

1958

# Weber Basin Water Conservancy District v. Willard A. Skeen, John G. Braegger, Elsie L. Braegger, his wife, et al : Brief of Appellant

Utah Supreme Court

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E. J. Skeen; Neil R. Olmstead; Attorneys for Appellant;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

WEBER BASIN WATER CONSERVANCY  
DISTRICT,

*Plaintiff and Appellant,*

vs.

WILLARD A. SKEEN, JOHN G. BRAEGGER,  
ELSIE L. BRAEGGER, his wife, et al.,

*Defendants and Respondents.*

Clerk, Supreme Court, Utah

Case No.  
8803

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BRIEF OF APPELLANT

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# IN THE SUPREME COURT of the STATE OF UTAH

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WEBER BASIN WATER CONSERVANCY  
DISTRICT,

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vs.

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*Defendants and Respondents.*

8803  
Case No.

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## BRIEF OF APPELLANT

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This is an appeal from a judgment of the District Court of Box Elder County on a verdict for \$80,000 in an action to condemn land for use in the construction of the Willard Dam and Reservoir, a part of the Weber Basin Reclamation Project. The action was filed against thirty-one landowners; however, this appeal involves only the property of the defendants, John G. Braegger and Elsie L. Braegger, his wife. When the word "defendants" is used, it refers only to Mr. and Mrs. Braegger.

## STATEMENT OF FACTS

John G. Braegger and Elsie L. Braegger, his wife, are owners of 174.4 acres of farm and pasture land near the town of Willard, in Box Elder County, and mountain range land northeast of Willard (see Exhibit 1). They also own a dwelling house in Willard and outbuildings consisting of barns, feeding shed, milking sheds, granary, a silo, a lounging shed, corrals and several small buildings. Prior to the filing of this action, Mr. Braegger operated a dairy; milking an average of thirty cows (R. 17), and operated a beef cattle business of about 150 head (R. 19). His farm land consists of 75 to 100 acres of "tillable" land and the remainder of his 174.4 acres is meadow pasture land. All but 36.79 acres of his 174.4 acres of land is condemned. The remaining land shown on Exhibit 1 (un-colored) is pasture and meadow. (R. 39, 40). The only buildings and improvements located on the land condemned consist of a small milk shed and a corral located on the old Central Pacific right-of-way in the lower fields. The dwelling house and the other buildings mentioned above are located in Willard and are not taken. The farm buildings are involved in this action because of the contention of the defendants that the taking of all tillable farm land and a substantial part of the meadow and pasture land resulted in a diminution in the value of such buildings.

It was stipulated in the pretrial hearing, after reading the numerous defenses in the answer, that the only issues in the case were the issues of value of the land taken, and damages to the remaining property (Pre-trial R. p. 7).

Two witnesses testified for the defendant as to value of

the land and improvements taken and severance damages, John G. Braegger, one of the defendants, and Joseph A. Capener. The defendant, Braegger, testified that the value of the land taken was \$160,000 (R. 30, 31), but on cross examination, he testified that \$80,000 of the \$160,000 was for putting him and his family out of business (R. 35). Mr. Capener testified that the value of the land taken and damages amounted to \$109,740 (R. 59). This figure included 40 acres at \$1,209 per acre and 8 acres at \$1,210 per acre (R. 60, 137). The witness testified that he had arrived at the value on the basis of fill dirt at five cents per yard (R. 137). Upon motion of the plaintiff, this evidence was stricken from the record (R. 138). Mr. Capener's testimony was then revised as follows:

Tract No. 2 123 acres:

20 acres at \$100 .....	\$ 2,000
23 acres at 300 .....	6,900
75 acres at 600 .....	45,000
5 acres at 200 .....	1,000

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Total Tract 2 .....	\$54,900.00
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Tract No. 1 17.5 acres:

17.5 acrs at \$600 .....	\$10,500	10,500.00
Improvements .....		12,500.00
Severance .....	None	None

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Total .....	\$77,900.00
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Plaintiff called two experts on the matter of value and severance damages. George W. Smith testified that the fair market value of the land taken on severance was \$44,969 rounded out to \$45,000 (R. 204). Bert Waddel testified that the fair market value of the land taken was \$42,642 (R. 262), and damages due to the diminution in value of the farm build-

ings not taken was \$5,000 (R. 273) making a total of \$47,642. He testified that there would be no severance damage to the 36.79 acre tract of land not taken in view of the stipulation in the record that the plaintiff would construct a road and ditch to such land around the north end of the dike (R. 262).

