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State of Utah v. Jack Keeley : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

WEBER BASIN WATER CONSERV-
ANCY DISTRICT,

Plaintiff and Appellant,

vs.

HAROLD L. WARD, C. ARNOLD
FERRIN and LUCILLE N. FERRIN,
his wife, LESLIE OLSEN and JESSIE
OLSEN, his wife, et al.,

Defendants and Respondents.

No.
8881

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

This is an appeal by the Weber Basin Water Conservancy District from a judgment of the District Court of Weber County on a verdict for \$59,339.00 in consolidated actions by the Weber Basin Water Conservancy District, hereinafter referred to as the "District," and the State of Utah to condemn land for use in the construction of the enlarged Pineview Dam and Reservoir, a part of the Weber Basin Reclamation

Project. Separate suits were filed by the District and the State and separate orders of immediate occupancy were taken. The cases were consolidated only for the trial. There are some twenty-one defendants in the District case but only the defendants C. Arnold Ferrin, Lucille N. Ferrin, Leslie Olsen and Jessie Olsen were involved in the trial and are involved in this appeal. The legal title to the property being condemned is in the Ferrins and the farm is being sold under contract to the Olsens. The State of Utah has not appealed.

Whenever the word "defendants" is used it refers only to Leslie Olsen and Jessie Olsen, his wife. The transcript is referred to as (R.), the Weber Basin Water Conservancy District file will be referred to as (F.), and the State case will be referred to as (State F.).

STATEMENT OF FACTS

The defendants are the owners of 496 acres of land near Eden, in Ogden Valley, consisting of 360 acres of mountain range land, and 136 acres in the valley used for pasture, hay, grain and the farmstead. Exhibit A shows the farm. The area colored yellow, consisting of 66.8 acres, is that sought to be taken by the District, and the green area, consisting of 5.66 acres, is that sought by the State. The land remaining is colored red. Exhibit 2 is a photograph showing the defendants' buildings consisting of a brick home, a hired man's house, machine shed, calf lounging shed, garage, granary, milk parlor, 2 barns, lounging shed and catch pen. The farm had been used by the defendants for the operation of a dairy for seven years preceding the trial. The defendants kept 48 to 50 head of cows

and 12 or 15 young stock. Werner Kiepe, plaintiff's appraiser, testified that the farm was over-improved; that if the buildings were to burn down "they would never be replaced, because they would not fit into a modern dairy operation with its modern buildings" (R. 255).

The defendants' valley land was in part sub-irrigated and the higher land was irrigated from the Eden Irrigation Company system. The defendants own certificate No. 50 for 77 shares in the Eden Irrigation Company and Mr. Olsen testified that he used about one-fourth of this irrigation water to irrigate the land taken by the District (R. 41).

The defendants called three witnesses to testify as to values, Mr. Olsen, D. Ray Wilkinson and Lubin A. Welker. Wilkinson and Welker collaborated in the preparation of a single report. Mr. Olsen testified from that report. Therefore, the defendants' testimony as to values was taken from one report summarized as follows:

Value of 66.8 acres taken by	
District	\$40,080.00 (R. 30)
Severance damages resulting	
from taking by both State and	
District	30,120.00 (R. 30)
Total.....	\$70,200.00

The District called as a witness, Werner Kiepe, who testified as to values and severance damages as follows:

Value of 66.8 acres taken	
by District	\$21,010.00 (R. 204)
Severance damages resulting	
from taking by both the	
State and District	\$14,430.00 (R. 251)
Total.....	\$35,440.00

The defendants' witnesses testified that the farm was peculiarly suited for a profitable dairy operation, and that the taking of the land by the District and the State in effect destroyed its usefulness for that purpose.

"Q. From your experience as a dairy farmer, and your general knowledge of the industry in general, what is the minimum number of dairy cows required to make a profitable operation?

A. At the present time 30 to 40 head, I would say.

Q. That would be a minimum?

A. Yes, sir" (R. 23).

Similar testimony was given by the defendants' other witnesses.

