellant's Brief, the wide disparity in the expert opinions as to value was the result of the application of different appraisal methods by the opposing experts. Experts for the State relied upon and applied the "income" (R. 351), or the "residual" (R. 426), or the "summation" (R. 477, 491) approach. In their opinion, as experts, that was the most appropriate formula or method to apply in estimating fair market value. In applying this formula, these experts assumed the obvious—that the best use of the property was for subdivision and sale as residential lots. However, they then approached the valuation as would a speculator. They first computed the retail sale values of the lots. Then they computed all conceivable possible future expenses which a speculator purchasing the entire parcel at a single sale might have to make, including his profit and interest on his investment. The sum thus obtained was then subtracted from the market value of the lots. This, said the experts, is the amount which one or a number of speculating subdividers would be willing to pay for the entire tract; thus this is the fair market value of Parcel 1. (R. 377)

Experts testifying for respondents admitted that this residual approach was appropriate from a subdivider's position where "raw acreage" was concerned

(e. g. R. 226-8, 264), but stated that in their opinions that approach was unreliable in appraising Parcel 1 because in fact it was not "raw acreage" (e. g. R. 229, 265). All witnesses agreed that except for Tract 1-C, Parcel 1 was not raw acreage but had been substantially improved; and that the lots contained therein were available for immediate sale in their then condition on July 12, 1951. (e.g. R. 480) The parcel contained streets, curbs, gutters and water, gas, power and telephone lines. (R. 52) Some twenty of the lots had been sold and all others were then available for immediate sale. (e.g. R. 485) Because of the improved condition of Parcel 1, experts for respondents accordingly applied principally the "comparative" approach (e.g. R. 225, 291), whereby the fair market value of the property on the specified date was determined by comparing the land condemned with other similar land where known sales of a similar nature had actually occurred at about the time involved. They utilized the income or residual approach only for purposes of checking the values obtained in using the comparative approach. (e.g. R. 230)

On cross examination, experts testifying for the State admitted the repete, integrity and qualification of respondents' experts. (R. 391, 485) We thus simply have a situation where qualified experts disagree. There was an honest difference of opinion as to the appropriate process to use in determining the fair market value of Parcel 1 on July 12, 1951. The jury, acting entirely within

its province, reached its own valuation of the property after considering the opinions of opposing experts. (R. 93)

Parcels 2 and 3, the remaining land items for assessment, were also designated without objection by the pre-trial order. (R. 52) The first tract abutted Oak-hills Drive on the north side of Emigration Canyon, and had been platted but neither surveyed nor recorded. Parcel 3 was a somewhat similar tract abutting Kennedy Drive on the Canyon's south side. In contrast with Parcel 1 (the "finished product" or virtually completed subdivision. (R. 229) Parcels 2 and 3 were primarily paper subdivisions — acreage suitable for future residential use (R. 128 et seq.), and were so treated and valued by all of the various experts. (e.g. R. 229, 255, 278)

Thus the specific objections raised by appellant to the jury's verdict as to Parcel 1 are not present as to either Parcel 2, valued by the jury at \$91,500.00, or as to Parcel 3, valued at \$70,000.00. (R. 93)

The second major contention concerns the valuation of the water-works owned by respondents, the fourth and last item to be assessed. (R. 52, 81) At the first trial, the court refused to admit expert testimony as to the value of the water-works system. This court, in *State v. Peek*, *supra*, held that such refusal by the trial court

was error. At the re-trial, the court admitted the testimony of Mr. Ullrich over the objection of appellant, thus conforming to the judgment of this court in *State v. Peek*, supra. (R. 313-314)

Appellant now assigns the admission of this evidence as prejudicial error. It admits that respondents were properly compensated for the taking of the water right, but contends that respondents should not be compensated for the taking of the balance of their water-works system. Thus appellant would pay respondents no more for the property involved than if they owned only the land and a water right, and some third party owned the water-works system.

It is of course true as contended by appellant that the experts for respondents in appraising the land in Parcel 1 "considered" (along with all other such factors) the incidental benefits of the presence of the water system. However, such witnesses expressly stated that the value of the waterworks system was *not* included (e.g. R. 231). Respondents owned both the land *and* the fully developed water-works system. The presence of the water system, regardless of its ownership, of course increased the values of the land where the water could be beneficially used. However, the fact that a single person owned both the water system and the land where it could be put to use, should not cause it to forfeit to the State the value of the water system.

Mr. Ullrich, testifying for respondents, stated that in his opinion, the value of the water collection, transmission, storage, and distribution system was \$93,400.00 exclusive of the value of the water right. (R. 314) Appellant objected to, but did not contradict this testimony. The competency and credibility of Mr. Ullrich is not challenged. The jury by its verdict resolved the issue by assigning a fair market value of \$82,927.00 to both the water-works and the water rights. (R. 93) That this value was to be a part of the award of just compensation to the Deere Estate had theretofore been established by this court on the first appeal as the law of this case; and the trial court so ruled. (R. 52)

Thus now before this court by way of the present appeal is first an attempt to change its decision in *State v. Peek* as to the water system; and then to persuade this court that errors were made by the trial court below in its rulings as to evidence and instructions which were sufficiently prejudicial to require that the jury's present verdict as to the values of the last three parcels of the Monument Park area should be set at naught.

Insofar as practical, respondents will meet the seventeen such errors alleged by appellant in the order presented by Appellant's Brief, under the seven points stated hereafter.

## **II.**

### **STATEMENT OF POINTS**

#### **Point 1.**

**The trial court properly instructed the jury as to the determination of fair market values of the land condemned.**

#### **Point 2.**

**The court properly denied the motion of appellant to strike the testimony of Witnesses Ralph B. Wright, H. Mervin Wallace and Joseph E. Benedict as to valuation of Parcel 1.**

#### **Point 3.**

**The court committed no error in admitting evidence, refusing to strike evidence, or in instructing the jury concerning the valuation of the water system.**

#### **Point 4.**

**The court properly limited the evidence proffered by expert witnesses Solomon and Ashton.**

#### **Point 5.**

**The court properly gave Instruction 15, and properly refused to give Requested Instructions 14 and 15.**



### **Point 6.**

**The failure of the court to instruct as to burden of proof, if error, was not prejudicial.**

### **Point 7.**

**The court properly included and computed interest in the judgment below.**

## **III.**

### **ARGUMENT**

#### **Point 1.**

**The trial court properly instructed the jury as to the determination of fair market values of the land condemned.**

**a. The instructions of the court were consistent with its pre-trial order.**

The pre-trial order (to which no objection was made) divided the property into eight separate parcels to facilitate orderly and systematic procedure. (R. 52-3) Instruction Number 11 following the pre-trial order states as follows: (R. 81-2)

For the purpose of assessing the compensation to which defendant may be entitled, the whole area of defendant's property has, by order of the

court, been divided into *eight parcels*. Parcel 1 is all that area colored yellow on the map, Exhibit 1, which lies north of State Road No. 65; Parcel 2 is the area colored purple, abutting Oakhills Drive; Parcel 3 is the area colored purple, abutting on Kennedy Drive, and including the small semi-circle colored purple farther up the canyon;

Parcel 4 is the area colored red; Parcel 5 is the area colored brown; Parcel 6 is the area colored yellow which lies at the southwest corner of the map;

Parcel 7 is the area colored green; and Parcel 8 is the area colored blue.

Each area is shown on the map and designated by its parcel number.

All of the areas which are left in white on Exhibit 1 belong to some owner other than the Deere Estate, and the respective owners have been paid just compensation for such areas. The value of such areas is therefore not to be computed in the compensation due the Deere Estate.