It was evident from the remarks of members of the jury in the early part and throughout the trial that they were prejudiced and were interested only in finding reasons for making as high and award as possible. They interrupted the trial to ask questions as follows:

“JUROR RICH: Should we know whether those flowing wells are going to be an asset to the government on this deal they’re building? (R. 178).

THE COURT: Now, I’m glad you asked that question. I’ll tell you now, and I’ve got it written out in longhand here. You can’t consider any benefit which the government may get out of this. It’s the loss that Mr. Braegger is sustaining.

JUROR RICH: Why can’t we?

THE COURT: Well, because the wisdom of the ages—

JUROR RICH: Oh, nuts.

THE COURT: —has told us that that has to be it. I didn’t ask you, but Mr. Mason or Mr. Skeen or somebody asked you if you’d take my instructions at the beginning of the case, and now you’re beginning to understand some of the things we’ve been thrashing over while you’ve been out. You can’t consider the benefits that will accrue to Ogden City or Layton or Bountiful or some big corporation that might use this water. It’s the

damage which Mr. Braegger sustains. That has to be the rule, and, ladies and gentlemen, very seriously speaking, the wisdom of ages and hundreds of years of experience in these kind of cases shows that this rule is the best rule. And it's fair to both sides. So you can't consider any benefits. I'm glad you asked the question. It's very proper, and it's one of the things that counsel are going to argue.

JUROR RICH: Well, that would take up the question of the gravel then (R. 179).

THE COURT: That's it.

JUROR RICH: May I ask at this time, what was the Noble case decision that was quoted?

THE COURT: We've been talking about that while you've been away.

JUROR RICH: Well, you should have left us here.

THE COURT: I know, but you're a woman. You're like my wife. You want to know everything that goes on all the time. I say that facetiously.

JUROR RICH: Well, you expect us to decide.

THE COURT: Well, I'm going to tell you what the law is. You'll have to accept that, and I'll tell you right now that it must be based on the damage to Mr. Braegger. The damage that he sustained, and not any benefits that this plaintiff may get. If they got some sand or gravel or something like that and it's worth a million dollars to them, it's none of your business, none of our business. I shouldn't say none of your business. It's none of our business.



JUROR RICH: Well, it ought to be Mr. Braegger's.

THE COURT: That isn't the rule, Mrs. Rich. The rule is what will justly compensate Mr. Braegger for what he had prior to the time that these people came on the scene. Now, we've thrashed this all over back and forth and we're all worn out from last night from when we quit, and we're all agreed that is the law. Even Mr. Mason will have to nod his head to that. Nod your head, George. All right, anything else?

MR. MASON: That's all with Mr. Braegger.

THE COURT: I should add, in fairness to Mr. Braegger now, he's entitled to just compensation based on the time prior to these people coming on the scene. Of a buyer who was willing and able to buy from Mr. Braegger under conditions when he was willing but not required to sell.

JUROR RICH: Well, now, may I raise a question here? It's probably not relevant (R. 180).

THE COURT: You go ahead.

JUROR RICH: This is in regard to income taxes. Mr. Braegger is going to have to have to pay on the sale of this property. Is he given any benefit from a forced sale where he doesn't have to report it?

THE COURT: Well, I guess maybe I can answer that by saying he is providing he takes the money within a certain length of time and reinvests it in property of a similar nature. Then he's protected under the income tax law. At least that's my understanding of the law. But that's no concern of yours, except I will tell you that he can reinvest it.

JUROR RICH: No other recourse on a forced sale as far as income tax is concerned?

THE COURT: The income tax law specifically says that on a forced sale the property owner can reinvest his money in the same kind of land in this or other communities within six months is it, Mr. Skeen?

MR. SKEEN: A year.

JUROR RICH: Well, anyone can do that.

THE COURT: Without payment of income tax on the amount you receive.

A JUROR: A farmer don't have a year to replace it.

THE COURT: Well, but this is a special rule relating to condemnation.

JUROR RICH: Doesn't it apply to everybody then?

JUROR MUNNS: Everybody can reinvest and trade property.

THE COURT: It doesn't apply to the Utah income tax. You sell your home and buy another one within six months or a year and you'll pay the Utah tax. We've got off on collateral things. There's no penalty to Mr. Braegger providing he puts his money back in the same kind of a business. If he buys a gas station or a bank or something, he'll probably have something to pay. It goes to some other business.

