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State of Utah, By and Through Its Road Commission v. Betty Lesourd, A Woman, Alex, T. Davies and thelma Davies, His Wife, and Valley Bank & Trust Comp Any : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff and Appellant,

vs.

BETTY LeSOURD, a woman, ALEX T. DAVIES and THELMA DAVIES, his wife, and VALLEY BANK & TRUST COMPANY,
Defendants and Respondents.

Case No. ~~11860~~ 12471

BRIEF OF RESPONDENTS

Appeal from Judgment of the Fourth District Court in and for Summit County, Utah
Honorable Thornley K. Swan, District Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
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BETTY LeSOURD, a woman, ALEX T. DAVIES and THELMA DAVIES, his wife, and VALLEY BANK & TRUST COMPANY,
Defendants and Respondents.

Case No. 11866

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

This Appeal makes the second time the subject case has been brought before the Court for review. Both appeals have been by the Government,[1] the initial one having involved a singular issue of law, and the instant one

[1]The initial appeal by the Road Commission was taken from the Judgment of District Judge Swan of March 26, 1969, and the case reported under Opinion No. 11866 of this Court on July 23, 1970. The case was remanded to the trial Court for further proceedings in accordance with this Court's mandate.

being the review of a factual determination made by the trial Judge. The action has been pending since the filing of the Condemnation Complaint in September, 1967.

STATEMENT OF THE CASE

This is a case in condemnation regarding the expropriation by the State Road Commission of certain property of the Defendant-Landowners situated in Summit County. The property, commonly known as the Kimball Junction Cafe and Service Station, was located at the intersection of U. S. 40 and the Snyderville-Park City highways (Kimball Junction). (Tr. 300, 572, 575, 586).

The jurisdictional issues relative to the right of the Road Commission to condemn the Defendants' properties were not contested and the matter proceeded to trail on the constitutional and statutory questions of Just Compensation. The latter questions were submitted for non-jury trial before District Judge Thornley K. Swan, and after approximately a week of value testimony from four expert witnesses in late 1968 and early 1969, Findings and Conclusions were made and Judgment entered. (R. 48-55). Upon appeal by the Road Commission, the case was remanded and additional proceedings ordered by this Court.[2] Further hearings and trial were held during the latter part of 1970, after which a Memorandum Decision was issued by the trial Court in January, 1971

[2] 24 U.2d 383, 472 P.2d 939 (1970).

and Amended Findings of Fact, Conclusions of Law and Judgment of Just Compensation were made and entered in March of this year pursuant to Rule 52(a) U.R.C.P. (R. 71-78).

The State takes this Appeal on claimed error of fact made by Judge Swan on remand.

DISPOSITION IN LOWER COURT AFTER REMAND

The Brief of Appellant's counsel herein hardly presents to this Court an accurate portrayal of the events of trial in the lower Court subsequent to remittitur in the first appeal.[3] Indeed, one would believe from a reading of the Brief that the District Court, upon remand of the case, listened to some perfunctory argument of lawyers and then in casual style, delivered a second Memorandum Decision and conformed Amended Findings, Conclusions and Judgment. Such was most certainly not the case. To the contrary, the trial Court, as set out in the Statement of Facts below, published its Memorandum Decision of January 25, 1971, only after extended Motions, Pre-trial Order, and hearings, all in compliance with this Court's mandate in the first appeal.

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[3]The Road Commission's Brief is devoid of any discussion or even reference to the specific proceedings which transpired before the District Court upon remand. While those proceedings were both substantial and material, the closest Appellant's counsel gets to them is a nondescript comment on page 3 of his Brief that the trial Judge;

> after argument of counsel and deliberation, entered a Memorandum Decision * * *.

Such slight of hand definition of the post-appeal happenings in this case scarcely does justice to the efforts of the trial Judge and the parties to meet the mandate of this Court in Opinion #11866.

Upon such proceedings having occurred, Judge Swan resolved the primary factual determinate incident to remand, viz., that in the initial Findings and Judgment, severance damage of $5,800.00 had been attributed to the "nonowned" land as defined by the opinion of this Court and that such severance damage *could be* eliminated from the condemnation award by mathematical deduction. In consequence, Judge Swan issued Amended Findings of Fact, Conclusions of Law in accordance with Rule 52, and thereupon entered the Amended Judgment of Just Compensation on March 10, 1971. (R. 76-78). In so doing, the trial Court reduced the condemnation award by $5,800.00 (as well as interest thereon at 8% for three years and six months) from the original Judgment of $65,992.00 to the Amended Judgment of $60,192.00.

The Road Commission counsel has filed this second appeal alleging insufficiency of evidence, in fact, to "justify" the Amended Findings, Conclusions and Judgment. (App. Brief pp. 3-4).

RELIEF SOUGHT BY ROAD COMMISSION ON APPEAL

In this Appeal, it is contended that this Court should now reverse the Findings made and Amended Judgment entered by Judge Swan on remand, and that a new trial is required and be ordered.

Alternatively, Road Commission counsel argues that this Court should *factually determine* that the value testimony of the Government's sole appraisal witness, Austin, was the only competent evidence received in the entire trial and that this Court, therefore, order judgment in favor of the State in the amount of the Austin appraisal, $34,500.00. (App. Brief p. 4).