The parties have agreed on the values of the lands in Parcels numbered 4, 5, 6, 7, and 8, and these tracts are not involved in this action; therefore, no evidence as to their value has been given, and you will not consider the value of such tracts. Your consideration and duty will be confined to determining the following matters:

- (a) The fair market value of Parcel 1 on July 12, 1951.
- (b) The fair market value of Parcel 2 on July 12, 1951.

(c) The fair market value of Parcel 3 on July 12, 1951.

(d) The fair market value of the water system and works installed by defendants in the development of the subdivision project.

You will determine separately the value of each of the four items numbered (a), (b), (c), (d), and from the evidence in the case, viewed and construed in the light of the law as given in these instructions, and return a verdict showing the value you find as to each parcel or item, and the total of all. We will furnish you a form of verdict for your convenience.

**b. The court at no time divided Parcel 1 into 62 parcels for purposes of evaluation.**

It is true that evidence of the value of such lots without objection by the State was admitted, but solely for the purpose of enabling the jury to understand the manner in which the expert witnesses arrived at their opinions as to fair market value of the whole of Parcel 1 as of July 12, 1951. The court properly and adequately instructed the jury how to determine itself the fair market value of Parcel 1 as a unit by its Instructions 12 and 13 as follows: (R. 83-4)

**INSTRUCTION NO. 12**

**It is elemental on determining fair value that the owner is entitled to the value of the property**

for the highest and best use to which it could be put at the time of taking.

Evidence in this case is undisputed that Parcel 1 on July 12, 1951 consisted of sixty-two lots, together with the small tract abutting State Highway 65 designated 1-C. Twenty-two lots of the eighty-four lots originally in the parcel had been sold to other persons prior the condemnation date, and the sixty-two remaining lots as of July 12, 1951 were suitable and available for use for residential purposes, and each was held by the defendants for sale as such. Tract 1-C likewise under the undisputed evidence had as its highest and best use, subdivision into lots and use for residential purposes, and this tract was then suitable and available for such use.

The owner is entitled to the fair market value of all of the components of Parcel 1 as the property actually existed physically on July 12, 1951. It is not proper to select a less advantageous or less profitable use as the basis for determining the owner's damages than the highest and best use to which each of the components could actually be put at the time of the taking in its then condition. Specifically, the defendants may not be required to hold as mere acreage available and suitable for sale as such to another or other subdividers, who in turn would sell it as lots to others, the lots in Parcel 1 into which a portion of the property had been divided.

### INSTRUCTION NO. 13

As to that part of the lands in Parcel 1 on which the subdivision work had progressed so far that sales could be made by lots and houses built

thereon for immediate use, the witnesses on values were permitted to testify with reference to values of separate lots. *This was permitted to enable you to understand the ways the witnesses, in making their appraisals of value, work, in arriving at their opinions as to the fair market of the whole parcel; the matters they deemed as affecting the market value of the property and why and to what extent.*

You may consider this evidence in determining the weight and value to be given to their opinions as to value, and also to aid you in arriving at your verdict *as to the fair market value of Parcel 1 on July 12, 1951.*

*You will not return a verdict as to the value of each separate lot, but a verdict for the total value of all the land embraced within Parcel 1, as your deliberations may determine.*

Part of the land in Parcel 1 marked 1-C had not been subdivided and was not saleable as lots ready for use on July 12, 1951. These lands were evaluated by the witnesses on an acreage basis as a solid tract. You may determine the value of such lands apart from the value of the platted part, but the two must be added together to fix the value of the entire parcel in your verdict. (Italics ours.)

Appellant contends on pages 15 and 16 of its brief that these Instructions 12 and 13 in effect directed the jury that it "could and should value each lot in Parcel 1 individually based upon the testimony of appraisers for respondents and that their verdict be a mathematical

total of all of the 62 lots in Parcel 1.” It is submitted that such is obviously not the fact. Instruction 12 advised the jury of the highest and best use of Parcel 1 as agreed by appellant’s own experts; that the owner is entitled to the fair market value of all of the components of Parcel 1 as it existed on July 12, 1951; and that the improved portion of Parcel 1 may not be treated as raw unimproved acreage available for sale only to another subdivider or other subdividers.

By Instruction 13 the court explained to the jury why the evidence of value of each lot was admitted, and directed that it might be considered with other evidence in determining the fair market value of the entire parcel. The only reference by the court to mathematical computation was the direction in the last sentence of Instruction 13 to add the values of the platted portion to the unplatted portion of Parcel 1 in order to arrive at the value for the entire parcel. An alternative within the court’s discretion would have been to have further divided Parcel 1 into two or still more parcels for separate assessments pursuant to statute (Judicial Code, 9 U.C.A. Sec. 78-34-10(1); *State v. Peek*, supra.)

**c. Instructions Number 9 and 17, to which appellant also objects, were proper.**

On page 15 of its brief, appellant as to Instruction 9 states as follows:

“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.”

Again, it is submitted that such is simply not so. Instruction 9 was as follows:

The fair market value of a parcel of property is based upon the value of that parcel apart from and regardless of who may be the owner. It does not change because of the color, creed, financial status or residence of the owner, or the fact that the owner owns other properties which may or may not be affected by the condemnation proceeding against the particular parcels which are being taken. The fact that these defendants own a relatively large part of the entire area to be condemned, does not subject them to any so-called wholesale discounts, or require you to assume that all of their property must be purchased by a single purchaser at a single sale. *You are to determine the just compensation to be paid on the basis of the fair market value of the various parcels of the property taken, regardless who happened to own the property at the time the condemnation action was brought.* (Italics ours.)

The sixty-two lots are not even mentioned in this instruction. However, the court *does* instruct that each of the *parcels* should be valued separately without giving any weight to their ownership. The parcels referred to are obviously the eight parcels specified by the pre-

trial order and which were set out in different colors on Exhibit 1. That exhibit was on a blackboard before the jury and was constantly referred to during the trial. (R. 106) Even if one could become confused about what the court meant by "parcels," any conceivable ambiguity or uncertainty would be cured by Instruction Number 11, quoted *supra*, in which the court describes in detail the eight parcels involved in this litigation and shown by Exhibit 1.

Instruction 17 is also objected to by appellant. This states as follows: (R. 88)

In determining the fair market value of the property taken and any part or parcel thereof, 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 any future special improvements that might be installed; nor the fact that it is the State which takes the land, nor the use they may make of it; nor any possible future cost to the State, nor possible future expenses that defendants be saved by selling now; nor any interest the defendants might be saved or be entitled to receive; nor any expenses incident to this litigation. Any question of interest must be determined and fixed by the court.

You are confined to the fair market value as of July 12, 1951.



The authorities to the effect that in eminent domain proceedings the trier of fact is confined to *existing* conditions and values *at the time of condemnation*, and may not consider speculative future occurrences, are too numerous to need citation. It is submitted that Instruction 17 was entirely proper.

**d. Appellant's Requested Instructions 10, 11 and 12 were given in substance.**

Appellant alleges error in refusing to give a portion of Requested Instruction 10, and on page 16 of its brief "most strenuously urge" that the request was not covered in substance by other instructions. This portion instructed that the value of each parcel was "to be measured by the fair market value of such parcel as an entirety as of July 12, 1951."

