

1959

Southern Pacific Company v. Mrs. Helen Sheehan Arthur et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff and Appellant,

vs.

MRS. HELEN SHEEHAN ARTHUR,

and

MRS. GLENERA SHEEHAN HUNTER,

vs.

NICK CHOURNOS and wife,

vs.

MILTON A. OMAN et al,

Defendants and Respondents.

FEB 16 1959

Supreme Court, Utah

Case No.
9123

APPELLANT'S BRIEF

RAY, QUINNEY & NEBEKER,
W. J. O'CONNOR, JR.,

*Attorneys for Plaintiff
and Appellant*

TABLE OF CONTENTS

and

INDEX

	PAGE
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	6
ARGUMENTS AND AUTHORITIES.....	8
POINT I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING THE TESTIMONY OF CERTAIN WITNESSES OF RESPONDENTS AS TO THE VALUE OF THE GRAVEL AND FILL MATERIAL TAKEN BY APPELLANT; AND IN RECEIVING INTO EVIDENCE THE DEFENDANTS' EXHIBIT 2 SHOWING OTHER GRAVEL SALES.	8
POINT II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SUBMITTING TO THE JURY THE QUESTION OF SEVERANCE DAMAGES, AND BY ADMITTING INTO EVIDENCE CERTAIN TESTIMONY PERTAINING THERETO.	
(a) The respondents failed to produce competent evidence that other similar lands were unavailable.	24
(b) The damages testified to by respondents' witnesses were from appellant's operations upon lands not owned by respondents.	31
(c) The so-called "severance" damages testified to by respondents' witnesses consisted of damages supposed to have resulted to a business carried on by respondents, or their lessee, namely sheep operations.	35

	PAGE
(d) Respondents' damages were arrived at by adding the values of different uses for the land taken.	42
(e) Respondents presented no competent evidence of the market value of their remaining lands claimed to have been damaged.	46
(f) The testimony does not establish any severance of respondents' lands as that term is used in the court decisions and the statutes.	49
POINT III. THE VERDICT IS EXCESSIVE AND THE RESULT OF PREJUDICE OF THE JURY.	53
CONCLUSION	55

CASES AND AUTHORITIES CITED

	PAGE
A. D. Graham & Co. v. Pennsylvania Turnpike Comm., 33 Atl. 2d 22	20
Alloway v. Nashville, 13 S. W. 123	45
Atlantic Coast Line R. Co. et al v. United States, 132 Fed. 2d 959	23
Bothwell v. United States, 254 U. S. 231, 65 L. Ed. 238	39
Campbell v. United States, 69 L. Ed. 328, 266 U. S. 368	32
City of Los Angeles v. Deacon, 7 Pac. 378	37
Department of Public Works v. Emerson, 57 Pac. 2d 955	34
Helena Power Transmission Co. v. McLean, 99 Pac. 1061	22
Keller v. Miller, 165 Pac. 774	33, 34
Mitchell v. United States, 267 U. S. 341, 69 L. Ed. 644	39
Monongahela West Penn Public Service Co. v. Monongahela Development Co., (W. Va.), 132 S. E. 380	44
Morton Butler Timber Co. v. United States, 91 F. 2d 884	45
Moyle v. Salt Lake City, 176 P. 2d 882, 111 Utah 201	45
Oakland v. Pacific Coast Lumber and Mill Company, 153 Pac. 705	37
O. W. R. & N. Co. v. Campbell, 202 Pac. 1065	33
Provo River Water Users' Ass'n. v. Carlson, et al, 133 Pac. 2d 777, 103 Utah 93	27, 29, 51

	PAGE
(d) Respondents' damages were arrived at by adding the values of different uses for the land taken.	42
(e) Respondents presented no competent evidence of the market value of their remaining lands claimed to have been damaged.....	46
(f) The testimony does not establish any severance of respondents' lands as that term is used in the court decisions and the statutes.	49
POINT III. THE VERDICT IS EXCESSIVE AND THE RESULT OF PREJUDICE OF THE JURY.....	53
CONCLUSION	55

CASES AND AUTHORITIES CITED

	PAGE
A. D. Graham & Co. v. Pennsylvania Turnpike Comm., 33 Atl. 2d 22	20
Alloway v. Nashville, 13 S. W. 123	45
Atlantic Coast Line R. Co. et al v. United States, 132 Fed. 2d 959	23
Bothwell v. United States, 254 U. S. 231, 65 L. Ed. 238.....	39
Campbell v. United States, 69 L. Ed. 328, 266 U. S. 368.....	32
City of Los Angeles v. Deacon, 7 Pac. 378.....	37
Department of Public Works v. Emerson, 57 Pac. 2d 955.....	34
Helena Power Transmission Co. v. McLean, 99 Pac. 1061.....	22
Keller v. Miller, 165 Pac. 774.....	33, 34
Mitchell v. United States, 267 U. S. 341, 69 L. Ed. 644.....	39
Monongahela West Penn Public Service Co. v. Monongahela Development Co., (W. Va.), 132 S. E. 380.....	44
Morton Butler Timber Co. v. United States, 91 F. 2d 884.....	45
Moyle v. Salt Lake City, 176 P. 2d 882, 111 Utah 201	45
Oakland v. Pacific Coast Lumber and Mill Company, 153 Pac. 705	37
O. W. R. & N. Co. v. Campbell, 202 Pac. 1065.....	33
Provo River Water Users' Ass'n. v. Carlson, et al, 133 Pac. 2d 777, 103 Utah 93	27, 29, 51