STATEMENT OF FACTS

The failure of Commission counsel to address himself to or discuss the post-appeal proceedings conducted by the trial Court in response to this Court's mandate in the first appeal, requires that the Respondent-Landowners present separately their Statement of the facts pursuant to Rule 75(p) (2) U.R.C.P.[4] Moreover, because of the context and form in which Road Commission's counsel has framed his Statement, no part of the same is adopted in the Landowners' statement.

1. *The Subject Property.*

In 1967, the year of condemnation, the Kimball Junction Cafe and Service Station was situated on the "swing" southwest corner of U. S. 40 and the Park City Highway, with full and direct access to both highway arteries. (Tr. 300, 572, 575). The property, 1.33 acres,

[4]Of the 9 pages of the Road Commission's Brief devoted to the Statement of Facts, approximately ½ of one page is taken with the events of trial upon remand before Judge Swan. In predominant measure, the Appellant's Statement of Facts simply defaults in coming to grips with the relevant issues with which this Appeal must concern itself, as a matter of law.

was developed with restaurant, service station, and small fishing-tourist type cabins. (Tr. 70, 278). It was undisputed that the highest and best use of the property, at the date of service of summons, was for the existing commercial purposes. (Tr. 383, 502, 575, 621). The taking by the Road Commission knocked out the sanitary system and storage tanks of the property (Tr. 311, 118, 406), the right-of-way line came within less than one foot of the remaining service station pumps (Tr. 311), and the property was deprived of all access to U. S. 40 and the Park City Highways (Tr. 514, 595, 596). It was the judgment of all value witnesses, including the State, that the highest and best use of the subject property, after condemnation, was no longer as a commercial service station-restaurant (Tr. 513, 662).

2. *The Initial Appeal.*

On original appeal, this Court was presented with the issue of whether open and undisturbed possession under claim and color of title by the Landowners was sufficient, as a matter of law, to support an award of severance damage to remaining property. *State Road Commission v. Davies, et al.*, 24 U.2d 383, 472 P.2d 939 (1970). The Court determined that such a showing was not legally adequate and that severance damages could not be awarded as to land (nonowned) which the owner could not make a showing of full title, by record or adverse possession. The case was thus remanded back to the trial Court with directions to eliminate, if possible, from the Findings and Judgment any factual considera-

tion of severance damages to such "nonowned" property, title to which had not completely ripened as of the date of condemnation. Under the Opinion, if and *only* if the trial Judge were unable to make the factual segregation of severance damage to the "nonowned" land and eliminate the same from the Judgment, was a new trial to be ordered. The mandate of the Court in this regard was specific:

> "The judgment is reversed and the case remanded with directions to the trial judge to eliminate from his findings and judgment all severance damages awarded for the nonowned land if he now can do so—otherwise a new trial is ordered." Page 940 of 472 P.2d.

No petition for rehearing with respect to the reversal or the mandate in the Court's Opinion, was filed by any party. (See Record and Docket Book).

3. *Lower Court Proceedings Upon Remand.*

Upon remittitur of the case, the following proceedings were had before District Judge Swan:

(a) On October 26, 1970, the Landowners filed before the trial Court a "Motion for Elimination of Damage to Non Record Title and Determination of Just Compensation In Accordance with Supreme Court Mandate." (R. 94-100). The Motion evidenced, as undisputed, that all commercial buildings, facilities and appurtenances of the Kimball Junction Cafe and Service Station were situated on the 1.33 acres of property, *the title to which was not*

in contest. (R. 95). No commercial buildings, improvements or facilities of the cafe or service station were located on "nonowned" property as defined by the Supreme Court Opinion. (R. 95). Under the mandate in *Davies,* the trial Court was to excise any severance damage to the "nonowned" land. It was submitted by the Motion that as a matter of fact, the trial Court in the first instance did not allocate severance damage to such "nonowned" land, or that if severance damage was so ascribed, it could not in fact exceed a sum certain, but that in all events, the trial Court should proceed to eliminate and strike any such severance damage to "nonowned" land and otherwise enter appropriate Amended Findings, Conclusions and Judgment. (R. 98).

The Road Commission filed no pleadings and did not contest in form the Landowners' Motion.

(b) A prehearing conference was held before Judge Swan on October 28, at which time the issues raised by the Opinion and Mandate of the Supreme Court were explored and discussed in depth and a course of procedure adopted to resolve the questions. (Vol. IV Tr. 2).

(c) Judge Swan, on November 10, entered an "Order Establishing Issues to be Presented and Determined in Accordance with Supreme Court Opinion." (R. 101-103). Under the Order, three *factual* issues were prescribed for determination by the trial Judge:

(1) Did the trial Court, in the initial Judgment, find severance damage to the "nonowned" land?

(2) Did the trial Court, in the initial Judgment, find some severance damage attributable to the "nonowned" land and if so, how much?

(3) Should the trial Court now find that it is factually impossible to separate, distinguish, and eliminate severance damage to the "nonowned" land and if so, should a new trial be ordered? (R. 102-103).

The Order was approved by counsel for both parties.

(d) Thereafter in November, a hearing went forward before the trial Court, at which both counsel presented extended argument on the attendant factual issues as framed in the Prehearing Conference Order of November 10. (Vol. IV, Tr. 1-34).