As was noted by the court (R. 65), this instruction was given in substance in other instructions, namely, in Instructions 5, 7, 9, 11, 12, 13, 14, 17 and 20. (R. 75-91)

Appellant's Requested Instruction 11, quoted on page 16 of its brief, was also given in substance in other instructions as noted by the court. (R. 66) The substance of this requested charge is very aptly set forth in Instructions 7 and 8 (R. 77-8) quoted in part as follows, to-wit:

## INSTRUCTION NO. 7

The owner of the land which is taken under proceedings in eminent domain for public use, is entitled to receive as just compensation for such taking the reasonable and fair market value of such land for the highest and best use of which the land is capable at the time of such taking. In this connection, you may consider use of appropriate tracts for subdivision, for commercial, for residential or for any other lawful purpose or use to which you believe the property could be or was best adapted.

By fair market value is meant the price which property will bring when it is offered for sale by one who is willing but is not obliged to sell. In other words, the fair market value means the fair value between one who is willing to purchase and one who is willing to sell, when neither is acting under compulsion or necessity. The question is: If the defendants were willing to sell their property, what could be obtained for it on the market from parties who were willing to buy and would give its full value for the most advantageous use to which the property is or could be adapted?

The compensation to which the defendants in this case are entitled is to be determined with reference to the uses for which each of the various tracts of the property was suitable in its then condition on July 12, 1951, having regard to its location, situation and quality, and to the wants in that locality, or such as might reasonably be expected in the near future. The compensation being the value of the property for the highest and best use to which it could reasonably be put.

## INSTRUCTION NO. 8

“Just compensation”, as used in these instructions, is such a sum of money as will make the property owner whole, so that, upon receipt of the same, he will be no poorer and no richer by reason of the taking of his property than he would be if the same were not taken. *The term “just compensation” means “just” not only to the party whose property is taken for public use, but also “just” to the party which is to pay for it. (Italics ours.)*

It is submitted that Appellant’s Requested Instruction 12, quoted on page 17 of its brief, was not a proper instruction because of the phrase “but your value must be the value of the whole of Parcel 1, the plotted and unplotted portions taken together as one unit.” To give this instruction would be like telling the jury to value a horse and a cow, as a whole, together as a unit. The principal part of the parcel was fully improved with roads, utilities, etc. and contained lots available for immediate sale to the public. Each of the six appraisers based his estimate of fair market value upon the value of the individual lots in this section of Parcel 1. As heretofore set forth, the difference in valuation between opposing witnesses resulted from the deduction by the State’s experts of speculative selling costs from their “gross” market value in determining what they thought was “fair” market value.

However, all of the witnesses in this case valued the remainder of Parcel 1, which was still raw acreage, on an acreage basis. Thus the two areas within Parcel 1 were fundamentally different and of necessity were valued independently by *all* witnesses. Therefore, in Instruction 13 (R. 84) the court directed:

Part of the lands in Parcel 1 marked 1-C had not been subdivided and was not saleable as lots ready for use on July 12, 1951. These lands were evaluated by the witnesses on an acreage basis as a solid tract. You may determine the value of such lands apart from the value of the platted part, but the two must be added together to fix the value of the entire parcel in your verdict.

With this exception, the substance of the requested instruction was given by the court in Instruction 13, quoted in full *supra*.

**e. The court did not err in giving Instruction 10 and rejecting Request No. 5.**

On page 18 of its brief appellant urges that the giving of Instruction 10 (R. 80) and the failure to give its Requested Instruction 5 (R. 60) was prejudicial error. The reason given is that Instruction 10 does not properly define a willing seller and a willing buyer. The inference then is that the requested instruction does so properly define. The questioned instructions are as follows:

## INSTRUCTION NO. 10

In ascertaining the fair market value of the defendants' property, it is not proper to assume either a single sale or a simultaneous sale. On the contrary, you must assume that the owner as a willing seller has a reasonable time under all the circumstances within which to dispose of his property. 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 a 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.

## REQUESTED INSTRUCTION NO. 5

The fact, if it is a fact, that an owner is unwilling to sell, or objects to the condemnation, does not affect the market value. The measure of compensation in the case of an owner who objects to the taking of his property for a public use is in no respects different from the measure in the case of an owner who is willing that his property be taken for such use.

It is submitted that neither of these instructions properly defines a willing buyer and a willing seller; that they were not intended to so define; that Instruction 7 (R. 77) quoted supra, to which appellant did not object, *does* properly define a willing buyer and a willing seller; that the substance of Requested Instruction 5 is contained in Instruction 7; and that Instruction 10 was entirely proper as a cautionary supplement to Instruction 7 and the other instructions given in the extensive charge of the court to the jury. (R. 74-92.)

On pages 38 and 39 of appellant's brief, reference is made to the alleged error in giving Instruction 10 and refusing Requested Instruction 5. As an additional ground for error, appellant alleges "there is no time limitation placed upon it." We submit that this is not error, for in Instructions 5, 7, 11, 12, 13, 14, 15, 17, 18 and 20 the date of evaluation was expressly set forth. The omission could not possibly have misled the jury and was cured by the frequent admonition for the jury to value the property as of July 12 1951.

Summing up appellant's objections to the court's instructions, we submit that a reading of Judge Larson's careful and extensive charge (R. 74-92), having the relatively simple issues in mind, will satisfy this reviewing tribunal that the jury was fully and correctly advised as to the law and as to its function and duties. Appellant's objections are neither well-taken nor could prejudicial error result from that to which complaint is made on appeal.

(Appellant's Point I(F), relating to its motion to strike certain evidence, will next be covered separately.)

## **Point 2.**

**The court properly denied the motion of appellant to strike the testimony of Witnesses Ralph B. Wright, H. Mervin Wallace and Joseph E. Benedict as to valuation of Parcel 1.**

Appellant does not question the following propositions:

- (1) Fair market value is a question of fact for the jury.
- (2) The jury may consider the opinions of qualified experts as to fair market value.
- (3) All of Parcel 1 except that part marked 1-C on Exhibit 1 was fully improved and available for immediate sale to the public as residential lots at the time of condemnation.
- (4) The highest and best use of Parcel 1 was the sale of the subdivided lots for residential purposes.
- (5) Witnesses Wright, Wallace and Benedict were qualified experts.
- (6) Their concept of fair market value was proper, and was the same as those of witnesses testifying for appellant.
- (7) Both the "income," "residual," and the "comparative" approaches are commonly used by appraisers to determine fair market values.

The only and particular complaint of appellant (and its argument of Point I-F in pages 19 through 38 of its brief) is that witnesses Wright, Wallace and Benedict for the owners utilized a wrong approach in reaching an opinion as to the fair market value of Parcel 1. The State contends in substance that the comparative approach is not an appropriate method when applied to Parcel 1, but that the income or residual approach is the *only* proper approach.

This contention is itself an opinion. A search of the record does not disclose any statement by appellant's own experts that the comparative approach is not a proper one to apply in appraising Parcel 1. They simply state that in their opinions the residual approach was here more appropriate. Respondent's experts, however, expressed opinions that while the residual approach might be appropriate in appraising *raw acreage* from the subdivider's point of view, it is *not* a satisfactory method of appraising a fully developed subdivision available for immediate sale to the public. (e. g. R. 229)

It is submitted that neither counsel nor the court is the proper person to select the only appropriate method of appraising Parcel 1. Reputable and qualified experts could not agree. Their testimony was conflicting. In such instance, the jury is the proper moderator. 29 C. J. S. 1297, Sec. 289. The court properly admitted the testimony of all of the experts and instructed the jury as to the correct way to consider and weigh such testimony by Instructions 20 and 21. (R. 91-2.)