Upon cross-examination, every effort was made by the District to find out from Mr. Olsen whether the dairy operation was in fact profitable before the taking. He was asked to produce his income tax returns for the years 1951 to 1956 inclusive, which he did. The returns were offered in evidence. The trial court sustained an objection to them (R. 47). Mr. Olsen was called by the District as an adverse witness (R. 257) and was asked whether he had realized a net profit from the operation of his dairy farm in 1955 (R. 259). Objection was made and overruled. He answered "I don't know." (R. 259). Mr. Olsen was then handed his 1955 income tax return and he was asked to examine it and then answer the question. Objection was made and sustained (R. 259). The following then occurred:

"Q. Do you know whether you operated the dairy farm at a profit from 1951 to 1956, inclusive? (R. 260)

A. No, sir.

MR. YOUNG: The same objection, if the Court please.

Q. You don't know?

THE COURT: The answer may stand.

Q. You don't know?

A. No, sir.

MR. SKEEN: If the Court please, I would like to go into other matters that I'm sure counsel will object to, and Your Honor has already indicated that you would sustain the objections, and rather than ask the jury to leave while I make the offer I would like to have the privilege of making the offer after the jury retires, and having it made part of the record.

THE COURT: I'll be glad to retire the jury for that purpose.

Again, ladies and gentlemen of the jury, remember the admonition of the Court. We'll call you when we want you.

(Thereupon the jury retired from the Courtroom and the following proceedings were had in its absence:)

Q. Mr. Olsen, what was the purchase price of your farm in 1950? The price you paid for it?

MR. YOUNG: I make the same objection I have heretofore made.

THE COURT: Now what do you claim for this, Mr. Skeen?

MR. SKEEN: Well, if the Court please, I have done a little research on this matter of introducing evidence as to the purchase price of the very farm in question, and its admissibility, and there is a dif-

ference of opinion among the Courts as to how far back you can go, but ordinarily it is admissible if it's not too remote. There are numerous cases holding that a purchase within seven and a half or eight years of the time of the taking is admissible evidence.

THE COURT: How can that have any relation to the value of the property at the time of the taking?

MR. SKEEN: Well, we have in the record the testimony as to increases in property values between 1950 and 1956. This land was bought in 1950 and sold in '56, and I think it's competent evidence and I think it's very enlightening in this case.

At any rate I'd like to make the record on it, and if Your Honor intends to sustain the objection I'd like to make a formal offer to prove with this witness on the stand.

THE COURT: I'm going to sustain the objection to the question, Mr. Skeen. You may make your offer of proof.

MR. SKEEN: Comes now the Plaintiff Weber Basin Water Conservancy District, and offers to prove with Mr. Olsen on the stand that he bought the farm in litigation, including the livestock on the farm, the farm machinery, the improvements and all of the land, including not only the land shown on the exhibits A and 1, but also the grazing land referred to, for a total of \$69,470.00.

That he estimated that the livestock at that time were worth \$25,000.00. That since that date—well, the record already shows what improvements he put on the property, and the approximate value, since that date.

MR. YOUNG: I renew my objection, if the Court

please. The danger of course is that if a man makes a good buy he shouldn't be penalized. That doesn't affect the fair cash market value of this property on the day of the taking. We know of lots of instances where people have been shrewd enough to buy property at a bargain (R. 262).

THE COURT: I'm going to sustain the objection."

The following offer of proof was made by the District respecting the question as to whether the dairy farm was a profitable operation before the taking.

"MR. SKEEN: Earlier in the trial the Plaintiffs offered to prove, from the Defendant Olsen's income tax returns, profits and losses from the year 1951 to 1956, inclusive, and gave some figures, some of which were correct and others incorrect (R. 277).

The following are the correct figures taken from the farm schedule of the Defendant Olsen's income tax returns: Net profit for 1951, \$41.58. Loss in 1952, \$11,108.35. Loss in 1953, \$4,338.28. Loss in 1954, \$3,948.71. Loss in 1955, \$2,971.58. Profit in 1956, \$681.07.

THE COURT: Mr. Young, you may take your exceptions.

MR. YOUNG: I want to state in connection with that, if the Court please, that the income tax returns from which counsel obtained this information shows on its face that it involves an entire complex operation of other properties, and is not a reflection of profit and loss, even under his theory, of the operation of the farm. It's the result which was obtained from his combined operations as a whole" (R. 278).

The trial court included among the instructions to the

jury No. 6 relating to the upsetting of the economic balance of the dairy farm as follows:

No. 6.