On the one hand, the Landowners contended that the Supreme Court had passed on an extremely narrow issue in the appeal (i.e., severance damage to "nonowned" land). That such question was merely one aspect of the larger case and that this Court, by its Opinion, had not intended to require a new trial and new findings on all other elements of the suit (such as the fair market value of land, improvements, and fixtures taken and damaged in the *un-*

disputed area), unless the trial Judge factually determined that segregation and elimination of severance damage to the "nonowned" land were not possible. (Vol. IV, Tr. 2-20). Thus it was urged that the mandate of this Court directed the lower Court "to eliminate from his Findings and Judgment severance damages awarded for the nonowned land if he could do so" therefore making unnecessary a retrial of issues that were uneffected and untouched by the Supreme Court Opinion. (Vol. IV, Tr. 2-7). Landowners' counsel then demonstrated to the trial Court the methodology which might be employed, in the Court's discretion, to strike the "nonowned" severance damage from the original Findings and Judgment. (Vol. IV, Tr. 7-20, 27-33).

State counsel, on the other hand, argued that it was a factual impossibility for the trial Court, as finder of fact, to isolate or eliminate severance damage to the "nonowned" land. (Vol. IV, Tr. 20-27). It was contended that State counsel had not cross-examined the valuation experts of the Landowners regarding the impact upon their total opinions of the "nonowned" land.[5] (Vol. IV, Tr. 26-27). The State in its argument offered no conceivable method or amount for the eliminiation of severance damage to the "nonowned" land. At no time did State counsel argue before Judge Swan that the value testi-

[5]It was noted in rebuttal argument that if cross-examination of the Landowners' witnesses had not been conducted at trial, the reason was because State counsel had voluntarily elected not to pursue such. (Vol. IV, Tr. 28-29).

mony of the Landowners' witnesses, Kiepe, Palmer and Mooney was legally incompetent.

The matter was thereupon submitted for consideration.

(e) On January 25, 1971, the trial Court issued its Memorandum Decision in which it stated:

> "*That this Court, in its original Findings and Judgment, did attribute some severance damage to that land which was referred to by the Supreme Court as "nonowned land" and such severance damage can be eliminated from the Findings and Judgment; that the element of severance damage to the property, characterized as "nonowned land," played a small part in the Court's considerations of this matter in the initial trial.* A review of the testimony of the expert appraisal witnesses at trial, and especially the breakdown of the categories of land in such opinion evidence, the exhibits, and the Court's calculations based thereon, indicate that the elimination of severance damages to the "non-owned land" is supported under the record and can be accomplished by the elimination of the rear non-owned land and other rear property from the case, leaving as the property under consideration the frontage area of 1.33± acres agreed upon by counsel, the title to which is undisputed." (R. 86).

Judge Swan observed that the testimony of the State's witness, Austin, was of significance in arriving at the factual conclusion that severance damage to the "nonowned" land could be excised from the Findings:

"Of particular importance to the Court in eliminating severance damage to the "non-owned land" is the evidence of the State's witness, Gregory Austin, who testified that he considered as part of the basic commercial unit 1.33 acres of land, and that as to the balance of the property the same was worth $2,000.00 per acre before condemnation and was of the same value after condemnation (Tr. 693). In other words, under Mr. Austin's appraisal, there was no difference in the value of the "non-owned land" before and after condemnation." (R. 86).

The trial Judge then factually indicated that $5,800.00 was the sum which had been previously allocated and awarded for severance damage to the "non-owned" land and:

"That the Court can eliminate from its Findings such severance damage by a reduction in the Judgment of $5,800.00 * * *." (R. 86).

The Memorandum Decision was concluded by a mathematical calculation of the fair market value of the property, title to which was not in dispute. Before and After condemnation, the difference in the two sums being $60,192.00. The Court declared:

"* * * The latter sum is $5,800.00 less than the original Findings and Judgment of $65,992.00 as just compensation to be awarded the landowners. The Court thus concludes that $5,800.00 is the amount of severance damages to the "non-owned land," that such should be eliminated from the Findings and Judgment, and that the Judgment of this Court should be accordingly entered for just compensation in the sum of $60,192.00." (R. 87).

(f) Amended Findings of Fact and Conclusions of Law were made (R. 71-75) and an Amended Judgment of Just Compensation thereupon entered on March 10. (R. 76-78). From the Amended Judgment, the State prosecutes this second Appeal.

4. *Value Evidence Supportive of Amended Findings.*

The testimony at trial upon which the lower Court, as trier of fact, could find the fair market value of the undisputed land *vis-a-vis* the "nonowned" land and thus eliminate severance damage therefrom, runs through the testimony of all the value experts. Since the case was a non-jury trial, the value testimony by both sides was submitted through the proffer of economic summation sheets on legal sized paper, for quick and convenient reference by the Court and counsel. (Ex. D24, D29, D31 and P38). Such evaluation sheets were ciphered so as to specify, with particularity, each of the elements of value as part of the larger appraisal. The fair market value of the owned land, as contrasted to the "nonowned" land, market value of the improvements and fixtures measured as part of the realty, both in their condition Before and After condemnation, the fair market value of the land taken[6] and the damage to the remainder land caused by the taking and construction of the public project were each and all broken out and defined separately as part of the witness's total opinion. (Ex. 24, 29, 31, 38).