JUROR MUNNS: He wouldn't be buying it if he wasn't forced.

THE COURT: That's right. That's a proper question. It's

a practical question, Mr. Skeen. Officially speaking, I have to tell you that's collateral to what we're inquiring into here.

JUROR MUNNS: Well, we've discussed it, anyway.

THE COURT: That's fine. I expected you would.

JUROR SORENSEN: If he decides to keep his money, I understood with the witness Mr. Capener he'd have sufficient means to keep him the rest of his life.

JUROR MUNNS: Well, if the government takes half he won't.

THE COURT: If he doesn't reinvest that in some other real property within six months or a year, then there may be some income tax features. Now, that's the angle that Mrs. Rich was asking about.

JUROR NELSON: Have to give half of it back again" (R. 182).

THE COURT: I think I'll tell Mrs. Rich that we've had a whole lot of lawsuits in this state involving condemnation proceedings. There's been many in this county, and there will be many after this case is over with. Now, the Noble case was a case brought by the State Road Commission (R. 186).

MR. MASON: Well, I object—

THE COURT: Well, I'm not going to go into it on other matters, but I wanted Mrs. Rich to know that the Noble case was brought by the State Road Commission, and the case was appealed to the Supreme Court, and the Supreme Court said the Judge down there didn't instruct the jury properly and

certain evidence was received separately which should not have been received. Now that's one of the last pronouncements from the highest court, and it had some bearing on the way the questions were asked here in court. Now, that's all there is to that. I could name several and Mr. Skeen could perhaps name more than I have, and Mr. Mason and Mr. Foley could name many, but they're all used as guides and beacon lights. However, this is the first case in our District involving this kind of a proceeding. We're pioneering, and for the benefit of all of you, you just as well know there may be, if all these cases are tried, there may be fifty or a hundred after you, and this is a kind of a pioneer case and we're taking it kind of easy. The Judge don't like to be spanked by these higher courts for telling you what the law is, and counsel have been very helpful. We've had a conference or two and that explains what we were doing yesterday. We could try this case hastily, and then two years from now the high court kick it out for error. Yes, Mr. Munns.

JUROR MUNNS: Well, then, these other cases pending, they could ride pretty heavy on the way this one goes, is that right?

THE COURT: Yeah, for the purpose of negotiation, that's right. But not for the purpose of trial. I guess that's a fair statement" (R. 187).

"A JUROR: Can we ask any questions? (R. 337).

THE COURT: If it relates to damages, yes, I'll take a question. But if you're going to ask something about the law or why something wasn't done this way or that way, I'll meet you on the street corner after it's over with and tell you. May

the juror state a question if it relates to the matter of damages or amounts or values?

A JUROR: It relates—now, if it don't you can say no, but it relates to piling up a man's life income and unloading it, does he have an easement of years to pay income on that, or does—if he should replace it?

MR. MASON: I think that's a pertinent question.

THE COURT: Well, I started to give you a dissertation on that subject the other day.

A JUROR: You never finished it.

THE COURT: I didn't, and I'm not going to finish it, because the rules won't permit me to. There's nothing in my instructions covering the subject except I can say this: that whatever amount is awarded, if ultimately approved, will be paid in one lump sum.

MR. SKEEN: That's right.

A JUROR: That's the question.

THE COURT: One check.

A JUROR: And it means like unloading thirty years wheat crop all in one.

THE COURT: Well, that's a matter of—

MR. MASON: That can be worked out.

THE COURT: Have I answered your question? It will be one payment on one day.

A JUROR: Okeh, that's all I wanted to know" (R. 338).

"JUROR RICH: Now may a juror ask a question? (R. 340).

THE COURT: State the question now and we'll see what it is.

JUROR RICH: Well, I think it's in order. You said according to what the property was or could be adaptable.

THE COURT: That's right.

JUROR RICH: All right. You have hinted and made references to some of this said gravel on the place, and we'd like a little clarification.

THE COURT: I think I had better talk to counsel in chambers and we can clarify it maybe. I'm not taking the words back, though. The word "adaptable" will stay in there, and you'll have to apply it. Maybe I can clarify it a little bit. It was put in there for a purpose.

JUROR RICH: It seems to me it's an asset of that land, and if you're taking it away forever there's something there.

THE COURT: It's in there, and maybe I can clarify it. If we can't agree, I won't, and you'll have to get the significance of what I said to you.

JUROR RICH: Are there any other stipulations we haven't been told?