If you find from a preponderance of the evidence in this case that the entire farm owned by defendants constituted a unit operation, to-wit: A dairy farm; and that the taking of a part of this farm has upset the economic balance of the farm and thus has damaged that part of the farm not condemned; and if you further find from a preponderance of the evidence that at the time of the taking by plaintiffs there was not available comparable lands in the area of the condemned lands which could be purchased by the defendants, thereby restoring to defendants the economic balance of said farm for the purpose to which said farm as a unit, to-wit, a dairy farm, was being used, and as a consequence thereof the taking of the portions of said farm by plaintiffs has depreciated the fair market value of the remaining property, at the time of the taking, then you should consider these facts in arriving at the amount of severance damages to be awarded to the defendants in this case (R. 271).

The court did not define severance damage or instruct the jury as to how to determine severance. The court refused to give the District's requested instruction No. 5 as follows:

The property sought to be condemned, shown in yellow on plaintiff's exhibit A, consists of only a part of the defendants' property and leaves the defendants the adjoining land shown on plaintiff's exhibit A. You are instructed that you may include in the just compensation to be awarded to the defendants, the damages to the remaining land caused by the severance of the part sought to be condemned from the remaining property. The just compensation is the difference

in money between the fair market value of the entire farm land and improvements on December 12, 1956, before the proposed taking and the amount of the fair market value of the remaining land and improvements as of December 12, 1956, after the taking. Your total award cannot exceed this difference. The part of the just compensation which constitutes the allowable severance damage is the amount left after deducting the fair market value of the property taken from the amount of just compensation determined as above. This difference is the severance damage. However, before any severance damages can be allowed, there must be evidence that there was no available comparable land in the area of the condemned land of December 12, 1956 (State F. 41).

The verdict insofar as it relates to this appeal was as follows:

"We, the jury impanelled in the above-entitled cause, find the issues in favor of the Defendants and against the Plaintiffs, as follows:

1. What was the fair cash market value of the 66.8 acres of land, together with the water located thereon and other improvements sought to be condemned by plaintiff Weber Basin Water Conservancy District? (R. 281).

Answer: \$33,400.00.

2. (This answer involved only the state land and is not pertinent to this appeal.)

3. What amount, if any, do you find that the remaining portion of the premises not being condemned has depreciated in value by reason of the taking of the lands sought to be condemned by both plaintiffs and the construction of the two highways across defendants' premises?

Answer: \$23,109.00.

Dated: January 28, 1958.

Frank E. Little, Foreman."

Judgment was entered on the verdict.

The District filed a motion for a new trial upon the following grounds (R. 89):

1. Insufficiency of the evidence to justify the answer to question number 1 in the Special Verdict.
2. Errors of law at the trial consisting of
 - (a) The Court's refusal to admit evidence as to the purchase price which the defendants Leslie Olsen and Jessie Olsen agreed to pay to C. Arnold Ferrin and Lucille Ferrin for the property sought to be condemned.
 - (b) The Court's refusal to admit evidence as to profits and losses of the defendants Leslie Olsen and Jessie Olsen in the operation of the dairy business on the land sought to be condemned from 1952 to 1956 inclusive as shown by Income Tax returns.
 - (c) The giving of instruction number 6 for the reason that said instruction is general and contains such undefined terms as "economic balance of the farm."
 - (d) The refusal of the court to give plaintiff, Weber Basin Water Conservancy District, requested instruction number 5 relating to severance damages.
 - (e) The Court erred in failing and refusing to instruct fully and adequately on the subject of severance damages.
 - (f) The Court erred in giving instruction number 9 and particularly the first paragraph thereof, which

implies that improvements as well as land were condemned by plaintiffs.

- (g) The Court erred in denying Plaintiffs' motion to strike all of the defendants' evidence as to severance damages (R. 90).

The motion was denied.

STATEMENT OF POINTS

1. There is insufficient evidence to support the answer to question No. 1 of the verdict.

2. The Court erred in refusing to admit evidence (a) to show that the farm was not profitably operated as a dairy farm before the taking, and (b) to show the purchase price paid for the farm by the defendants; thereby improperly limiting cross-examination.

3. The Court erred in giving instruction No. 6, which implies that the defendants' farm was an economic dairy unit before the taking.

4. The Court erred in failing adequately to instruct the jury on severance damages.

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

The argument under this point is directed to the insufficiency of the evidence to support the answer to question No. 1 as follows:

What was the fair cash market value of the 66.8 acres of land together with the water located thereon

and other improvements sought to be condemned by plaintiff Weber Basin Water Conservancy District?

Answer: \$33,400.00.