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[6]Title to the property actually condemned by the Road Commission was never in doubt and was acknowledged to be in these Landowners. (Tr. 18-19).

Incident to the findings of the trial Court, the following evidence was a part of the record:

Marcellus Palmer (Ex. 24) . . . Market value of the land upon which the commercial improvements were located was $12,500.00 per acre. (Tr. 392, 393, 399). Three comparable sales were supportive of that evaluation. (Tr. 394-399). Improvements and fixtures located on the undisputed land and appraised as part of the realty, were evaluated pursuant to the income and cost replacement approaches to value. (Tr. 402, Ex. 24). The value of the "nonowned" land was also determined and stated separately. (Ex. 24, Tr. 399). The market value of remaining undisturbed land and improvements were evaluated and denoted. (Ex. 24A, Tr. 399, 418-419).

Werner Kiepe (Ex. 31) . . . Land value of the owned commercial area was stated and specifically segregated from the back or "nonowned" land. (Ex. 31 p. 3, Tr. 586, 601-602). Improvements and fixtures, as part of the realty, were likewise appraised and their value demonstrated separately on the summary chart Exhibit 31. The value of the property remaining, title to which was uncontested, was independently catalogued from the "nonowned" land, along with the remainder improvements and fixtures on property admittedly owned. (Ex. 31A, Tr. 601-602). Mr. Kiepe utilized sales of related properties to establish the value ascribed to the undisputed land. (Tr. 587-593).

Jerome H. Mooney (Ex. 29) . . . Property within the undisputed area was appraised at $13,000.00 per acre, together with improvements and fixtures thereon under the cost and capitalization methodology of evaluation. (Ex. 29, Tr. 506-508). The witness testified to four sales of property deemed comparable to the property admittedly owned by the Defendants. (Tr. 508-512). The value of the remaining owned property After condemnation was separately appraised as well as the remnant improvements and fixtures being set out specially. (Tr. 513-516).

All of the value experts for the Landowners testified with respect to a sale or sales of other remnant tracts as comparative to the remaining owned land, in arriving at severance damage opinion, as well as factors of depreciation, diminution in value, and loss of economic utility of the remaining property and improvements. (Tr. 406-417, 516-517, 606-607).

Testimony and evidence of the Landowners' experts on market value of the property Before and After condemnation, comparable sales, land value of the taking and severance damage were received by the trial Court without objection from the State as to the competency or relevancy thereof.

Gregory Austin (Ex. 38) . . . The single value witness called by the Road Commission, Mr. Austin testified that the "nonowned" land had no effect upon and made no difference in his appraisal of the

owned land, either Before or After condemnation (Tr. 693). The witness found that the "nonowned" land had no bearing upon any determination of severance damage (Tr. 686, 693) and that his total opinion of land value condemned and severance damages was without regard to "nonowned" property. (Ex. 38, Tr. 693, 719).

ARGUMENT

POINT I.

AS FACT FINDER, THE TRIAL JUDGE WAS FULLY EMPOWERED TO EXERCICE AND ELIMINATE THE SEVERANCE DAMAGE TO THE NONOWNED LAND FROM HIS CALCULATION OF DAMAGE AND TO AMEND THE FINDINGS AND JUDGMENT ACCORDINGLY.

District Judge Swan sat as the trier of fact in this case. He heard the testimony, received and examined the exihibits, observed the demeanor of the witnesses, and listened to argument. It was the trial Court who weighed the testimony and exhibits for their probative value and determined, based upon the evidence and personal notes, wherein the preponderance rested. It was that Court who reviewed the economic summation charts of each value expert wherein the categories of land, owned and "nonowned," improvements and fixtures, were segregated and categorized. And it was that Court,

who upon remand of this case on appeal, reviewed the evidence, the summation sheets and his personal notes, and *factually* resolved that it was possible to ascertain the severance damage which the trial Judge, himself, had previously allocated in the initial Findings and Judgment to the "nonowned" land and that it was possible to strike and eliminate that severance damage from his Amended Findings and Judgment. It is this factual determination as to which State counsel seeks review in this appeal.

The rule of law applicable in the instant case is so well founded in decisional precedent that it stands above all but the most academic debate. Broad discretion is bestowed on the trial Court as a fact finder in a non-jury trial. *Sweeney v. Happy Valley Inc.*, 18 U.2d 113, 417 P.2d 126 (1966). His is the prerogative to believe or disbelieve the testimony of one or more witnesses, to ferret the conflicts in the evidence, to draw inferences, to determine reliability, and to measure and calculate the factual elements of damage. *Marks v. Continental Casualty Co.*, 19 U.2d 119, 427 P.2d 387 (1967); *Dilworth v. Lauritzen*, 18 U.2d 386, 424 P.2d 136 (1967). The discretionary scope of the trial Judge in passing upon questions of fact in a non-jury action has no less breadth than that of a venire in a trial by jury. *Evans v. Stewart*, 17 U.2d 308, 410 P.2d 999 (1966).[7] While the

[7]The Court stated in the *Evans* decision that:

> "We have often stated that the jury has broad prerogative in determining issues of fact; and when it [the trial judge] has the role of trier of the facts, this is of course equally true of the trial Court."

precedent from this Court, alone, is thus legion on the prerogatives and authority of the trial Judge on matters of fact in a non-jury trial, the position of the Road Commission in this appeal seems to be taken in patent disregard. Simply put, that position holds that Judge Swan erred in his "finding that severance damages to the nonowned land could be eliminated" from the trial Court's Findings and Judgment. See Appellant's Brief Point I, p. 13. It is said therein that there is no evidence in the record in which the expert witnesses specifically delineated and inventoried the land into categories of owned and "nonowned" property, and that consequently, Judge Swan could not, from all the testimony, arrive at a calculation as to the amount of severance damage which *he, as fact finder*, initially attributed to the "nonowned" property.