TABLE OF CONTENTS

and

INDEX

	PAGE
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	6
ARGUMENTS AND AUTHORITIES.....	8
POINT I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING THE TESTIMONY OF CERTAIN WITNESSES OF RESPONDENTS AS TO THE VALUE OF THE GRAVEL AND FILL MATERIAL TAKEN BY APPELLANT; AND IN RECEIVING INTO EVIDENCE THE DEFENDANTS' EXHIBIT 2 SHOWING OTHER GRAVEL SALES.	8
POINT II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SUBMITTING TO THE JURY THE QUESTION OF SEVERANCE DAMAGES, AND BY ADMITTING INTO EVIDENCE CERTAIN TESTIMONY PERTAINING THERETO.	
(a) The respondents failed to produce competent evidence that other similar lands were unavailable.	24
(b) The damages testified to by respondents' witnesses were from appellant's operations upon lands not owned by respondents.	31
(c) The so-called "severance" damages testified to by respondents' witnesses consisted of damages supposed to have resulted to a business carried on by respondents, or their lessee, namely sheep operations.	35

	PAGE
Public Service Co. v. Loveland, 245 Pac. 493	34
Railway Company v. Warren, 12 Pac. 641	44
State Highway Commission v. Brown, 168 So. 277.....	20
State of Utah v. Cooperative Security Corporation of L. D. S. Church, 247 Pac. 2d 269, 122 Utah 134	28, 46, 51
State of Utah v. Noble, 6 Utah 2d 40, 305 Pac. 2d 495.....	18, 37, 46, 53
State of Utah v. Peek, 265 Pac. 2d 630, 1 Utah 2d 263.....	16
State of Utah v. Tedesco, 4 Utah 2d 248, 291 Pac. 2d 1028.....	18
United States v. Honolulu Plantation Co., 182 F2 172	40, 47
Yellowstone Park R. R. Co. v. Bridger Coal Co., 87 Pac. 963.....	22

TEXTS CITED

170 A. L. R., page 721.....	33
29 Corpus Juris Secundum, page 1025.....	43
Lewis Eminent Domain, Section 569.....	34
Nichols on Eminent Domain, Volume 3, Section 8.61.....	18
Nichols on Eminent Domain, Volume 4, Sections 13.3 and 13.3 (1)	41, 42, 44
Nichols on Eminent Domain, Volume 5, pages 269 to 277.....	17
Orgel on Valuation Under Eminent Domain, Volume 1, 2nd Edition	12, 14, 18, 19 20, 22, 23, 45 51
Wigmore on Evidence, Third Edition.....	16

STATUTES CITED

Section 78-34-10(2), U. C. A., 1953	24
---	----

IN THE SUPREME COURT of the STATE OF UTAH

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff and Appellant,

vs.

MRS. HELEN SHEEHAN ARTHUR,

and

MRS. GLENERA SHEEHAN HUNTER,

vs.

NICK CHOURNOS and wife,

vs.

MILTON A. OMAN et al,

Defendants and Respondents.

Case No.
9123

APPELLANT'S BRIEF

STATEMENT OF FACTS

The above entitled three cases were consolidated for trial before the District Court of Box Elder County, Utah. Each is a proceeding in eminent domain wherein Southern Pacific, plaintiff and appellant, filed suit to condemn a

right of way over and upon certain grazing lands owned in fee by the different respondents and upon two mining "claims" in which defendants Oman and Chournos and some of their family claim an interest. All of the real property involved is situated on Promontory Point, Box Elder County, Utah. The said right of way was needed to obtain gravel and other earth material as fill for appellant's new railroad bed running west across Great Salt Lake from Promontory Point. The trial court, over respondent's objections, granted appellant an order of immediate occupancy in each case and found the necessity existed for the requested right of way. With the approval of respective counsel, the court then proceeded with the trial of the question of damages in the consolidated cases.

While the pleadings of respondents as well as their opening arguments endeavor to include numerous so-called elements of damage resulting from appellant's condemnation, the actual trial of the cases here on appeal resolved itself into an attempt of respondents to establish two damage items: (1) Market value of the gravel taken in each case, and (2) Loss or damage from interference with sheep operations, or a "severance" damage as the trial court described it. (Tr. 151-153) The evidence presented was directed to those items. It is that evidence and the court's rulings thereon which form the subject of this appeal.