If \$33,400.00 is divided by 66.8, the result is \$500.00. Let us examine the record to determine whether there is any evidence to support such a figure. As indicated above, although three witnesses testified on values there was in fact only one appraisal made. Witnesses Wilkinson and Welker made an appraisal report and the defendant Olsen in giving his testimony simply read from the report. (R. 32). The report stated that the value of the 66.8 acres taken by the District was \$40,080.00, which figures out at \$600.00 per acre for all land taken.

It was brought out on cross examination of Mr. Wilkinson that his figure of \$600.00 per acre was largely based upon unaccepted offers of land for sale. He knew of no sales of comparable land. We quote:

"Q. Now, Mr. Wilkinson, just where did you get this figure of \$600.00 an acre, if you know of no comparable sales up there in that area? (R. 92).

A. Well, I didn't know of any comparable sales, but I had a client who wanted to purchase some land in that area and I went to a number of places, and I have bona fide listings here of four places up there that are offering their property for sale, and every one of them is more than \$600.00 an acre.

Q. In other words your testimony then is based upon unaccepted offers of certain property in that area for sale?

A. Not entirely.

Q. Well, do you know of any actual sales?

A. I answered that.

Q. You don't?

A. That's right.

.
.

Q. Well, now, if you are appraising property, and there are no comparable property sales, no accepted offers, will you tell me again how you arrive at your figure? (R. 99)

A. I use my own judgment.

Q. And you base that judgment upon what?

A. What I see.

Q. You don't care what the land produces?

A. Well, there used to be a time when you sold land that way, but since the things are inflated such as they are now why it's a difficult thing to appraise land from that basis.

Q. So you just base your opinion then on just looking at the land and picking a figure out of the air?

A. No. All the other information I can get from anywhere.

Q. Well, what other information did you have? That is what I'm anxious to get.

A. Well, I had the—

Q. Don't go over the unaccepted offers and so on, because we have been all over that, but anything new that you haven't mentioned that had something to do with your judgment I'd like to hear about.

A. I think I mentioned everything.

Q. Pardon me?

A. I think I have mentioned everything.

Q. You have mentioned everything you based your opinion on?

A. That's right." (R. 100).

He testified further that in his opinion, farm lands in the vicinity of Ogden had increased in value substantially between 1950 and 1956 and further *that there had been an increase in value because of the enlargement of Pineview Reservoir*. He declined to say how much of the increase had been due to this cause.

Mr. Welker gave the same testimony as to the value of the 66.8 acres of Mr. Wilkinson. The following quotation from the record indicates the basis for Mr. Welker's opinion of values:

"Q. Your judgment then of \$600.00 an acre was just based on what you saw on the place, and had no reference to comparable sales of other land in the area; is that right? (R. 125).

A. It was my opinion as to the fair value of it.

Q. It was just based on what you saw on the ground, is that right?

A. Well, what I saw on the ground, from my experience and my judgment.

Q. And then you'd answer definitely that it was not based on any comparable sales?

A. Oh, I think comparable sales entered into it a lot.

Q. With your mental operations; is that right?

A. Yes, sir (R. 126).

Q. But you don't know of any land up there ever having been sold for \$600.00 an acre?

A. I didn't say that.

Q. Isn't that a fact?

A. Well, I know of people that have certified a willingness to pay more than \$600.00 an acre for land, if I could get it.

Q. You don't know of any actual sales for that amount?

A. I know of offers. I know of offers that have been made, but they were refused.

Q. But you don't know of any actual sales?

A. No, sir. They wouldn't sell. Wouldn't sell similar land.

Q. That's been right recently, hasn't it?

A. Yes, sir.

Q. You know of course that there has been quite a lot of interest in subdivision property around the new lake, and recreational areas?

A. Yes.

Q. For speculative purposes? You know that, don't you?

A. Yes, sir, I know that.

Q. And you know that there have been quite a few offers to buy land that looks favorable for subdivision and recreation?

A. I have heard there has been some."

The rule is well settled that offers are inadmissible except as admissions against the owner, Orgel on Valuation, p. 494.

1 N. 11

Mr. Welker agreed with Mr. Wilkinson that the construction of the enlarged Pineview Reservoir, the improvement for which this land was condemned, had affected his estimate of value. On cross-examination he testified as follows (R. 116):

"Q. Mr. Welker, in fixing this figure at \$600.00 per acre, did you take into consideration the growing scarcity of meadow land up in that area, due to the enlargement of Pine View Reservoir?