Appellant cites no cases which hold that evidence of the retail value of lots in a completed subdivision is not proper. As has been repeatedly stated, Parcel 1, with the exception of section or tract 1-C, was fully subdivided into residential lots, fully improved, and held and ready for immediate sale to the public. The Deere Estate had been developing this area for a period of many, many years as a residential subdivision. The long-range planning, engineering, and development had been substantially completed prior the time of condemnation. An extensive water system had been developed and installed. Power, telephone and gas lines had been laid underground, a selling program had been adopted. The lots were fully divided. The roads were completed with the exception of a final hot plant mix which winter weather had delayed. Mr. Solomon on cross examination (R. 480) admitted that every lot in the subdivision was available for immediate sale as residential lots on July 12, 1951. The only other work which in his opinion was necessary was the marking of the lot corners with stakes. However, he admitted that some of the lots had already been sold without such marking. (R. 494) No conflict existed as to these physical facts.

Under these circumstances, respondents submit that it was entirely proper for the court to admit opinion evidence as to the retail value of each lot in Parcel 1. Such values were taken into consideration by all of the experts in arriving at their opinions as to the fair market value of the whole parcel, and no objection was made by the State when such evidence was offered.

Three cases, as follows, each cited and quoted from by appellant, alone completely justify the action of the court in refusing to strike the expert testimony so admitted:

(1) The California case of *Redwood City Elementary School District v. Gregoire*, 276 P. 2d 78, cited by appellant on page 38 of its brief, most definitely justifies the consideration of the lot values in Parcel 1 by the jury. That case is particularly strong for respondents' position. There the property consisted of 12.23 acres of land containing acacia and eucalyptus trees, a six-bedroom home, a barbecue with kitchen and dance hall, workmen's quarters, garage, hay barn, chicken coops, sheep barns and acreage of farm land devoted to raising flowers. However, the expert appraisers all agreed that the highest and best use of the property would be for subdivision purposes, and that it could be divided into 60 separate lots. As noted, no subdivision had as then been initiated. Quoting from appellant's brief, page 38:

"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 (holding?) that it was proper to submit both sets of values to the jury \*\*\*.*" (Italics ours.)

The property in this Gregoire case was not subdivided. It was raw acreage. *Yet, the experts were permitted to justify their opinions as to fair market value by showing the mathematical computations of the sums of the retail sale price of each lot.* Lots in this case were conjectural only. None existed in fact. Not only would extensive development be necessary to make the lots ready for sale, but the existing buildings would have to be razed.

(2) *State v. Deal*, 233 P. 2d 242, cited by appellant at page 35 of its brief, though also dealing with raw acreage, is cited by respondents for dictum justifying the consideration by the jury in this case of the value of actual individual lots in Parcel 1. There the property was hilly ocean-side property. It was completely unimproved. No subdivision had been made. The land was raw acreage. Since the land was completely unimproved, the court stated:

“probable value of lots that do not exist is too speculative.”

However, the court added by way of dictum that:

*“Evidence which is speculative in one situation may not be so in others.* Thus, in *County of Blue Earth v. St. Paul & Sioux City R. Co.*, 28 Minn. 503, 11 N. W. 73, the court, per Mitchell, J., held it proper for witnesses on value to adopt as a basis for their calculations the process of dividing the land into lots for residential purposes and

then calculating the market value of the property by lots. But the land in that case was city property, in fact the court house square, *while here we are dealing with a wild land on the Ocean Coast.*'' (Italics ours.)

It is interesting to note that in the Minnesota case where evidence *was* allowed (involving the court house square) no subdivision had been attempted and razing would also be necessary.

(3) *Catlin v. Northern Coal and Iron Co.*, 225 Pa. 262, 74 Atl. 56, cited by appellant's brief, page 24, in support of its contention that it was reversible error to deny its motion to strike the testimony of respondent's experts, is also cited by respondents for the opposite proposition. There, a tract had been marked out on the ground into lots and streets. No improvements had been made. The owner advertised them for sale, but no sale was consummated because his offer was \$500 per lot above the highest bid. A large number of witnesses testified as to the value of the property if sold as individual building lots. Appellant contended that it was reversible error for the trial court to refuse to strike such evidence. This issue was not reached on its merits because appellant's objections were not properly presented. However, the trial court also refused to instruct the jury to disregard such evidence as speculative and remote, but charged that such would be the case only if the estimates of lot value were based upon *future* sales. This instruc-

tion allowed the jury to consider testimony as to market value of the lots *at the time of condemnation*. The court held that the charge was proper. In justifying its decision, the court distinguished the case from one where unimproved raw acreage was concerned as follows, to wit:

What was said in these cases, if not considered in connection with their facts, might appear to give support to the view now earnestly pressed upon us. These cases, however, must be read and understood in view of the situation at the time of the entry. The entry in these cases was made on farm land in rural districts, *and they were not immediately available for sale as building lots*. The effort was made to add a fictitious value to the lands entered upon by undertaking to show that they could be divided into lots, and might be sold for building purposes. It was apparent, however, that *this was all speculative, and had no real basis in fact*. The lands appropriated were farm lands, and in determining their value it was necessary to limit the inquiry to those intrinsic elements of value existing at the time of the appropriation. In the case last cited a witness was asked on preliminary cross-examination if his estimate was based upon what it would bring if it had been laid out in building lots, and all the lots had been sold at what he considered them worth, to which an affirmative answer was given. This court held that the method of estimating market value indicated by the answer of the witness was improper. *This case is clearly right on the facts. The tract of land had not been laid out in lots. It was farm land. There was no immediate pros-*

*pect of its being available for sale as building lots, and hence such a method of estimating value would be purely speculative. (Italics ours.)*

It is interesting to note that practically all of the authorities cited by the appellant refer specifically to *unimproved land where no subdivision has commenced*. Each of them is therefore necessarily distinguished from the case at bar by the reasoning of Judge Elkin in *Catlin v. Northern Coal & Iron Co.*, *supra*, cited by appellant. The following cited by appellant fall into this category:

4 Nichols on Eminent Domain, p. 107 (Page 22).

18 Am. Jur. on Eminent Domain, Sec. 244, at p. 881 (page 23).

United States v. 3,544 Acres of Land, 147 F. 2d 596, (Pages 25-26).

City of Los Angeles v. Hughes, 262 Pac. 737, (page 32).

Redwood City Elementary School Dist. v. Gregoire, 276 P. 2d 78, (page 38).

City of Napa v. Navoni, 132 P. 2d 566, (page 34).

Thornton v. Birmingham, 250 Ala. 651, 35 So. 2d 545, (page 34).

It is further submitted that no other authority cited by appellant supports its contention that it was error to deny appellant's motion to strike the testimony of Wright, Wallace and Benedict as to the fair market value.

Finally, it should be made clear to this court that the experts' appraisals were not just made by simply adding up the totals of the possible values of sixty-two lots and Tract 1-C, using this mathematical result as the fair market value of Parcel 1. The opinions expressed were in each case judgment figures *for the entire parcel*. In arriving at such opinions, each expert had of course taken into consideration a vast store of pertinent information reflecting or having an effect on values. This included, as expressly authorized by this court's opinion in *State v. Peek*, *supra*, lot values of the twenty-two comparable lots in this very area which had been sold on the open market shortly before the Legislature authorized this condemnation.

For example, as to the witness Ralph B. Wright: (R. 229-230)

“Q. Now, as I understand it, your assessment or appraisal of fair market value of the entire parcel is not the mathematical total of your individual appraisals of all of the various parts, as I understand it?