The pertinent facts of the case are as follows: Defendants' Exhibit 1, admitted into evidence, is a colored map showing the general location of the gravel pits exca-

vated by appellant, and the ownership of the various tracts occupied by appellant under the order of occupancy. Southern Pacific Company, the appellant, used the gravel and other material taken from those pits, along with material from adjoining lands of others, to construct the new railroad fill across the Lake from Promontory Point. The parties in each of the cases stipulated at the trial upon the amounts of material taken from the respondents' respective lands, and the judgments for the gravel material are based upon those amounts. The type of material taken was substantially the same in each case, and consisted of gravel and other earth material as found upon the ground. Appellant used the material without any processing or other treatment, and placed it directly along the proposed new railroad line in the Lake. Approximately 44 million cubic yards of said material of all types were deposited in the construction work, but the quantity used from respondents' properties amounted to approximately one million nine hundred thousand cubic yards in the Hunter-Arthur case (#8071), about two million one hundred thousand cubic yards in the Nick Chournos case (#8191), and a little more than a million in the remaining case. (Tr. 303, 361-362) The evidence disclosed no special use to which the said gravel could be applied without some treatment, and respondents did not produce evidence that any such material had been sold or used for any purpose from their Promontory lands prior to appellant's construction of the fill. In fact, the evidence revealed that there would be no actual demand for the material at any time in the foreseeable future. (Tr. 32, 38, 51, 60 and 94)

Respondents' only use of their Promontory property up to the time of trial had been as grazing land for sheep operations carried on by respondent Chournos and by lessees of the Hunter-Arthur lands. (Tr. 170). Mrs. Hunter and Mrs. Arthur do not own livestock and have carried on no such operations upon the lands involved in case #8071. (Tr. 169-170)

The evidence is that the two gravel pits dug by appellant upon the Chournos lands cover 7.38 acres of a 40 acre tract temporarily taken and occupied by appellant in one pit area under the order of immediate occupancy, and 29.79 acres of a 160 acre tract to the south temporarily occupied in the other pit area. This latter tract has no relation to the "severance" damage issue. The two Hunter-Arthur gravel pits excavated by appellant cover 18.44 acres of a 100 acre tract taken, and 17.92 acres in the other tract (140 acres) occupied under the court order. (Plaintiff's Exhibit 4)

The whole borrow pit area #2, which includes among other lands the aforesaid small portions belonging to respondents, covers approximately 344 acres. (Plaintiff's Exhibit 4). That is the borrow pit supposedly causing the "severance" damage. We therefore see that the Chournos' land in that area excavated is only 1/49th of the whole pit, and Hunter-Arthur's excavation in that pit area covers only about 1/9th of the said pit.

The court made the order of occupancy on October 25, 1957, in the Hunter-Arthur case and on June 24, 1958, in the Chournos and the Chournos-Oman suits. Appellant, on or before June 30, 1959, surrendered possession

to respondents of all the lands held under the orders of occupancy, and as of that date relinquished any rights it had therein by reason of the lawsuits here on appeal.

The testimony of respondents' own witnesses disclosed that the gravel pits made by plaintiff upon respondents' lands do not prevent the passage or running of livestock around or near them from one part of respondents' lands to another (Tr. 230). The map (Defendants' Exhibit 1) and the testimony established that no legal "severance" occurred to respondents' lands by plaintiff's taking.

The court submitted to the jury a form of special verdict, containing a question in each case as to the value of the fill material removed by plaintiff; and questions in case #8071 and case #8191 as to the "severance" damage resulting to respondents from plaintiff's condemnation of their lands. The jury returned an unconscionable verdict upon each item submitted. The court entered judgment immediately upon the verdict for the fill material, but held up judgment on the "severance" items until it heard arguments upon plaintiff's motion for a new trial. The court at first sustained the motion as to the "severance" item in each of the two cases, but conditional upon respondents' accepting and plaintiff's paying a reduced amount of such damage. Plaintiff declined to pay the reduced sum agreed to by defendants, and the court then completely overruled the motion for a new trial. Plaintiff here appeals from the court's judgment and its denial of plaintiff's motion for a new trial in the case and upon each item of damage; from the court's admission of certain evidence; from its submission to the jury of the

question of “severance” damage, and from other errors in law committed by the court.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING THE TESTIMONY OF CERTAIN WITNESSES OF RESPONDENTS AS TO THE VALUE OF THE GRAVEL AND FILL MATERIAL TAKEN BY APPELLANT; AND IN RECEIVING INTO EVIDENCE THE RESPONDENTS’ EXHIBIT 2 SHOWING OTHER GRAVEL SALES.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SUBMITTING TO THE JURY THE QUESTION OF SEVERANCE DAMAGES, AND BY ADMITTING INTO EVIDENCE CERTAIN TESTIMONY PERTAINING THERETO.

(a) THE RESPONDENTS FAILED TO PRODUCE COMPETENT EVIDENCE THAT OTHER SIMILAR LANDS WERE UNAVAILABLE.