THE COURT: Yes, Mrs. Rich. This lawsuit started on July eighth and we've had a multitude of sessions here and there have been a multitude of questions passed on, none of which has any direct bearing on the question of damages. I'll

talk to counsel in chambers and maybe I can clarify it. I might be able to clarify it, but I won't withdraw it.

JUROR RICH: You mean that "adaptable"?

THE COURT: That's right. That's going to stay in there for what significance you draw by it.

JUROR RICH: Well, if you leave that word "adaptable" in there, we should be given some accurate information about the quality of that stuff.

THE COURT: Well, there are lots of things I think about lawsuits, Mrs. Rich, but I just sit here and listen to the evidence, and that's what you're going to have to do, is decide the case on the evidence.

JUROR RICH: Well, we need more evidence.

Oral instructions were given to the jury throughout the trial. Exception was taken by the plaintiff.

The court submitted the following form of special verdict to the jury, and the answers were inserted by the jury as indicated:

\* \* \* \*

IN THE DISTRICT COURT FOR BOX ELDER COUNTY,  
UTAH

WEBER BASIN WATER CON-	)	
SERVANCY DISTRICT,	)	
	)	
Plaintiff,	)	
vs.	)	
JOHN G. BRAEGGER and wife	)	
Defendants.	)	

SPECIAL VERDICT

We, the jury, duly impanelled and sworn, return the following Special Verdict:

1. What was the value of the 122.86 acres and all improvements thereon appertaining to the realty? (Answer in dollars).

Answer: \$58,000.00.

2. What was the damage, if any, which will accrue to the 36.79 acres not being condemned, by reason of its severance from the lands referred to in the previous question? (Answer in dollars).

Answer: \$1850.00.

3. What was the value of the 14.75 acres and all improvements thereon appertaining to the realty? (Answer in dollars).

Answer: \$8850.00.

4. How much will the barns, sheds, corrals, and other buildings and improvements, not on the premises heretofore referred to, belonging to the John Braegggers and used in their livestock operations, be damaged, if at all, by the taking of the land described in the complaint?

Answer: \$11,300.00.

DATED this 14th day of October, 1957.

/s/ MARGUERITE RICH  
Jury Foreman

A motion for a new trial was filed by the plaintiff attacking the verdict on the grounds (1) excessive damages appear to have been given under the influence of passion or prejudice; (2) there is no competent evidence in the record supporting the answer to paragraph No. 2 of the Special Verdict; and (3) Errors in law occurred at the trial. The court erred in giving oral instructions in answer to questions asked by individual



jurors throughout the course of the trial. The court erred in giving Instruction No. 15 (last instruction).

The motion was denied and a judgment was entered on the verdict.

## STATEMENT OF POINTS

1. Excessive damages appear to have been given under the influence of passion or prejudice.
2. There is no competent evidence supporting the award of severance damages to the 36.79 acres of land not taken.
3. The court erred in giving oral instructions throughout the trial.

## ARGUMENT

### 1. EXCESSIVE DAMAGES APPEAR TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

One of the grounds for a new trial was that it appeared that excessive damages were awarded under the influence of passion or prejudice. It is apparent from the reading of the record and particularly the part quoted above that several members of the jury were seeking ways to make the verdict as high as possible. During the examination of the defendant, John G. Braegger, and before any evidence was introduced by the plaintiff, members of the jury asked such questions and made such comments as:

1. "Should we know whether those flowing wells are going to be an asset of the government on this deal they're building?" (R. 178).

2. "Well that would take up the question of gravel then?" (R. 179).

3. "This is in regard to income taxes Mr. Braegger is going to have to pay on the sale of this property. Is he given any benefit from a forced sale when he doesn't have to report it?" (R. 180).

4. "Juror Sorensen: If he decides to keep this money, I understood from the witness Mr. Capener, he'd have sufficient if the government takes half he won't."

5. "Have to give half of it back again." (R. 182).

Later in the trial the following questions were asked and comments were made.

6. "It relates—now, if it don't you can say no, but it relates to piling up a man's life income and unloading it, does he have an easement of years to pay income on that?"

7. "It means like unloading thirty years' wheat crop all in one" (R. 338).

8. "All right. You have hinted and made references to some of this said gravel on the place and we'd like a little clarification.—It seems to me its an asset of that land, and if you're taking it away forever there's something there" (R. 340).