Such argument is preposterous and falls of its own weight. There is no ignominious rule that the trier of fact must view the evidence in a vacuum divorced from all common experience, that he must passively accept or reject the land value of particular acreage under a witness's testimony, that he adhere to some slide rule formula of severance damages, or that he must somehow wed himself, as a mechanical robot, to the precise testimony of the witness. Indeed, the opposite proposition holds sway, that the fact finder is accorded wide latitude to draw from the evidence such factual derivatives as he deems the weight and preponderance suggests. As stated by this Court in *Even Odds, Inc. v. Nielson*, 22 U.2d 49, 448 P.2d 709 (1968):

"We have no disagreement with the proposition that the fact-trier should not be permitted to arbitrarily ignor competent, credible and uncontradicted evidence. *Nevertheless, he is not bound to slavishly follow the evidence and the figures given by any particular witness. Within the limits of reason it is his prerogative to place his own appraisal upon the evidence* which impresses him as credible and to draw conclusions therefrom in accordance with his own best judgment. * * *"

In *Weber Basin Conservancy District v. Nelson*, 11 U.2d 253, 358 P.2d 81 (1960), a condemnation case, it was contended that the trier of fact could not accept one phase of the testimonial evidence as to land value Before condemnation and also adopt in the findings inconsistent opinion evidence on the remainder value After condemnation. In rejecting such argument, this Court declared:

"The jury was entitled to believe or disbelieve in part or in whole the testimony of the two appraisers. Regardless of how arrived at, the jury chose the 'before' value of Plaintiff's appraiser and the 'after' of the Defendants' appraiser. * * * This Court cannot go behind the answers and analyze or speculate as to the process by which the jury arrived at them."

The facts in the case at hand come short of even the rule in *Nelson* for there is nothing to prompt the suggestion herein of inconsistent opinion testimony or findings. The point to be made, however, is that the trial Court is not required to cling to the formal, structured testimony in strait-jacket fashion. It may and it did derive from the perimeter of the testimony the amount of

severance damage attributed to the "nonowned" lan and such severance damage was stricken from th Amended Findings and Judgment. In so doing, th Judgment was reduced in the sum of $5,800.00 togethe with forty-two months of interest at 8%, to the benef of the State Road Commission.

1. *The trial Court Findings of Fact are presume correct.*

Judge Swan found, as fact, that some severan damage was allocated to the "nonowned" land in th original Findings and Judgment, although such "playe a small part in the Court's considerations," that the "elim ination of severance damages to the "nonowned" land i supported under the record and can be accomplished b the elimination of the rear nonowned land" and that suc severance damage of $5,800.00 "should be eliminate from the Findings and Judgment." (Memor. Dec. R. 86 87). The Brief of Appellant fails to recognize that suc Findings of the trial Court carry a presumption of cor rectness and validity in the judicial review and that thi Court, on appeal, will canvass the evidence in a ligh favorable to the Findings. As stated by this Court i *Sullivan v. Turner*, 22 U.2d 85, 448 P.2d 907 (1968)

> "When the trial judge has made findings o fact and entered judgment thereon, they are en titled to the presumption of correctness; on appea the evidence is surveyed in the light favorable t them; and if there is any reasonable basis in th evidence to support them they will not be over turned."

The "reasonable basis" test in *Sullivan* as supportive of the trial Court's Findings has not at all begun to be examined by the State in this Appeal.

POINT II.

THE DISTRICT JUDGE FOLLOWED TO THE LETTER THE MANDATE OF THIS COURT ON THE FIRST APPEAL.

The Statement of Facts herein discusses with some amplification, the legal issues raised in the first appeal and the Opinion of this Court. The Decision carried a mandate to the trial Court to remove from his Findings and Judgment any severance damages awarded to the nonowned land, if such were possible. The language of the mandate was not unclear:

> "The judgment is reversed and the case remanded *with directions to the trial judge to eliminate from his findings and judgment all severance damages awarded for the non-owned land if he now can do so*—otherwise a new trial is ordered."