(b) THE DAMAGES TESTIFIED TO BY RESPONDENTS’ WITNESSES WERE FROM APPELLANT’S OPERATION UPON LANDS NOT OWNED BY RESPONDENTS.

(c) THE SO-CALLED “SEVERANCE” DAM-

AGES TESTIFIED TO BY RESPONDENTS' WITNESSES CONSISTED OF DAMAGES SUPPOSED TO HAVE RESULTED TO A BUSINESS CARRIED ON BY RESPONDENTS, OR THEIR LESSEE, NAMELY SHEEP OPERATIONS.

(d) RESPONDENTS' DAMAGES WERE ARRIVED AT BY ADDING THE VALUES OF DIFFERENT USES FOR THE LAND TAKEN.

(e) RESPONDENTS PRESENTED NO COMPETENT EVIDENCE OF THE MARKET VALUE OF THEIR REMAINING LANDS CLAIMED TO HAVE BEEN DAMAGED.

(f) THE TESTIMONY DOES NOT ESTABLISH ANY SEVERANCE OF RESPONDENTS' LANDS AS THAT TERM IS USED IN THE COURT DECISIONS AND THE STATUTES.

POINT III

THE VERDICT IS EXCESSIVE AND THE RESULT OF PREJUDICE OF THE JURY.

ARGUMENT AND AUTHORITIES

POINT NO. I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING THE TESTIMONY OF CERTAIN WITNESSES OF RESPONDENTS AS TO THE VALUE OF THE GRAVEL AND FILL MATERIAL TAKEN BY APPELLANT; AND IN RECEIVING INTO EVIDENCE THE DEFENDANTS' EXHIBIT 2 SHOWING OTHER GRAVEL SALES.

The opinions of the witnesses called by respondents to establish the value of the fill material taken for appellant's railroad fill were based on sheer speculation. Not one witness established any present market value, or even one arising in the near future. To appreciate the incompetency of the evidence presented by those witnesses, one must review their testimony in some detail.

The first witness called by respondents, a Mr. Storey, was not qualified as an expert to render an opinion on values. He was not connected in any way with the gravel business, and knew nothing of the local market conditions for gravel. (Tr. 22-35) His testimony was that he had not made any appraisal of gravel properties for ten years, and he had no knowledge of similar sales in the area, nor had he made an effort to learn whether such sales had occurred. (Tr. 25 and 26) Over appellant's objection, the court permitted this witness to give his opinion of the "value of the material." An even more serious error is that Mr. Storey's opinion was admittedly based upon a "future value" of such deposits of material and a demand "not too

far away.” (Tr. 26-27-32 and 38) Furthermore, the questions by respondents’ attorney to Mr. Storey referred to “value” of the material and not market value. (Tr. 25-31) This witness also testified that he did not know of anyone who would pay even close to the figure he gave as a value per cubic yard for the gravel taken. (Tr. 37)

The second witness for respondents, Mr. J. P. Gibbons, testified that he is president of Gibbons & Reed, a construction firm in Utah, and had some experience with fill material and buying and selling of sand and gravel within the western states. Mr. Gibbons’ opinion of the type or quality of the material removed by appellant was arrived at primarily from his brief inspection of some of the subject Promontory area before the pits were begun or any material removed. In fact, he gave as one of his qualifications for opinion testimony a plane trip he made over the area. (Tr. 43-44) As in the case of witness Storey’s interrogation, nearly all of the questions directed by respondents’ counsel to Mr. Gibbons referred to “value” and not market value.

Furthermore, Mr. Gibbons’ testimony is replete with statements that his opinion is pure speculation and that he was speaking of a “future” value. (Tr. 48 and 49). Answering a direct question, he affirmed that his estimate was a “speculative” value at this time. (Tr. 49 and 50). He testified that he did not know of any one who would buy the material, and that his firm would not offer anything for the gravel taken, but “we buy land on a speculative basis in the hope that the future will make it of some value and it is conceivable that we would consider it in that light. I have no opinion as to what that would be.”

(Tr. 48) When asked whether he would consider paying 5¢ for the material (his given opinion as to value), he gave the unconsidered and irrelevant reply that he would “if he had that contract,” referring to the contract appellant railroad had let for constructing the fill project.