It will be noted from the above that the jury, despite repeated instructions and statements of the court, was concerned

with such collateral matters as income tax on the amount awarded, a deposit of gravel on the property, benefits to the government and whether the award would keep Mr. Braegger for the rest of his life. On the income tax matter, Juror Munns said, "Well, we've discussed it anyway." This is an unusual case for the reason that members of the jury blurted out statements throughout the trial indicating how they were thinking about the case—and it was all bad for the appellant. It was unnecessary to get affidavits as to passion and prejudice, it was all shown in the record.

Members of the jury showed disrespect for the court and his instructions by such comments as:

1. "Oh nuts" (R. 178).
2. "Well, you should have left us here" (R. 179).
3. "Well, it ought to be Mr. Braeggers" (R. 180).
4. "You never finished it" (R. 338).
5. "Are there any other stipulations we haven't been told?" (R. 340).
6. "You won't tell us anything, we're not going to tell you anything" (R. 347).

The plaintiff, a public corporation, and the public whose tax money is spent by the plaintiff, were entitled to have the issues of value and damages tried to a fair and impartial jury. It is apparent that the jury in this case was interested in only one thing—how much *can* we award the defendants? Referring to the Special Verdict, one juror asked the question, "Can you put more damages on the number four than it was appraised

at?" (R. 347). It is obvious from the comments of members of the jury and the results that the jury did not weigh, and consider the evidence offered by the expert appraisers, Smith and Waddel, but were simply taking the highest figure suggested, regardless of the source. The verdict was nearly double the Smith appraisal and exceeded the Capener appraisal.

Despite the apparent prejudice, the trial court denied the plaintiff's motion for a new trial. This was reversible error.

## 2. THERE IS NO COMPETENT EVIDENCE SUPPORTING THE AWARD FOR SEVERANCE DAMAGES TO THE 36.79 ACRES OF LAND NOT TAKEN.

As stated above, all of the defendant's farm land except 36.79 acres of meadow-pasture land was condemned. The relative locations of the lands taken and the tract remaining is shown on the map, Exhibit 1. Mr. Capener, the defendant's expert, testified on direct examination that the taking of the land condemned would not diminish the value of the remaining 36.79 acre tract (R. 62).

"Q. What would you say would be the damage to that 36.79 acres by being cut off from the other tract?

A. I have no damage to it at all, because it's large enough a piece that I think he could find a buyer for it, and I think he has ample water for it if the water is placed over there on the piece of ground. So that I don't think it would interfere with it." R. 62).

In an effort to be absolutely fair to the defendants and to minimize their damages, it was stipulated by the plaintiff

that a road and ditch would be constructed around the north end of the proposed dike to give the defendants full access to the 36.79 acre tract with no inconvenience. The stipulation as follows:

MR. SKEEN: "If the court please, and ladies and gentlemen of the jury, as Mr. Braegger indicated, we have worked out an arrangement with him, which he said last evening was satisfactory, for giving him access to water for the 36.79 acre tract. The plaintiff will construct at its expense for Mr. Braegger a suitable ditch to carry water from Willow Creek around the north end of tract one marked in blue, along the north side of it, I should say, and down to the 36.79 acre tract. Proper diversion gates will be provided so that he can carry his water in the new ditch. Now, the new ditch will be constructed before the old ditch is destroyed. So he will never at any time be without water for the tract of land that we're not taking. In addition to that, the plaintiff will permit Mr. Braegger to have possession of all of his property until May 1, 1958, subject only to the right of the plaintiff to have its engineers go on the property and survey and dig test holes or do whatever they need in connection with the construction of the project. Third, the plaintiff will construct a graded dirt farm road from the Union Pacific Railroad tracts on the Zundel property — that's the property just to the east of tract number one indicated on the map—around the dike and on the north side of the tract one to Mr. Braegger's 36.79 acre tract. So that he will at all times have access to the remaining property. That will be true also during construction. His right of access will not be disturbed. Now, fourth, that the plaintiff will construct a fence from the point on the northwest corner of tract number 15-A, indicated by across mark along the heavy line easterly to the corner marked "X" immediately under the word

“tract” on the map, so that there will be no danger of Mr. Braegger’s cattle getting off the remaining land and onto the tract that the plaintiff is taking. Now, that may be considered in the record as a stipulation and condition under which the award of just compensation and damages will be made.” (R. 164-165).

MR. MASON: “Now, Mr. Skeen, I might ask you one other question. How about the construction of diversion headgates where the water is going to be taken from Willow Creek or Mill Creek to the north?”