On remand, and after a full fledge of motions, hearings and argument, the District Court, in compliance with the mandate, excised $5,800.00 in severance damage, originally attributed to the nonowned land, and eliminated such from his Amended Findings and Judgment. That the trial Judge was able to make such calculation and deduction is manifest from the language of the Memorandum Decision and from the Findings of

Fact. Only NOW State counsel is heard to complain with respect to Judge Swans' observance of this Court's mandate. The meaning of the mandate was perfectly apparent when the Opinion was filed on July 23, 1970 i.e., that the trial Court should excise from his Findings any severance damage to the nonowned land and by so doing, thus avoid a full trial de novo on every aspect of value and damages in the case (none of which were before this Court or affected in the first appeal).[8]

State counsel was well advised of this Court's mandate and charge to the trial Judge when the opinion in the first appeal was issued. If he is dissatisfied with that mandate *now*, he was dissatisfied with the mandate *then* and accordingly, the appropriate remedy was to have brought before this Court, on a Petition for Rehearing his alleged grievance. In a word, the complaint of Appellant's counsel is directed not to the Amended Findings and Judgment of Judge Swan, *but rather to this Court's mandate.* An attempt to resurrect at this belated time such claimed error is ill-fated in this Appeal. *Davis v. Payne & Day, Inc.*, 12 U.2d 107, 363 P.2d 498 (1961); *Prudential Federal Savings & Loan Assoc. v. St. Paul Insurance Co.*, 22 U.2d 70, 448 P.2d 721 (1968).

Judge Swan's Amended Findings, Conclusions and Judgment should be affirmed. *Johnson v. Koyle*, 7 U.2d 27, 317 P.2d 596 (1957).

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[8]The laudable judicial policy not to require needless litigation with respect to issues already and finally resolved has had long tenure at this Court. *Petty v. Clark*, 113 Utah 205, 192 P.2d 589 (1948); *Gaddis Inv. Co. v. Morrison*, 4 U.2d 152, 289 P.2d 730 (1955).

POINT III.

THE APPEAL OF THE ROAD COMMISSION HEREIN FAILS TO PRESENT ANY QUESTION OF LAW SUBJECT TO REVIEW BY THIS COURT.

This Court, through the whole span of its decision making process, has been mindful of its constitutional role in appellate review. That rule has been stated with clarity and firmness in a host of cases from *Nelson v. Southern Pacific Co.*, 15 Utah 325 49 Pac. 644 (1897), through *Whittaker v. Ferguson*, 16 Utah 240, 51 Pac. 980 (1898), to the recent case of *Brigham v. Moon Lake Electric Assoc.*, 24 U.2d 292, 470 P.2d 393 (1970), that in cases at law, an appeal from the District Court shall be *only on questions of law.* The footings for this fundamental legal axiom is the Judicial Article of the Constitution,[9] the proscription of which is:

> "* * * in cases at law the appeal shall be on questions of law alone."

Even in a suit wherein this Court might conceivably disagree with or otherwise resolve the facts differently than the trial Judge, this Court has been circumspect in not substituting its factual judgment in lieu of that of the lower Court. *Lyman, et al. vs. Town of Price*, 222 Pac. 599 (Utah 1924); *In Re Alexander's Estate*, 104 Utah 286, 139 P.2d 432 (1943). Thus, this Court has held that in cases at law, the scope of the judicial review as to matters of fact is one of determining whether there

[9]Article VIII Sec. 9. See also the limitations in 78-2-2 U.C.A., 1953.

is a reasonable basis in the record of trial upon which the Findings of the lower Court may be premised. If so the judicial review of the facts is at an end. *Western Gas Appliances Inc. v. Serval, Inc.*, 123 Utah 229, 257 P.2d 950 (1953).

An action in eminent domain is fundamentally a case at law. *Nichols on Eminent Domain*, Vol. 6 §26.731; 68 3-1 U.C.A. 1953. In particular, the issue of Just Compensation is of legal character with the right of jury trial preserved. Rule 38, U.R.C.P., 78-34-10 U.C.A. 1953 as amended. Contrary to this plethora of blackletter law, Road Commission's counsel bottoms this appeal on issues of factual essence. Firstly, it is contended that this Court factually declare that the trial Judge could not, in fact, eliminate severance damages to the "nonowned" land from his Findings and Judgment and reversal is sought on that score. Secondly, it is contended that this Court *factually* determine that the value testimony of the State was the only credible, competent evidence at trial and that this case, therefore, be remanded another time with instructions to enter Judgment squarely on the Road Commission's testimony of Mr. Austin. Each assertion requires of this Court a de novo analysis and weighing of the facts. Each Point suggests that this Court should determine whether it concurs with the factual determinations made by the trial Judge. But both Points are defective and lack standing in this Court when measured by the light of controlling constitutional, statutory, and decisional precedent.

It is respectfully submitted that this Court decline, as in the past, a factual review and determination of the evidence in this case. The trial Court herein, on remand, operated strictly within the disciplines of this Court's mandate and made Amended Findings and entered Judgment accordingly. Those Findings and Judgment should remain undisturbed.

POINT IV.

CONTRARY TO THE STATE'S CLAIM, THE RECORD OF TRIAL CONTAINS SUBSTANTIAL, COMPETENT EVIDENCE UPON WHICH THE TRIAL COURT COULD DETERMINE AND ELIMINATE FROM ITS FINDINGS SEVERANCE DAMAGES TO THE NONOWNED LAND.

The Statement of Facts herein outlines in some detail the evidence of trial which is supportive of and would enable District Judge Swan to calculate and determine the severance damage to the "nonowned" land and to eliminate that damage from the Findings and Judgment. See Statement of Facts, pages 13 through 16. Without recounting that evidence fact by fact here, it is sufficient to say that there is a wealth of admittedly competent testimony upon which the trial Court could arrive at a measurement of the amount of severance damage which it had, in the inital Findings and Judgment, attributed to the "nonowned" land.