(Tr. 47) Mr. Gibbons testified on cross examination that he considered the gravel materials and deposits of respondents as “a natural resource that has a market or *has a value when a market is established*. . . . There’s a fixed number of yards of material in existence. Currently we are depleting the materials that are closest to the point of usage . . . so any gravel that is of a satisfactory nature has a value on it. And the time and conditions will establish what that value will be at the time of consumption, but we would look on it ourselves, it is like dollars that are in the ground that *will some day have a value* (italics ours.)” (Tr. 51 and 52) From these statements by Mr. Gibbons, it is readily apparent that he was guessing at some value for the material taken by appellant, and that he did not consider it to have any present value as that term is used in a business sense and by the court in eminent domain cases. His testimony amounts to sheer speculation about a future value for some indefinite use at some indefinite time. Appellant submits that if such opinion testimony is allowed to stand in condemnation proceedings, the whole principle of just compensation for the award of damages is destroyed, and every party, whether public or private, faced with the necessity of condemning property, will be at the mercy of such speculation and will find the cost of acquisition prohibitive. The court’s admission into evidence of Mr. Gibbons’ opinion of the

“value” of respondents’ fill material was so prejudicial as to constitute fatal error. (For a contrast in the lower court’s ruling upon qualification of experts on gravel valuation see the discussion about Mr. Bagley’s testimony.) (Tr. 296-297)

There is also reversible error in the court’s allowing Mr. Gibbons to testify about the use of other fill materials in the “State of Utah,” and on various projects in Salt Lake County. (Tr. 54) The general uses related by the witness were not connected in any way to a use or even a possible market for the material on Promontory Point. Mr. Gibbons never identified his road projects which used the fill material except to say “the new interstate system in the state.” (Tr. 54) His testimony was certainly irrelevant.

Mr. Gibbons’ opinion in court of 5¢ per cubic yard as a value of respondents’ material appears to have been based primarily upon a document respondents introduced as their Exhibit 2, and identified by Mr. Gibbons as a survey from his office of different gravel pits from which his firm had purchased gravel in the years 1953 through 1958. (Tr. 56-59) The court admitted this Exhibit in evidence over appellant’s objection, and that ruling violates a very important principle of damages in condemnation cases. The Exhibit contains references to purchases by Gibbons & Reed of gravel from California and Nevada, and various Utah locations not pertinent to the local area now under consideration. This highly incompetent and prejudicial piece of evidence is alone sufficient to compel a reversal of the lower court’s decision in all three cases here on appeal. For example, the second “NOTE” on the Ex-

hibit refers to gravel material owned by Gibbons & Reed, and states that the materials were "charged to the projects at . . . 5¢ per cubic yard." How can any value or price set under those circumstances be considered a sale of similar material under similar circumstances in the present case! (Neither the Exhibit nor the testimony indicates to what projects that "NOTE" refers.) Such an accounting procedure or entry whereby the contractor's own material is charged to the job at so much per yard is not a sale at all, regardless of the time or the place of the project. Another example of the shocking incompetency of this Exhibit 2 is its last "NOTE" at the bottom of the page where appears the information that Geneva Steel Company "offered" to sell some three million yards of fill material "at 5¢ per cubic yard." (The time and circumstances of the offer were never disclosed). That statement in the Exhibit cannot be considered as any reference to a similar sale of similar materials. An offer to sell, especially by one not a party, is no proof of a sale or of value. See *Volume 1, Orgel on Valuation Under Eminent Domain*, Second Edition, page 620-622, and the cases therein cited. This Exhibit 2 accompanied the jurors to the jury room for their deliberations in the trial court. No further argument is needed to point out what prejudicial affect such irrelevant and incompetent information must have had upon the minds of these jurors.

The next witness called by respondents was Mr. Fife. He testified that his gravel company had paid all the way from 2¢ to 10¢ "on an average," for sand and gravel in place, and that the average price would be about 5¢ per cubic yard. In stating his opinion of the value of the ma-

terial taken by appellant, this witness actually testified as to what he and his firm had paid for sand and gravel, but did not state where those purchases were made or what type of material was bought. His opinion as to the value of the respondents' material was not a true opinion of any market value for the material in our cases. On cross examination, Mr. Fife testified that he still held the opinion that the respondents' gravel material had no commercial value at any time, including the dates when the appellant took the material; that the only party who would buy the material would be the appellant railroad and that at the time of taking, "there would be no market for it." (Tr. 68 and 69) The witness further testified that he had examined the material and the gravel pits of respondents just prior to the time of the trial and that the gravel would require processing to be used for concrete aggregate; that because of the haulage cost from the pit areas on Promontory Point, the respondents' material could not compete with the large supply located in the vicinity of Brigham City some sixty miles away. (Tr. 71 and 72) (The respondents through their witnesses frequently attempted to prove the Brigham City area to be a market for their fill material). Mr. Fife expressly stated that at the times pertinent to the present law suits, no demand existed for the material and there was "no need for it," other than by appellant, at any price. (Tr. 74)

Another instance of prejudicial error in the respondents' cases occurred when their counsel asked Mr. Fife a hypothetical question based on the assumption that there was no gravel on Promontory and the material had to be hauled from Brigham City. Counsel added up the esti-

mated freight cost of such haulage, and then asked the witness if such a practice would bring the cost of gravel delivered at Promontory to \$5.65 a yard. The court permitted the question. Obviously, the assumption made in the question was contrary to the evidence that there was a large quantity of material at Promontory. More important, it is established law that the cost to the condemnor of bringing other material to a job site is irrelevant and highly improper to establish value of material (i.e. property) already there. (See *Orgel, supra, Volume 1, pages 352-353*).