A. Yes sir, that's correct.

Q. That is, it isn't the total, or it is the total?

A. Well, let me be specific. The total for all the figures—that is, for the three elements of Parcel 1—is \$314,250.00.

Q. That is the mathematical total?

A. That is the mathematical total of all the lots, plus the \$14,000.00 which I ascribed to the area 1-C down in the corner. I rounded that off at \$310,000.00

Q. And, in doing that, you also took into consideration the various other methods which appraisers have available to them as tools?

A. Yes sir.

Q. And the figure of \$310,000.00 for the entire period is your judgment figure based upon your experience?

A. That's correct."

The trial court properly denied plaintiff's Motion to Strike.



### Point 3.

The court committed no error in admitting evidence, refusing to strike evidence, or in instructing the jury concerning the valuation of the water system.

a. Appellant does not challenge Mr. Ullrich's qualifications as an expert, nor does it contradict his testimony. Its major contention with respect to the valuation of the water system 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.* (p. 41) (Italics ours.) In support of this contention appellant states "we feel compelled" to quote cross-examination; whereupon a portion of the record is quoted at page 41 and 42 of the brief.

Had appellant's feelings of compulsion caused it to continue to quote the record from page 231, it would have become abundantly clear that Mr. Wright did *not* include the value of the water system in his valuation of the land. The court's attention is invited to the record, page 231, where appellant's quotation stops:

BY MR. BEHLE:

Q. Well, on this point now, of course, you took into your values the fact that water was ready and available, did you not?

A. Yes sir.

Q. And, if there hadn't been water, the values would have been lower just as they are lower because there is no sewer, is that correct?

A. Yes sir.

Q. But, as to the value of the water system that made that water available, were those independent values or are those reflected in the lot values?

A. Well, the value of the water system itself is another matter. The presence of the water system in the streets is reflected in my values for the lots, but that does not imply that the owner of the land owns the pipe or the water system itself.

Q. In other words, the lot values with water would have been the same whether water came from Salt Lake City, Salt Lake County, the Deere Estate, or apart from the ownership of the source?

A. Yes sir, that's correct.

Q. And did you, or did you not, include in your figures the value of the water system itself?

A. No, I did not.

As is admitted by appellant on page 42 of its brief, witnesses Wallace and Benedict made similar statements. (e. g. R. 261)

In appraising this land, the experts considered all the favorable factors operating which would give the land desirability as residential property. The availability of such facilities as power, gas, telephone, and water lines, roads, curbs, gutters, etc. naturally incidentally increased the market value of the property. If there had been no water available on the property, the value would of course have been less. If the telephone lines were not installed, that also would be reflected in a decreased valuation of the land in question. However, that incidental effect upon the fair market value has no relation to the actual value of the facility itself.

The near proximity of the Indian Hills and Monument Park residential subdivisions also increased the value of the land in question. Could appellant be heard to argue that since presence of the Indian Hills subdivision was reflected in the fair market value of the Deere Estate, that the owners of Indian Hills need not be

compensated should it be condemned? It could not. It is submitted that appellant's contention with respect to this extensive water system is equally ridiculous.

The Deere Estate developed and owned a complex water collection, storage, transmission and distribution system which took a great deal of time and money to develop. (R. 115, 197) This property was seized by the State of Utah in this condemnation proceeding. Yet, appellant contends that the Estate should not be compensated for this valuable property beyond the incidental increased value which its presence contributed to the property which it served.

Note that on page 45 of its brief, appellant contends the system had no market value except with the property condemned. There is no evidence in the record to support such a contention. Mr. Ullrich testified without contradiction on cross examination as follows: (R. 324-5)

Q. Mr. Ullrich, on what other areas in this vicinity could this water be beneficially used?

A. The water in question could be used to supply domestic and culinary water to homes in Emigration Canyon over a distance extending from the mouth of the canyon to two miles up said canyon. Said water could also be used as a culinary and domestic supply to any building sub-division developed in the foothill area immediately south of

Emigration Canyon and above the area now served by Salt Lake City municipal water system. Similarly, said water could be used on any building subdivision in the foothills north of the present State Park area. Said water could also be used as an auxiliary supply to Fort Douglas.

This identical question was decided by this court in *State v. Peek*, 1 U. 2d 263, 265 P. 2d 630. In commenting upon the refusal of the trial court to admit opinion evidence as to the value of the water system (the very same evidence that appellant now claims should not have been admitted in the second trial) this court said in part:

The court also erred in excluding appellant's opinion evidence on the value of their waterworks system. Appellant's witness showed himself qualified to give an expert opinion on that question. He also testified that this system was capable of being used in connection with property outside of appellant's lands. \* \* \* It undoubtedly would have aided the jury in determining the true value of appellant's property had all of these details been shown to them, for certainly they could more accurately assess the valuation of this property if they had before them the value which the experts placed on this system in arriving at their over-all value of the property, and could test such valuation by comparison with the opinion of an expert on the value of that kind of property. The value of such a utility is especially one which calls for expert opinion because such property is not bought and sold every day on the open market, so expert opinion thereon is almost mandatory.

Appellant does not contend nor does the record show that the testimony of the expert in the second trial is different in any way from that proffered at the first. It simply contends that the court "improperly permitted the witness, Ullrich, to testify as to values of the water distribution and transmission system." A complete answer is that the decision of this court stating that the value of the waterworks system *was* competent evidence is the law of the case. The evidence was properly admitted.

b. It is further contended by appellant that this court did not intend that the water system be valued separately from the property condemned. The court's attention is respectfully directed to the statement in *State v. Peek*, *supra*, at page 275, that "Respondent's own witnesses treated this (the water-works system) as a valuable property right of appellants." Whether or not this court anticipated that this particular property right should be determined separately, or jointly with other property is not here important. It was a valuable property right for which just compensation must be paid. Appellant does not challenge the pre-trial exercise of the trial court's discretion in permitting the jury to evaluate this particular property right as a unit; nor Instruction Number 11 (R. 81), quoted *supra*, in which the court instructs the jury to make separate findings as

to the values of the four separate property interests, one of which was the water system. It simply challenges the propriety of allowing the jury to consider evidence giving *any* value whatsoever to this property right.

c. By the same token, appellant's Requested Instruction 19, quoted at page 40 of its brief, was properly refused. This instruction would in effect strike the evidence as to value of the water system which this court held to be proper in *State v. Peek*, *supra*.

d. The trial court properly admitted the testimony of Mr. Brayton and Exhibit No. 39 as evidence of the value of the water system. It should be noted that Mr. Brayton gave no opinion as to value of the system. He simply testified from his own knowledge as to the cost of the system. (R. 317) In support of its contention appellant cites cases saying that the cost of improvements is not admissible as evidence of the fair market value of the land improved.

First, this is a minority view. The prevailing rule is stated in 29 C. J. S. 1267 as follows, to wit:

Where the land is improved, and the improvements have an intrinsic value which must be added to the land in order to ascertain the market

value of the whole, evidence of the separate value of improvements is admissible. *Livesch v. Board of Education of St. Bernard*, 13 Ohio App. 161; *Hall v. City of Providence*, 121 A. 66, 45 R. I. 167; *State v. Carpenter*, 89 S. W. 2d 979, 126 Tex. 604.

Second, this line of cases has no application to the case at bar. As is shown by Instruction 11, quoted supra, that part of respondents' property comprised of the waterworks system was evaluated separately by the jury. This was done by exercise of the trial court's discretion (*State v. Peek*) to facilitate orderly and systematic procedure. Appellant took no objection to Instruction 11 directing the jury to evaluate Parcel 1, Parcel 2, Parcel 3 and the Water System separately, nor to the pre-trial order; and no abuse of direction is shown.