The economic summation sheets (Exhibits 24, 2
31 and 38) of all the witnesses illustrate that each valu
expert made opinion judgments separating the bac
"nonowned" land from the front acreage owned by th
Defendants. The specification of land categories estab
lished by the witnesses for the Landowners and the valu
ascribed to that land which, of necessity, delineated th
nonowned and the owned property, is so marked an
pronounced throughout the transcript and evidence tha
no one of reasonable mind could be misled or miscon
ceive the testimonal and exhibit evidence. The fact tha
Mr. Kiepe found 1.8 acres of prime commercial prop
erty, that Mr. Palmer found 2+ acres of higher commer
cial value and that Mr. Mooney found 2 acres in tha
category, with the balance of the land (all of which wa
"nonowned") having a substantially lower use and mar
ket value, *does not require that the finder of fact be tied in lock step to those precise value opinions.* The fact tha
Mr. Austin for the State found that precisely 1.33 acre
of land had a high commercial value, with the balance o
the property, "nonowned," of a lesser value did not re
quire the Court to accept in bushel basket form, each ele
ment of that appraisal.

It is most significant, however, to note that the
Austin appraisal, itself, forms a part of the basi
upon which the trial Court could predicate finding
in the case, for this particular witness did classify the
higher commercial value at 1.33 acres. While the trial
Court need not have, it could have taken the 1.33 acre
as the defined property under the Austin testimony, and

applied to that acreage value estimates as found by the preponderance of the testimony from that of Messrs. Kiepe, Palmer and/or Mooney. *Even Odds Inc. v. Nielson, supra; Weber Basin Conservency District v. Nelson, supra*; authorities in Point I. It is to be emphasized that the trial Court could have made such finding, but it need not have done so to sustain the findings under the record of trial in this case. But the Austin testimony has additional significance as part of the larger record, for he testified that the "nonowned" land made no difference, whatsoever, to his findings of compensation and damage; included or excluded from the trial, the nonowned land mattered not to his damage appraisal. (See Memor. Dec. of January 25, 1971, p. 2, Tr. 693).

It was and is the trial judge's prerogative, and his alone, to determine from the weight of the evidence that less than 1.8 acres had a highest and best use for commercial purposes, to predicate market value thereon, and to determine, as a result of the partial-taking by the Road Commission of the condemned land, the severance damage to the remaining owned land. In corollary fashion, it was the trial Court's prerogative to review the evidence, and its probative value, find the preponderance and factually calculate, if determined possible, the severance damage which was allocated to the "nonowned" land in the original Findings and Judgment. The efforts of Appellant's counsel in this appeal to require that the trial Court's fact finding process be structured and stereotyped so as to conform on the mark with the exactitudes

of the opinion evidence, is in vain.[10] Judge Swan labore under no such aberration in this lawsuit, and counsel attempt to bring about a contrary holding should be re jected.

The central question is whether the evidence sub mitted as to the market value of the land, improvemen and fixtures situated thereon, both Before and Aft condemnation forms a reasonable bases upon which th trial Judge could make findings with respect to th damages originally allotted to the "nonowned" lan After careful scrutiny of evidence and record Judg Swan found, in fact, such determination could be, an should be made pursuant to this Court's mandate an such severance damage of $5,800.00 together with in terest, was thereupon eliminated in the Amended Find ings and Judgment.

The opinion testimony and exhibits of the Land owners was proffered and received without objection b State counsel regarding its competency, relevancy an general admissibility. No objection of that nature o whatsoever form was raised by the State in the firs appeal. And more importantly, no argument or conten tion on that score was ever advanced by the State before Judge Swan by motion, in prehearing conferences, hear ings or argument upon remand of the case in the firs

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[10]The law abhors a mechanical fact determination. In reality, State Counsel says by his Brief, that the trier of fact *must* find, on damage questions four-square directly on the testimony of the witness—that findings cannot be made with the range of the evidence. Such esoteric position has been repudiated by *State Road Commission v. Williams*, 22 U.2d 301, 452 P.2d 548 (1969).

appeal.[11] And so the answer to the question must be that there was adequate, competent, admissible evidence adduced upon which the trial Judge could and did find the amount of severance damage which he initially attributed to the "nonowned" land. It follows *a fortiori* that having made that factual determination, the elimination of such severance damages from the Findings and Judgment is to be sustained, pursuant to the mandate of this Court in the first appeal.

1. *The cases cited by State counsel are irrelevant.*

Appellant refers this Court to several federal decisions and two State holdings in an effort to support the position that there is no competent evidence in the record of trial to sustain the Findings of the District Judge. The decisions cited are unremarkable[12] and we have no quarrel with the proposition of the law expressed there-

[11]The absence of such objection being raised on the first appeal and most certainly the failure to interpose the same before the trial Judge upon remittitur, precludes the raising of any such issue (even assuming arguendo that any such objection was well taken, which it is not), for the first time before this Court. *Porcupine Reservoir Co. v. Keller Corporation*, 15 U.2d 318, 392 P.2d 620 (1964); *Huber v. Newman*, 106 Utah 363, 145 P.2d 780 (1944).