For a real trip into the realm of speculation and fantasy, we invite the court's attention to all of the testimony of Mr. Ford, the next witness for respondents. Over objections of appellant's counsel, this witness was asked and permitted to answer questions ranging from the future business growth of the state of Utah to the possible future use of fill material on roads that might be constructed in the general area near Brigham City, but whose location and date of construction were not known to the witness. The only source of his knowledge of those proposed roads came from what he had read in newspapers. (Tr. 95) A typical statement made by this witness was in response to Mr. Oman's question asking him to give his opinion as to "what will be the condition within the next five or ten years for demand of that kind of material." The witness replied as follows: "We (whoever that is) are using more concretes every year, by the national surveys, and I think this type of material will be in greater demand as years go by." (Tr. 94 and 95) Then the witness covered the subject of future "industrial expansion." He testified:

“Well, I feel that there will be a considerable demand for fill material, an increased demand as we grow in this area.” The witness was also permitted to give his opinion as to how the present consumption of fill material compares with “what was consumed in this valley 25 years ago.” (Tr. 96.) The court also allowed Mr. Ford to testify concerning a 1954 purchase from the State of Idaho of certain materials by his company near Soda Springs, Idaho. (Tr. 98) Such a sale is so remote in time and place as to be irrelevant. That bit of incompetent information admittedly formed the basis for this witness’ speculative opinion of the value of respondents’ material. (Tr. 109)

On cross examination, Mr. Ford testified that he did not know whether there was a willing buyer for respondents’ Promontory Point material; that he did not know of anyone who would pay more than $2/10$ th of 1¢ per cubic yard for the material he examined at Promontory on behalf of respondents; that he knew of no person who wanted to buy the material at any price when the law suits were commenced nor at the present time; and that his valuation of the Promontory Point material of 5¢ per cubic yard was arrived at solely from the price paid in the above Idaho sale to his company. (Tr. 109)

PRESENTATION OF AUTHORITIES

The court below, by admitting into evidence the respondents’ Exhibit 2 showing other so-called sales of fill material, and by permitting the witnesses, Storey, Gibbons and Ford to give their opinions of the value of the material, committed reversible error. The trial court also was guilty of prejudicial error in allowing respondents’ wit-

nesses to testify about sales of gravel material at times and locations far removed from the taking we have in the present law suits.

The court committed reversible error in refusing to give appellant's requested instruction No. 3 limiting the jury to a finding of value for the material of not more than two tenths ($2/10$) of a cent per cubic yard, that being the figure established by the only competent evidence of value in the record, the sale by Mr. Adams to appellant. (Tr. 341, Exhibit 8)

Finally, because of the incompetent testimony permitted of respondents' witnesses respecting speculative and future values, uses and markets for respondents' fill material, and because the respondents failed to sustain their burden of proving the damages they sustained by appellant's condemnation, the court fatally erred in refusing to grant appellant's motion for a new trial.

Appellant submits the following authorities to support its position upon the above points:

This court in *State of Utah vs. Peek*, 265 Pac. 2d 630, 1 Utah 2d 263, ruled directly upon the subject of similar sales as evidence of value. The court held admissible the testimony of the owners' witnesses concerning sales of land located between the lots under condemnation for the "This is the Place Monument" site in Salt Lake City. The lower court had rejected that testimony as well as evidence of the price paid in a "recent sales of a neighboring subdivision." In holding that the lower court erred in rejecting this evidence, the court discussed *Wigmore on Evidence*, 3rd Edition, and *Nichols on Eminent Domain*,

Vol. 5, and quoted from Nichols, page 269 to 277, as follows:

“ ‘Upon the question whether the price paid at voluntary sales of land similar to that taken at or about the time of the taking is admissible as independent evidence of the value of the land taken there is conflict of authority. It is held in most jurisdictions that such evidence is admissible.’ ”

The Utah court then announced the following rule:

“Thus the price paid for similar lands, if the time of such sale and location of the lands are sufficiently near and the sale is made without compulsion, is admissible in evidence on direct examination to show the value of the lands in question. However, to be admissible there must be a similarity between the two properties, even though they do not have to be identical in size or shape or possible uses, but there must be sufficient similarity in these respects and in proximity in time of sale and the location of the properties to satisfy the trial judge that such evidence will be helpful to the jury in determining the value of the property in question.
 . . . ”

Appellant submits that the “other sales” testified to by Mr. Gibbons and Mr. Ford and the information contained in Mr. Gibbons’ survey list admitted into evidence as defendants’ Exhibit 2, violate the above standards established by this court in the Peek case because, as we have above pointed out, two of the Exhibit’s references to price do not even refer to a sale; and furthermore, there was no similarity shown in location, time or circumstances between the Exhibit’s sales and the acquisition of respondents’ materials.