In computing the value of the water system, its recent actual cost was material and was properly admitted as evidence of its fair market value. The rule is properly stated in 29 C. J. S., *Eminent Domain*, at page 1267, as follows, to wit:

*Price paid for property:* While there is authority apparently to the contrary, evidence as to the price paid for the property sought to be taken is generally held admissible as some evidence of its market value, except where the purchase was so remote in point of time from the condemnation proceeding as to afford no fair criterion of present value \* \* \*.



The rule is stated similarly in *H. & H. Supply Co. v. U. S., C. A. Okl.*, 194 F. 2d 554, *Thornton v. City of Birmingham*, 35 So. 2d 545, 250 Ala. 651, 7 A. L. R. 2d 773, and *Regents of University of Minn. v. Irwin*, 57 N. W. 2d 625.

The rule is stated in 18 Am. Jur. 994, Sec. 351, as follows, to wit:

When a parcel of land is taken by eminent domain, it is competent, as evidence of its market value, to show the price at which it was bought, if the sale was a voluntary one, and not so remote in time as to have no bearing upon the question of present value.

In Requested Instruction 19 (Brief p. 40) appellant admits that the only evidence in the record as to value of the water system was that supplied by witnesses Ullrich and Brayton. It does not complain that these witnesses assigned an erroneous value to the system. Its only contention is that respondents should not be compensated for the water-works system at all.

This theory is not only grossly inequitable—it is in direct contradiction of the opinion of this court and the law of this case declared in *State v. Peek*, *supra*. It controverts established constitutional principles necessitat-

ing the payment of just compensation for property seized by the State. The questioned evidence was properly admitted.

#### **Point 4.**

**The court properly limited the evidence proffered by expert witnesses Solomon and Ashton.**

Appellant's concern on appeal, and failure to understand the basis of the court's rulings below as to this point, may be due to lack of recognition both of the scope of direct and cross examination of expert witnesses and the trial court's powers with respect thereto.

By pre-trial order or in the course of trial, the court in the exercise of sound discretion can limit even the right to call an expert witness at all, by curtailing the number to prevent endless trials. (U. R. C. P. 16 (4).) Its control over the expert testimony adduced is plenary, subject of course to review if arbitrary or capricious and prejudicial in result. Uniform Rules of Evidence, Rule 56 et seq.

Usually, the expert qualifies as such; and then on direct is asked if he has formed an opinion on the fact at issue; and if so, what that opinion is. In this case, the only facts at issue were the fair market values of the parcels and property condemned. Each expert, having qual-

ified as such and having shown to the satisfaction of the court his competency to express an opinion of value, was permitted to testify to such on direct examination.

On *cross examination* it is of course then appropriate, under general law as well as *State v. Peek, supra*, to test credibility, methods, etc.

In the trial below appellant's first witness as to the land values—Kiepe, as noted on page 45 of the State's Brief, was permitted on direct examination to give a very thorough and comprehensive review of the basis of his expert appraisal, detailing the many steps he took in forming an opinion as to the fair market value of the property condemned. He of course had formed as a result an opinion of the fair market value of the three parcels, and on direct examination was further permitted to express such opinions, which were the only issues of fact involved.

Also without objection by defendants, Kiepe on direct examination was further permitted to give his estimates and opinions as to the possible expenses which might in the future be incurred by some assumed speculating subdivider who might care to purchase the whole of the Deere Estate property, including hypothetical surveying, planning, road building, construction of sidewalks, curbs and gutters, installation of utilities,

taxes, revenue stamps, abstracting, marketing costs, interest on investment, and the profit which the imaginary speculator might reasonably anticipate. He was also permitted without objection on direct examination to put an estimated dollar value on each of these speculated expenditures. All this resulted in further lengthy and extensive cross examination which delved in detail into these "guesstimates." (R. 332-417.)

Following this, the next expert witnesses for the State, Solomon and Ashton, were also permitted on direct examination to show in equal detail their processes in arriving at the opinions which they then expressed of the fair market values with which the case was concerned. (R. 418 et seq.) However, their direct testimony was restricted by the court upon defendant's objections, only in that they were not permitted to assign hypothetical dollar values as to each speculative possible future expenditure. The issue may be clarified by quotations from the record at pages 428, 434, et seq.:

**THE COURT:** The witness may testify to the methods he used in arriving at his judgment as to the value—the things he took into consideration. I think he should not testify with respect to the values he put on individual elements he used in arriving at his conclusion.

**MR. HORSLEY:** But I can inquire as to which elements make up which group without going into the numbers in each case, is that true?

THE COURT: Yes.

\* \* \*

THE COURT: Here is the problem, Mr. Porter, as the Court sees it; what we are after here is the fair market value of this property on the twelfth of July, '51, as the property was.

MR. PORTER: That's right.

THE COURT: Now, what you are seeking to do is to establish value, not of what the property was at that time, but of a price—may I say—that a a speculator might hope to realize out of it at some future time.

MR. PORTER: No, we are not Your Honor.

THE COURT: And, then deduct from that certain expenses, which, if he did that, he might have to meet and say, "Now, the result is the fair market value."

MR. PORTER: I think it goes a lot further than that, Your Honor.

THE COURT: Now, the market value of that property isn't what it would be if it had sewer and paved roads, and all the utilities in there, and then take a value, then go and take those things out and say, "Now, it cost that much to do that."

\* \* \*

MR. PORTER: Now, for the record, we make the same proffer of evidence to be asked the witness Ashton as to Parcels 2 and 3, as was made with

respect to Parcel 1 to include the same items, or approximately the same items, and we make the same proffer with respect to the witness Solomon, to be called as to all three parcels. The evidence in both cases to be pretty much the same.

MR. BEHLE: Well, that is the figures.

MR. PORTER: That's right.

MR. BEHLE: Our objection is to the use of the figures; not to the process.

The language from State v. Peek quoted on page 46 of appellant's brief is entirely consistent with the action of the trial court. The court specifically permitted on direct examination, evidence of the value of the "*various elements, items and parts*" of respondents' property. It also permitted testimony as to the *methods* used in arriving at fair market value of "*various elements, items and parts*" of the property. All of appellant's evidence as to *fair market value* of the property in question on July 12, 1951 was admitted. None was excluded. The experts were permitted fully to explain their methods in reaching their expressed opinions as to the fair market values.

The court, on objection by defendants and acting within its discretion, properly limited on *direct* examination only detailed opinion evidence as to the hypothetical particular amounts of possible future expenditures which

some imaginary speculating subdivider might make in disposing of the property some day if he ever might acquire it.

### **Point 5.**

**The court properly gave Instruction 15, and properly refused to give Requested Instructions 14 and 15.**

These instructions (R. 69, 70 and 86) pertained to the streets within and abutting the property of the defendants herein condemned by the State of Utah. It is to be noted that the appellant excepted only to that portion of Instruction 15 dealing with Kennedy Drive (R. 519), which as given by the court reads as follows: (R. 86)

### **INSTRUCTION 15**

The evidence in this case is undisputed that the defendants' property denominated Parcel 3 and colored on Exhibit 1 in purple, while planned and suitable for residential subdivision purposes, nevertheless as of July 12, 1951 had not yet been so divided into separate lots which were then ready, available and intended for sale and use as such.