A. I think that has affected the values.

Q. You took into consideration, did you not, in fixing this figure of \$600.00?

A. I think that would have affected the value.

Q. Well, now, do you have an estimate as to how much it affected the value? One-third, one-fourth, or some other amount?

A. Oh, a guess would be about one-fourth perhaps.

Q. In other words your appraisal would have been \$450.00 an acre, except for the fact that this reservoir is being enlarged; is that right?

A. Perhaps.

Q. Well, if it's right say it's right. If it's not, why change it. I want your testimony, and I think the jury should have it. "Perhaps" or "I guess" doesn't mean anything.

A. Well, let's say yes then.

Q. Pardon me?

A. Yes." (R. 117).

The Supreme Court of the United States held in the case of *United States v. Miller*, 317 U.S. 369, 87 L. ed. 337, that

an increment of value in land being condemned attributable to the improvement for which the land is taken cannot be considered in determining value. We quote from the opinion:

"There is, however, another possible element of market value, which is the bone of contention here. Should the owner have the benefit of any increment of value added to the property taken by the action of the public authority in previously condemning adjacent land? If so, were the lands in question so situate as to entitle respondents to the benefit of this increment . . . " (87 L. ed. at page 343).

"The question then is whether the respondent's lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities." (87 L. ed. at page 344).

This rule has been approved and followed.

United States v. Cors, 337 U. S. 325, 93 L. ed. 1392.

Harris v. Wyandotte County, 151 Kans. 946, 101 P. 2d 898.

Annotation: 147 A.L.R. 66.

On page 68 in the American Law Report note cited above the author states that the great weight of authority denies to the owner the right to recover an increase or en-

hancement due to the proposed improvement in the value of the land taken.

If we take the defendants' witnesses testimony at face value the record would not support a verdict in excess of \$450.00 per acre. Although the landowner, Mr. Olsen, testified that the land was worth \$600.00 per acre, he admitted on cross-examination that he was simply reading from the report prepared by his appraisers (R. 32). The following question and answer indicate this:

"Q. Well, you have testified as to the value of the 66.8 acres as \$40,080.00. Will you state whether you have an opinion as to how that \$40,080.00 was arrived at? I mean know of your knowledge?

A. Well, I'd say no sir."

The maximum value per acre of the 66.8 acres not attributable to the Pineview enlargement, which is supported by the evidence, is \$450.00 per acre, and it is apparent from the testimony quoted above that that figure was "picked out of the air." This would amount to \$30,060.00, or \$3,340.00 less than the answer to question No. 1. It will be recalled that Mr. Kiepe's testimony was that the fair market value of 66.8 acres was \$21,010.00. The answer to question No. 1 in the verdict exceeded substantially the evidence before the jury as to the value of the 66.8 acres, and the case must be reversed for this reason alone.

2. THE COURT ERRED IN EXCLUDING EVIDENCE AS TO (a) FARM OPERATION LOSSES, AND (b) THE PURCHASE PRICE PAID BY THE OLSENS FOR THE

FARM INVOLVED IN THIS SUIT, THEREBY IMPROPER-
LY LIMITING CROSS-EXAMINATION.

(a) It was the theory of the defendants that the highest and best use of their farm was for a dairy; that because of its location and the kinds of land of which it was comprised, it was peculiarly adapted for that use, and that it was one of the better dairy farms in Ogden Valley. The testimony of the defendant, Leslie Olsen, Mr. Felt, Mr. Story, and the real estate men—Mr. Wilkinson and Mr. Welker—was all to this effect (R. 20-23; 69, 70, 105-107, 132-135, 141-143). The jury undoubtedly got the impression that the farm was an excellent dairy farm, had been operated by a good farmer, and was a profitable enterprise. The plaintiff had only one way to meet such testimony and that was to show by the actual records of the farm that it was not a successful dairy farm operation. The plaintiff notified the defendants to produce their income tax returns for the entire period of their operation of the farm. They were produced by the defendants and as indicated above, showed that the farm was operated as follows:

1951	.....	Profit	\$	41.58
1952	.....	Loss		11,108.35
1953	.....	Loss		4,338.28
1954	.....	Loss		3,948.71
1955	.....	Loss		2,971.58
1956	.....	Profit		681.07

Over the six years of operation the aggregate loss was \$22,366.92. In the two years when there was a profit the total was \$722.65.