The authorities on condemnation agree that value to the taker is no basis for an award of damages and should be excluded from consideration in a condemnation case. See *Volume 3, Nichols, Eminent Domain, Section 8.61*; also *Orgel, Volume 1, Page 352*, (often cited by the Utah Supreme Court) where decisions of the United States Supreme Court are cited in support of the author's statement that exclusion of value to the taker is the "uniform law of the land." In our situation, the testimony of defendants' witnesses amounts to proof not of market value, but what a taker should or would pay if and when he needs the gravel for some job. For instance, Mr. Gibbons testified that the defendants' gravel material would be worth 5¢ per yard to him if he had "the contract" for the project. Mr. Ford stated that such fill material had a value of 5¢ because his contracting company had found it expedient to pay that price in Idaho for a use not shown to be probable in the foreseeable future for any fill material on Promontory Point, let alone respondents' material. He was speaking of a value to a future taker, not a market value, which he denied existed.

In the condemnation suit of *State vs. Noble*, 6 Utah 2d 40, 305 Pac. 2d 495, involving gravel lands, this court quoted from the Utah decision of *State vs. Tedesco*, 4 Utah 2d 248, 291 Pac. 2d 1028, some language that well shows the irrelevant and incompetent nature of the above outlined testimony of respondents' witnesses, as follows:

" 'A condemnee is not entitled to realize a profit on his property. It must go to the condemnor for its fair market value. . . . The test is not what the lots will bring when and if willing buyers

come along, but what the tract, as a unit, as is, platted or not, and in whatever state of completion, will bring from a willing buyer of the whole tract.' ”

The Tedesco case declares this pertinent rule:

“A speculator or investor, in deciding what price he could afford to pay, would consider the chances and probabilities of the situation as then actually existing. A jury should do the same thing. They are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in.”

The Noble decision goes on to say:

“The measure of damages is (said to be) the market value of the property and not the output thereof. The accepted formula for determining fair market value is not how much would the property produce over a period of fifteen years, but what would a purchaser willing to buy but not required to do so pay and what would a seller willing to sell but not required to do so, pay.”

The testimony of all the respondents' witnesses relative to valuation of the fill material fails to conform with these rules of our highest state court.

Volume 1 of Orgel on Eminent Domain, page 154, in discussing fair market value and speculative uses, states:

“The courts draw the line at the point where it can be said that a purchaser would actually buy the property for the use in question. An appraiser

must be prepared to show that the uses which he considered could actually command a price in the market. The courts have variously stated that such uses must be immediately available within a reasonable time.”

The author quotes from the Pennsylvania case of *A. D. Graham & Co. vs. Pennsylvania Turnpike Comm.*, 33 *Atl. 2d* 22, where the court announced the rule that “evidence of the value of land for a particular purpose is of no avail when there is shown no market for land for such a purpose. For example, a certain kind of timber might be useful in the making of bows and arrows but if there was no market for these implements, the timber’s value for such use could not be shown.” The analogy to respondents’ evidence of value is striking.

Again, in *Volume 1 of Orgel*, page 158, is a quotation from a recent case, *State Highway Commission vs. Brown*, 168 *So. 277*, in support of the author’s statement that “the mere existence of the physical facilities to make the use available does not prove that the use may be considered as influencing market value.” That decision involved the taking for a highway of a strip of land used principally for farming. The owner contended that the property was available for industrial uses, and the jury evidently accepted that conclusion and awarded some \$9,000.00 damages. The appellate court set aside the verdict with these words:

“We are reminded by appellee (owner) of the fact that the jury views this land insofar as adaptability for industrial sites is concerned. These jurors might have gone the length and breadth of any

railroad in this state and found lands that were perfectly beautiful and perfectly adapted to manufacturing enterprises, but that fact alone would not authorize the assumption that such land would be sought and used for such purposes within any reasonable time. . . . After showing that the property is adapted to a particular use and available therefor, it must appear that there is some probability that the land will be used for such purpose within a reasonable time. The fact that a manufacturing plant might be established upon the land within twenty years would add but little intrinsic present, determinate, market value to the land, whereas the probability that such a plant might be established thereon within a year or two would add materially to the present market value thereof and would be a basis upon which a verdict could be rendered.”

In our situation, the testimony of defendants’ witnesses on gravel values, and particularly that of Mr. Gibbons and Mr. Ford, amounts to no more than a forecast that defendants’ fill material may at some future time have a value for some use such as a highway, at some indefinite place. Defendants have not met their burden of proving any legal damage or value for the gravel taken.

In considering the above decisions, we must keep in mind that the willing buyer or prospective user, or the demand or purpose for the property, as discussed by the courts, does not refer to or mean the condemnor. In all condemnations there is always such a party—an unwilling buyer who finds it necessary to buy the property to fulfill a public need and service of some kind.