Accordingly, in making your determination as to the fair market value of Parcel 3, you will assess separately first the tract abutting on and north of Kennedy Drive; secondly, the tract abutting on and south of Kennedy Drive, includ-

ing the defendants' interests in the other half of Kennedy Drive as abutting owners subject to the public easement, and also including defendants' interests to the center of Michigan Avenue, since vacated as a public highway; and finally, the small area in the draw up Emigration Canyon. All these are colored purple on Exhibit 1.

Each of the three tracts will be separately valued by you, and the total of the three will constitute your assessment of the fair market value of the parcel 3.

It is submitted that the foregoing instruction, including the portion to which exception was made, properly states the law. The court instructed the jury to include the property rights of the defendants as abutting owners of land adjacent to Kennedy Drive, subject to the public easement. The court did not instruct that defendants were the owners of the fee title. It just instructed the jury to value "defendants' interests to the center of Kennedy Drive." These interests would be the same, whether the public interest in the Drive was still "owned" by Salt Lake County or was to be condemned and acquired from Salt Lake County by the State of Utah as first directed by the legislature until the amendment discussed in the case of *State v. Bird & Evans*, 265 P. 2d 639, 1 U. 2d 276.



Only the two cases cited by appellant at page 47 of its brief need be cited to show that an abutting owner *does* have a property interest in platted streets. *Boskovich v. Midvale City*, 243 P. 2d 435, ( U ) does not hold that a platted street vests title in the city or the county, and that the abutting owners thereafter have “no further interest therein,” as contended by appellant. Just the reverse is true. This case clearly shows that an abutting owner has two valuable rights in a platted public road:

- (1) An easement to the roadway which may not be taken by the governing authority without the payment of just compensation.
- (2) A right to the possession and ownership to the center of the roadway when and if the governing authority vacates the public street.

These were valuable property rights appurtenant to the defendants’ abutting land. The court properly instructed that the value of such rights should be considered when valuing the abutting property.

*White v. Salt Lake City*, 239 P. 2d 210, —U.—, also recognizes a valuable property right to the center of a public road, appurtenant to abutting land. This court stated the law to be as follows:

The segregated statutory provisions are reconcilable when construed to mean that the county or city authorities are vested with the fee in the streets. Such ownership carries with it the right to use it *for the enumerated purposes* when, in their discretion, it best serves the public interest. If the street should cease to serve any public interest, *it may be abandoned and, in that case, the right to the use and control of the roadway would revert to the abutting owner pursuant to 36-1-7 and the common law principles.* (Italics ours.)

Consequently, the court also properly refused to give Requested Instructions 14 and 15. They do not correctly state the law. They give no value to the two property rights of the abutting landowner above set forth. Under these suggestions of the State, rejected by the court, property interests would be taken from defendants without payment of just compensation.

### Point 6.

**The failure of the court to instruct as to burden of proof, if error, was not prejudicial.**

Throughout the conduct of the trial, all recognized the owners' duty to go forward with the burden of presenting evidence to the jury as fact-finder upon which to enable it to determine the issue of fair market value. (Augmented record dated June 15, 1955.)

In the proposed instructions submitted by both parties a specific instruction on burden of proof was included since at no time was such in dispute. (R. 57) Normally this would immediately precede the old "preponderance of evidence" definition, which is contained in the stock printed instructions of the District Court which were given in this case. (R. 92) Appellant's requested Instruction No. 2 included also this "preponderance of the evidence" definition, and also other portions which were at least controversial, causing the court to reject same in the form requested.

The omission of the stock "burden of proof" was not noted at the time the instructions were given by counsel or the court, and certainly were not in the mind of counsel for the State when objection was made to the rejection of Request No. 2 in the following language:

"We except to the failure of the court to give plaintiff's requested Instruction No. 2, for the reason that said instruction *does not correctly state the law*, and failure to give it was prejudicial to the plaintiff; the said requested instruction speaks for itself in that respect. (R. 517-18.) (Italics ours.)

Was the omission of a specific instruction as to burden of proof, and the refusal to which the above exception was made, prejudicial to the fair trial of the issues of value in this case?

It is agreed that in the decision of *Tanner v. Provo Bench Canal & Irrigation Co.*, 40 U. 105, 121 Pac. 584, this court aligned itself with those jurisdictions placing the burden on the owner to prove the value of the property condemned. However, burden of proof is not as critical in eminent domain proceedings as in other areas of the law. Some jurisdictions have wisely ceased to give even lip service to "Burden of Proof" in condemnation cases.

In *City of Cincinnati v. Tuke et al.*, 44 N. E. 2d 748 (Ohio), the court stated as follows:

In such a proceeding, there are no formal pleadings or definite issues, which admit of affirmation upon one side and denial upon the other, and hence the doctrine of "burden of proof" has no application.

The jury acts merely as an appraising or assessing board, determining the fair market value of the property from all the evidence submitted.

In *Bank of Edenton et al. v. United States*, 152 F. 2d 251, the court states as follows, to wit:

It may be noted that the entire concept of burden of proof does not lend itself too readily to application in condemnation proceedings, and, in at least one jurisdiction, has been entirely rejected."

The jury could not have been misled in this case. Respondents opened the case and presented their evidence first. They assumed the role of a plaintiff throughout the case, meeting the burden of carrying forward the evidence. At page 331 of the transcript Mr. Behle, for respondents, says:

“The plaintiff rests—rather, the defendant rests; the defendant being in the nature of the plaintiff.”

The verdict of the jury was nearer to the valuation of respondents' witnesses than to those given by witnesses for appellant, indicating that it was more convinced by their testimony.

Bank of Edenton et al. v. United States, *supra*, is similar to the case at bar. There, not only did the court refuse to place the burden of proof upon defendant, but expressly instructed the jury that the government had the burden. In holding the error immaterial, the court said:

The majority rule, which has been generally adopted in the federal courts, places the burden of proof of value in condemnation proceedings upon the landowner. A number of jurisdictions, however, follow a contrary view and place the burden upon the condemnor. (Citations listed.) The record does not show which practice is customary in the State courts of North Carolina. *But, in any case, the assignment of the burden of proof to the government is not a material error.* (Italics ours.)

In *Malvin v. County of Blue Earth*, 46 N. W. 2d 464 (Minn.) the court held that the failure of the court to instruct as to Burden of Proof was not a reversible error. The court states:

We are of the opinion that the omission was not prejudicial. The only question submitted to the jury was the amount of benefits and damages. *Damages and benefits in some amount must be conceded. The sole question was how much.* The testimony of the county's witnesses and those who appeared for respondents was so far apart that it appears to have been largely a question of which group of witnesses the jury would believe. *We do not feel that the jury's verdict would have been different if the court had instructed that the burden of proof rested on respondents.* (Italics ours.)

*Wiegand v. Siddons*, 41 Appeal Cases, Dist. of Columbia (Tucker 1919-13) 130, is also similar to the case at bar. In that jurisdiction, the burden of proof was upon the government. However, the trial court refused to grant an instruction placing the burden upon the District of Columbia. In that case, as in the case at bar, the party with the burden assumed it and went forward with the evidence. In holding the error non-prejudicial the court said:

In the absence, therefore, of any showing that the assessment was inequitable or arbitrary, we must hold that the refusal of the court to grant the instruction in question was not so prejudicial to appellants as to justify a reversal of the judgment.

It is submitted that the proposed instruction in question was properly refused. Although in this state the burden of proof as to value is on the defendant, this instruction does not properly assign it. The last sentence of said instruction was unnecessary. It stated as follows: (R. 57)

Therefore, if you believe that all the evidence is evenly balanced, you will reject the propositions advanced by the defendant as to value, and as to damages, and will accept those advanced by plaintiff.