As a matter of fact, Appellant's counsel not only failed to raise this objection before Judge Swan but he has *changed* his theory from the question presented to the trial Court and the issue that he attempts to press here. Before Judge Swan on remand, it was State counsel's lament that the lower Court must grant a new trial because cross-examination of Landowners' expert had not been conducted relative to the "nonowned" land in the trial. The response to that contention was that the absence of such cross-examination was a matter of election of State counsel and that he had opted voluntarily not to conduct such cross-examination. No such cross-examination was ever attempted and no ruling ever issued which would have foreclosed the same. *State counsel has not raised the cross-examination question in this appeal at all.* Appellant cannot now switch the theory of his case on appeal from that presented to the Court below. *Davies v. Mulholland*, 25 U.2d 56, 475 P.2d 834 (1970).

[12]Most of the decisions were pulled from Briefs filed in a recently tried federal condemnation suit in Salt Lake City.

in. But it is a plain and simple fact that such decision have not a whit to do with this case, or with the Findings and Judgment of the trial Court. The opinion evidence before Judge Swan that enabled him to determine the amount of severance damages to the "nonowned" land was not speculative, was not conjectural and was not based upon hypotheses. It was, to the contrary full competent and admitted evidence which permitted the trial Court, in its discretion as the trier of fact, to determine the nonowned severance damage and to excise and strike that damage from the Amended Findings and Judgment.

POINT V.

CONTRARY TO THE CLAIM OF STATE COUNSEL, THE LANDOWNERS FULLY SUSTAINED THEIR BURDEN OF PROOF ON COMPENSATION AND DAMAGES IN THE CASE.

Under Point II of Appellant's Brief, it is contended that the Landowners failed to meet their burden of proof on the issues of fair market value of the land taken and damages to the remainder. Cases are cited on the subject of the Landowners' burden.[13]

It would only be to dignify an otherwise frivolous point to discuss this question in any depth under the rec-

[13]The most recent cases of this Court on the subject, the Appellant fails to note. *State Road Comm. v. Papanikolas*, 19 U.2d 153, 427 P.2d 749 (1967); *State Road Comm. v. Taggart*, 19 U.2d 247, 430 P.2d 167 (1967).

ord made in this case. It is utter nonsense to allege that under the testimony of the Landowners with respect to the value of the owned land, Before and After condemnation, the market value of the property condemned and the damages to the remaining owned land, the Landowners fell short of the required burden of proof. The trial Court found, as a matter of fact and law, that the burden of proof and persuasion had been satisfied and that indeed, the preponderance of the testimony weighed in favor of the Landowners' testimony as to the owned property.

The burden of proof claim in Appellant's Brief is a make-weight argument and is unworthy of consideration.

CONCLUSION

This Appeal is cleanly controlled by the ruling law of this Court as announced in ***Prudential Federal Savings & Loan Assoc. v. St. Paul Insurance Co.***, 22 U.2d 70, 448 P.2d 724 (1968), a case arising out of a remand and accompanying mandate from an earlier appeal. In affirming the Judgment of the trial Judge, Henriod, J., writing for the Court stated:

> "This appeal is not from a new case, but involves an alleged interpretation of what precisely we decided in our previous decision, which seems to revolve about the reversal and remanding of the case with the interdiction 'consonant with this opinion.' * * *
>
> "*We believe that the present so-called appeal is abortive and is more in the nature of a belated*

petition for rehearing, after a previous appe and petition for rehearing in both of which even the problems involved here were canvassed an resolved. * * *."

The questions raised by Appellant's counsel in th case at bar have distinct, parallel import. District Judg Swan, herein, fully carried out the mandate of July 2 1970, of this Court, factually determined and resolv the severance damage previously awarded as to th "nonowned" land to be $5,800.00 and struck that damag from the Amended Findings and Judgment. State cou sel's claim that such determination was factually impo sible of accomplishment by the trial Judge is not, in la a quarrel with the trial Court's ruling on remand, but a quarrel with the mandate of this Court of a year ag If the State was displeased now it was equally so the and the proper remedy was via a petition for rehearin directed to the mandate. This appeal is as deficient an "abortive" as was that in the *Prudential* decision.

The mandate of this Court in its Opinion of Jul 1970, established the "rule of the case" and under th doctrine, all subsequent proceedings were governe thereby. *Petty v. Clark*, 113 Utah 205, 192 P.2d 5 (1948). The narrow issue of severance damages to th "nonowned" land was resolved in the first appeal in th State's favor. On remand and under the mandate, th trial Court was able to calculate from the evidence re ceived and the notes kept at trial, the nonowned sever ance damage and such was excised from the Amende Findings and Judgment of Just Compensation. In co

sequence, the original Judgment was diminished by $5,800.00 together with better than $1,500.00 interest. But rather than this result, Appellant, by this appeal, seeks a second crack at a full blown trial de novo on all other aspects of value and damage in the case, aspects which were never raised, discussed, or touched upon in the first appeal.

The points raised in this Appeal are of ephemeral character. The law of the case requires that the in-fact determination made by the District Court in satisfying the mandate be affirmed in this Appeal and that Appellant's position be rejected.

Respectfully submitted,

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