MR. SKEEN: “Well, I’ll state that if we destroy the usefulness of his present headgate we’ll replace it with a proper headgate so that he can divert the water. We’re not going to build a ditch for him that long distance and then leave it so he can’t get any water out of it.” (R. 166).

Mr. Waddel testified as follows with respect to the 36.79 acre tract:

“Q. Now, Mr. Waddel, you have considered, have you, the 36.79 acres of land which is not taken shown colored, or left plain white on the map? (R. 262).

A. Yes, sir.

D. Did you look at that land?

A. Yes, sir.

Q. Now, did you make a study to determine whether the taking of this area in blue would affect the valuation of the 36.79 acres?

A. I don’t believe it will make any difference in the fair market sale price of the 36.79 acres that is left there.

Q. Are you making that statement in the light of

our stipulation here that a ditch will be built around the north end of the dike?

A. A ditch and a road.

Q. And a road to serve it?

A. Yes, sir, based on that.

Q. So there will be access to it for water and by road?

A. Yes, sir."

There is no specific testimony in the record that after the stipulation was made there would be any damage at all to the 36.79 acre tract, and in fact, the only specific evidence on the point prior to the stipulation is that of the defendants' expert, Mr. Capener, that there was no damage.

The court erred in denying the plaintiff's timely motion to strike the items of damages to the remaining tract (R. 354). The point was raised again in the motion for a new trial (par. 2) and the trial court again erred in denying the motion.

### 3. THE COURT ERRED IN GIVING ORAL INSTRUCTIONS THROUGHOUT THE TRIAL CONTRARY TO RULE 51 OF THE RULES OF CIVIL PROCEDURE.

Rule 51 of the Rules of Civil Procedure requires instructions to the jury to be in writing "unless the parties stipulate that such instructions may be given orally—." It is uniform practice for the court to give the instructions after the close of the testimony and before argument. In this case, as indicated by the parts of the record quoted above, the members of the jury were permitted to interrupt the trial and to ask questions. The court orally instructed the jury on the questions raised.



Most of the questions related to matters not properly before the jury, such as the liability of the defendants to pay income tax (R. 180, 338), and the opinion of the Supreme Court of Utah in the Noble case (R. 187). The asking of the questions was entirely unexpected, and the oral answers of the court, except in one instance, were given without consultation with the attorneys.

An exception was taken by the plaintiff to the oral instructions (R. 356).

The rule is well settled that where a statute requires written instructions, it is mandatory and not merely directory. In the case of *Henderson v. Kessel*, 116 S.E. 68, 93 W.Va. 60, the court said with reference to such a statute, "To hold it merely directory would be in effect to repeal it." The reasons for the rule that instructions must be in writing have been discussed by the courts.

It is easily conceivable that during the course of a trial a verbal instruction . . . would be wholly overlooked and forgotten by a jury in the consideration of a case. *Gause-Ware Funeral Home v. McGinley* (Texas) 41 S.W. 2d 433, 435.

The great object of the statute (requiring that instructions be in writing, is to prevent disputes between the judge and counsel as to what was the charge; and the only way to prevent them is to require the courts to conform rigidly to the statute. *Fry v. Shehee*, 55 Ga. 208; *Citizens Bank of Bainbridge v. Fort*, 83 S.E. 235, 142 Ga. 611. See also, *Wheatley v. West*, 61 Ga. 401; *Alabama Great Southern R. Co. v. Arnold*, 2 So. 337, 80 Ala. 600, 609.



In the case of *Henderson v. Kessel*, supra, it was held that where the statute requires instructions to be in writing, it is error for the court to give an oral instruction to the jury, governing the matters in issue in a civil case, even though the instruction be correct as a matter of law.

The giving of the oral instructions referred to above was clearly contrary to the intent and purpose of Rule 51 and constituted reversible error.

## CONCLUSION

The questions asked by members of the jury relating to such subjects as income tax, payment in a lump sum, gravel deposits, and severance during the trial of the case indicated clearly that the jury was interested in building up as high a verdict as possible. This, together with the apparent contempt for the court's instructions, indicated passion and prejudice that prevented the plaintiff from having a fair trial of the issues.

There was no evidence in the record supporting the answer to question No. 2 in the special verdict. In fact, the defendants' expert witness testified that there was no damage to the 36.79 acre tract remaining. Therefore, the verdict cannot be sustained.

The court gave numerous oral instructions contrary to Rule 51 of the Rules of Civil Procedure.

In view of the foregoing, it is respectfully submitted that the judgment of the district court must be reversed.

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