It created a real danger of confusing the trier of fact and was properly refused.

It is further submitted that even if it was error to refuse the instruction, such error in no way prejudiced the State of Utah. *Defendants assumed the burden.* The owners were treated as a plaintiff throughout the trial. That the jury fully understood its function is indicated by the following (comparable figures for the other two property items valued by the jury have been given at the opening of this brief):

### Parcel 2.

State		Estate	
Kiepe .....	\$56,500.00 (R. 361)	Wright .....	\$115,000.00 (R. 183)
Ashton .....	71,320.00 (R. 439)	Wallace .....	107,000.00 (R. 252)
Solomon .....	92,500.00 (R. 474)	Benedict .....	107,000.00 (R. 287)
Jury's Verdict \$91,500.00 (R. 93)			

### Parcel 3.

Kiepe .....	\$56,400.00 (R. 358)	Wright .....	\$75,000.00 (R. 184)
Ashton .....	73,090.00 (R. 440)	Wallace .....	72,700.00 (R. 254)
Solomon .....	58,500.00 (R. 474)	Benedict .....	76,700.00 (R. 288)
Jury's Verdict \$70,000.00 (R. 93)			

Obviously the jury below was most conservative, and in reaching its own independent judgment as to the values involved, in each case used a figure somewhat less than the highest estimate of the State's own expert appraisers. The verdict would have been no different had the omitted sentence in the requested instruction been given. The award was neither arbitrary nor inequitable, but was entirely fair and reasonable under the evidence.

The jury was not misled by the alleged error; it was charged to "determine separately the value of each of the four items \* \* \* and from the evidence in the case, viewed and construed in the light of the law as given in these instructions, \* \* \* return a verdict showing the value you find as to each parcel or item, and the total of all." (R. 82) Precisely this, the jury did. (R. 93) The trial court committed no prejudicial error.

### **Point 7.**

**The court properly included and computed interest in the judgment below.**

In considering this final point raised by the State in appealing from the judgment of compensation below, we understand that there is no controversy as to the following:



1. Defendants' property was actually taken, as determined by this court in *State v. Peek*, supra, by final judgment of condemnation duly made, entered and recorded May 27, 1952 (R. 43-51); whereupon legal title to the property so taken vested by operation of law in the State of Utah for the purpose of the State Park (Sec. 78-34-15, U.C.A. '53).

2. Subject to other points raised by this appeal and exclusive of interest, these defendants are entitled to receive as compensation the sum of \$632,145.00. This amount is "the total fair market value on the 12th day of July, 1951 of the property of the defendants named herein taken by the State of Utah by said judgment of taking dated May 27, 1952 and all severance damages resulting from such taking." (R. 98; Sec. 78-34-11, U.C.A. 1953.)

3. As a condition precedent to the entering of the statutory "final judgment of condemnation," defendants pursuant to Sec. 76-34-16, U.C.A. 1953 filled "an abandonment of all defenses to the action or proceeding except as to the amount of damages \* \* \* in event that a new trial shall be granted." At that time the judgment of compensation as first made and entered herein on May 13, 1952 was in the sum of \$495,875.00. (R. 43)

4. Responsive to mandate of this court issued in *Peek v. the District Court*, Case No. 7860, on January 5, 1953 there was paid to these defendants, respondents herein, the "upset price" for their land so taken of \$495,874.00. (R. 98) *Mt. Shasta Power Corporation v. Dennis*, 225 Pac. 877 (Calif.).

5. On appeal from the first judgment of compensation of May 13, 1952 that judgment was reversed in *Peek v. State*, 1 U. 2d 263, 265 P. 2d 630; and upon retrial of the sole remaining issues of value in the condemnation proceedings, the judgment from which the present appeal is taken was entered November 5, 1954. (R. 99) As stated above, thereby defendants' damages for their land taken and their severance damages were determined to be \$632,145.00, resulting from the State's final Judgment of Taking of May 27, 1952. (R. 98)

6. In addition, and as part of the constitutional and statutory requirements of an award of "just compensation," defendants are entitled to interest thereon at least from the date of actual legal taking, namely, from May 27, 1952 rather than the date when summons was served. (*Peek v. State*, supra.)

7. As to the interest rate to be allowed, under Section 15-0-4 the legal rate for judgments as construed by this court in the Danielson case is eight per cent; otherwise the legal rate under Section 15-0-1 is six per cent.

Judge Martin M. Larson, the trial judge here responsible for computing interest on the award for the property taken from respondents on May 27, 1952, was not confronted with the problem in the Danielson case, 247 P. 2d 900, which as a recent pronouncement of this court was well in mind. Here we had no "mere interlocutory order," with neither a taking, nor a definitive determination that the property would be taken, as was the mandate of the Utah Legislature concerning the Monument Park area.

Nor was there here involved a mere "final order" as appellant mis-states on page 52 of its brief. Legal title had here actually passed irrevocably, at the State's own election, on May 27, 1952 when the court below made and entered its "Final Judgment of Condemnation." When the State that day recorded this Final Judgment, title passed to it from the owners by operation of law. Sec. 78-34-15. The wording "Final Judgment" is that of the same legislature which has said that in the case of a "judgment," interest shall accrue at eight per cent.

After this taking and passing of title, the former owners so deprived on that date of their property from then on had no defense. They had the monetary right, under both the State Constitution and the Fourteenth

Amendment to the Federal Constitution, to receive \$632,145.00 for the taking of their property, together with the right to interest accruing between time of taking and date of payment for the period when they were also deprived of the required compensation for the value of their property so taken.

Under these circumstances the trial court held that an entirely different situation from that of the Danielson case was involved. Accordingly the court computed interest at the judgment rate from May 27, 1952. This of course was the date when the property was taken by the final judgment; as of that date the sum of \$632,145.00 became due and owing defendants for the property then so taken.

Such interest as of January 5, 1953, when partial payment was first made under mandate of this court in Case No. 7866, amounted to \$31,888.09, as recited in the judgment below. (R. 99) Thus at this latter date, the State of Utah owed the Deere Estate the sum of \$664,033.09, principal and interest.

Then the trial court credited that amount with the partial payment of \$495,875.00, leaving a balance still owing the former owners for their property taken May

27, 1952 of \$168,158.09. Interest on that balance had accrued to November 5, 1954 in the sum of \$24,663.10. This was properly added to the unpaid principal balance to determine the total owing to the defendants as of that latter date. Judgment for the total accordingly was so made and entered. (R. 99)

It is submitted that the trial court followed the statutes and Constitution of the State of Utah and the requirements of the Constitution of the United States in so including and computing interest on the award. Thus only can appellant compensate the former owners, not only for the value of the property taken from them by the State of Utah, but for the delays they have encountered in receiving payment since they were deprived of their property on May 27, 1952.

#### IV. CONCLUSION

On this fourth proceeding before the Supreme Court of Utah involving a relatively simple condemnation case, this controversy between the State of Utah and the owners whose property it voluntarily took should finally be put at rest. As to the judgment of just compensation from which this appeal is taken, it is respectfully submitted that:

1. No error was committed below as to the admission or rejection of evidence.

2. The jury was properly and fairly instructed by the learned trial judge, and performed its function and duty in determining the four remaining factual issues in this extended litigation.

3. Interest on the award since the actual legal taking of defendants' property on May 27, 1952 was properly included and computed.

4. The judgment of compensation from which this appeal was taken was duly and regularly made and entered.

It is respectfully submitted that this judgment should be forthwith affirmed, costs to respondents.

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