The plaintiff offered the returns in evidence and the

defendants' objection was sustained (R. 43-47). Later in the trial the defendant, Leslie Olsen, was called by the plaintiff and asked whether his operation of the dairy in 1955 was profitable. He answered that he did not know. He was then handed the income tax return for that year and was asked to examine it and then answer the question. The court sustained the defendants' objection (R. 259). This was error because it in effect took away the plaintiff's right of cross-examination upon one of the most essential points in the case.

It has been held that in a condemnation case, evidence as to annual crops and income is admissible for the purpose of determining the value of farming land.

Orgel on Valuation, pp. 548, 549.

Weyer v. Chicago W & N. R. Co., 68 Wis. 180, 31 N.W. 710.

Cushing v. Pote, 128 Okla. 303, 262 P. 1070.

Stolze v. Manitowoc Terminal Co., 100 Wis. 208, 75 N.W. 987.

DeFreitas v. Suisun City, 170 Cal. 263, 149 P. 553.

Annotation: 65 A.L.R. 455.

In the Weyer case, *supra*, the court said:

"In estimating the value of farming land, its productiveness or the income which may be derived from it is always considered. Indeed there is no better nor safer criterion than this to get at its real value."

This is a stronger case for admissibility of evidence of profits than those cited above, because here the evidence was

offered on cross-examination to show that the farm was not a balanced economic dairy unit, and clearly it was proper to test the credibility of the defendant, Olsen, in this manner.

In 1950 Arnold Ferrin and Lucille Ferrin, his wife, sold to Leslie Olsen and Jessie Olsen, his wife, the farm involved in this condemnation suit. On cross-examination Mr. Olsen was asked to state the amount of the purchase price shown in the contract for the purpose of testing the validity of his testimony and its credibility. The court sustained an objection upon the ground that such testimony was incompetent, irrelevant, immaterial and too remote (R. 36). Later, Mr. Kiepe was asked to repeat what Mr. Olsen had told him about the purchase of the farm from Ferrin. Objection was sustained (R. 206, 207). However, Mr. Kiepe did testify that Olsen purchased the property in September, 1950 (R. 207). This was 6 years and 3 months before the "taking date," December, 1956.

The following is a quotation from 5 Nichols on Eminent Domain, page 267:

"When a parcel of land is taken by eminent domain, the price which the owner paid for it when he acquired it is one of the most important pieces of evidence in determining its present value, provided the sale was recent, and was a voluntary transaction between parties each of whom was capable and desirous of protecting his own interest and no change in condition or marked fluctuation in values has occurred since the sale. A price paid under such conditions is a circumstance which a prospective purchaser would seriously consider in determining what he himself should pay for the property; as evidence before a jury it consumes little time in

introduction and raises few collateral issues so that every argument is in favor of its admissibility."

There is a great diversity in the cases as to the period of time in which the previous sale was made, as affecting the admissibility of evidence. Also, there is some difference of opinion as to the purpose of the evidence. See:

Ohio Turnpike Com. v. Ellis, 164 Ohio St. 377, 131 N.E. 2d, 397.

Palmer v. St. Highway Com., 195 N.C. 1, 141 S.E. 338.

Epstein v. City of Denver, 293 P. 2d 308, Colo.

In the recent work entitled "Just Compensation," by Kaltenbach, the author makes the following statement on pages 41 and 42:

"There is no exception to the general rule with respect to this topic. All of the cases cited in the State Summaries hold that the general rule permits evidence of previous sales of the condemned property to be introduced, subject to two conditions; namely, that the sale must have been made within a reasonable time so that it has some bearing on the market value at the time of the taking, and also that the sale must have been voluntary. Subject to the foregoing conditions, evidence of the sale of the condemned property is admissible.

The courts vary quite substantially on what is a reasonable time. Up to eight years has generally been considered not too remote, although one jurisdiction did rule that seven and one-half years was too remote. Usually anything over eight years is too remote. However, in one case, evidence of a sale made thirteen years previously was permitted. In another case, the exclusion

of evidence of a sale that had occurred two years previously was held not to be reversible error, although the upper court said that the evidence should have been admitted."

The court improperly limited the cross-examination of the defendant, Olsen.

In *State v. Peek* (Utah), 265 P. 2d 630 at page 637, Mr. Justice Wade, writing the opinion, made an excellent statement regarding the scope of cross-examination in cases of this kind:

"There is no other instrument so well adapted to discovery of the truth as cross-examination, and as long as it tends to disclose the truth it should never be curtailed or limited. Any inquiry should be allowed which an individual about to buy would feel it in his interest to make."

In 5 *Nichols on Eminent Domain*, 183, Section 18.45 (2), it is said:

* * * *

The scope of the cross-examination of experts and other witnesses who have testified to value in land damage cases is very broad, since cross-examination is often the only protection of the opposing party against the unwarranted estimates that a certain class of mercenary experts is wont to indulge in. A witness may be asked on cross-examination any facts which would be admissible on direct examination.

* * * *

A witness who has given an opinion of value may, however, in the discretion of the court, be asked questions on cross-examination, for the purpose of testing his opinion, which would be improper upon direct examination.

* * * *

The opinion of a witness may be impeached by showing that his acts are inconsistent with his words, as for example by showing that he has offered the same or similar property for sale at a price far different from what he now says it is worth, or he may be asked whether he has not made inconsistent statements upon the same point upon other occasions. *He may be asked what the owner paid for the property or what he has been offered for it.* Should the fact stated be material, and should the witness, after having been afforded a reasonable opportunity for explanation, deny the making of the statement mentioned, the fact may be proved by other witnesses at a later stage" (emphasis added).

As stated above, the only protection the condemnor has against "unwarranted estimates" of value is cross-examination. A denial or limitation of that right may, and undoubtedly often does, have serious consequences. The landowner is entitled to just compensation, but the public, represented by the condemning agency, is entitled to place before the jury evidence tending to show that the landowner and his experts are making wild and exaggerated estimates. As was well stated by Mr. Justice Wade, as long as cross-examination "*tends to disclose the truth it should never be curtailed or limited.*" The trial court ignored this important rule and left the jury with only half the story as to value, damages and "economic balance." This was reversible error.

3. THE COURT ERRED IN GIVING INSTRUCTION NO. 6.

The full text of instruction No. 6 is given above on page 10. It will be noted that the jury was instructed that if the taking of a part of this farm "*has upset the economic balance of the farm*" and there is no comparable land available for re-

placement, "and as a consequence thereof the taking of the portions of said farm by plaintiffs has depreciated the fair market value of the remaining property, at the time of the taking, *then you should consider these facts* in arriving at the amount of severance damages to be awarded to the defendants in this case." The instruction implies that the farm *had* "economic balance" before the condemnation of part of the land. This was clearly an invitation to the jury to award severance damages for destruction of the dairy business which is contrary to law. It is cleverly worded to tie such severance damages to the remaining lands and buildings, but any jury would take the meaning to be that if the "economic balance" of the farm is upset, and it is no longer possible to run a dairy on the farm, substantial severance damages are in order. Emphasis was placed on the *dairy* and "economic balance" and was taken away from the market value of the remaining lands and buildings for other purposes.

The law is well settled that damage to a business operation is not compensable.

18. Am. Jur., Section 259.

Bothwell v. United States, 254 U.S. 231, 65 L. ed. 238.

Mitchell v. United States, 267 U.S. 341, 69 L. ed 644.

The instruction was especially prejudicial because of the refusal of the trial court to allow the plaintiff to cross-examine the defendant on profits and losses to show that the dairy farm was not a successful operation. The jury undoubtedly assumed, as the instruction clearly implied, that the farm was an economically balanced dairy operation which was destroyed by the taking. The result was an excessive award of severance damages. This was reversible error.

4. THE JURY WAS NOT INSTRUCTED ON SEVERANCE DAMAGES.

The court refused to give the plaintiff's requested instruction No. 5 which explains the meaning of the term "severance damages" and properly instructs the jury on the method of determining them. There is much testimony in the record respecting such matters as "damage to the dairy business;" "being put out of the dairy business," and "upsetting an economic unit" and the jury may well have considered that to be "severance damages" in the absence of a proper instruction.

The requested instruction followed closely the ruling of this court in the case of *State v. Ward*, 112 Utah 452, 189 P. 2d 113, to the effect that the difference in market value before and after condemnation is the proper measure of damages. The trial court's refusal to properly instruct the jury in the regard undoubtedly contributed substantially to the excessive verdict and justifies reversal of the case.

CONCLUSION

The insufficiency of the evidence to support the answer to question No. 1 in the verdict, the improper and highly prejudicial limitation of plaintiff's cross-examination of the defendant Olsen, and the court's error in giving and refusing to give instructions require reversal of this case.

Respectfully submitted,

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