We have already noted the objectionable statement in plaintiff’s Exhibit 2 relative to an offer by a third party

(Geneva Steel) to sell some three million cubic yards of fill at a certain price. The particular "NOTE" in that Exhibit does not even state the year or place said offer was made. An outstanding author on condemnation, *Orgel on Valuation Under Eminent Domain*, Volume 1, at pages 620-622, discusses the error in admitting such evidence or testimony. Orgel points out that such evidence constitutes an attempt to get before the jury hearsay declarations of third parties as to value not supported by oath, without the right of cross-examination by the appellant. In support thereof he cites a number of decisions, including the Montana case of *Helena Power Transmission Co. vs. McLean*, 99 Pac. 1061. There, in a condemnation suit, the lower court had allowed the jury to consider "what similar land has actually been offered for sale. . . ." The Montana Supreme Court, in ruling that such evidence was inadmissible, stated:

"What land has been offered for by one not a party to the suit is not a criterion of the market value, and the evidence of such offer is inadmissible for the very obvious reason that the offer is not made by one under oath and subject to cross-examination. An offer to sell stands upon precisely the same footing as an offer to purchase, and evidence of either is objectionable upon the ground stated."

The court quoted from another Montana case, *Yellowstone Park R. R. Co. vs. Bridger Coal Co.*, 87 Pac. 963 as follows:

"Furthermore, the value of such evidence depends upon the determination of so many col-

lateral issues that it cannot be relied on with safety. The reception of this class of evidence would multiply the issues upon questions of damages to an extent not to be tolerated by courts aiming to practically administer justice between litigants.’ ”

Orgel, supra, page 622 comments:

“With reference to offers by owners to sell property not taken, the courts have held that this proof is not admissible both by direct examination and cross-examination.”

Attention is called to the decision of the Fifth Circuit Court of Appeals, *Atlantic Coast Line R. Co. et al vs. United States*, 132 Fed. 2d 959, wherein the court, in a condemnation proceeding by the Government ruled that offers which had been made to owners of land are not admissible to prove value and that an opinion of an expert founded in part on such evidence “ought not to be expressed.” The court also ruled that an actual sale remote in time affords no standard of value.

The above authorities and comments apply equally well to the second “NOTE” on Exhibit 2, which, as we have heretofore observed, pertains to a bookkeeping valuation or charge made by Gibbons & Reed Company for its fill material. The time and the locality of the job or jobs to which that “NOTE” might refer are not even indicated. Appellant submits that the admission of such evidence of itself constitutes reversible error.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SUBMITTING TO THE JURY THE QUESTION OF SEVERANCE DAMAGES, AND BY ADMITTING INTO EVIDENCE CERTAIN TESTIMONY PERTAINING THERETO.

(a) THE RESPONDENTS FAILED TO PRODUCE COMPETENT EVIDENCE THAT OTHER SIMILAR LANDS WERE UNAVAILABLE.

The Utah statute giving a right to severance damages under certain conditions is *Section 78-34-10(2), U.C.A. 1953*, as follows:

“Compensation and damages—How assessed—the court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

* * *

“(2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

“(3) If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.”

While the above Section 3 does not refer to “severance” damage, we quote it for the court’s information and

because much of the following discussion upon "severance" damage applies equally to that part of the statute.

In considering the question or issue of "severance" damage, we must keep in mind that the 40 acre tract taken for gravel in the Chournos case was at the time of suit isolated from his other grazing lands on Promontory by property of others. Instead of being contiguous to his immense holdings of some 20,000 acres on Promontory, that tract was separated therefrom by distances up to six miles (Defendants' Exhibit 1). Furthermore, the Promontory lands of Hunter-Arthur at the time of the commencement of suit were on a checkerboard pattern, some parcels not even contiguous. Their two areas taken by plaintiff under its right to condemn were located, with the exception of two small isolated tracts of Hunter-Arthur lands totaling 240 acres, at the extreme southern end of the 14,000 acres they owned on Promontory Point at the time of suit. The total pit area upon the Hunter-Arthur properties amounts to approximately 36 acres (Appellant's Exhibit 4 and Tr. 204). Little Valley, where the said gravel pits making up borrow pit #2 are located, runs easterly across part of Promontory from the Lake shore, and extends through sections 2 and 1, Township 6 North, Range 6 West, and into sections 6, 5 and 4 of Township 6 North, Range 5 West, in that order (Defendants' Exhibit 1). Respondents claim that the gravel pit dug by appellant for the necessary fill material has interfered with and otherwise damaged their sheep operations over and upon their respective Promontory lands and in and through Little Valley, so as to cause them "severance" damage. Mr. Chournos also asked for and was awarded

such damages in the sum of \$3,200 for the one year appellant conducted its gravel operations on his 40 acres in Little Valley. The jury awarded respondents Chournos and his wife \$32,000.00 for their claimed "severance" damage, and also awarded respondents Hunter-Arthur \$32,000.00 for their claimed "severance" injury. (See the special verdict in each case and Tr. 361, 362 where an error of arithmetic occurs at line 13 for the temporary damage amount awarded Mr. Chournos).

The land ownership of Little Valley and the other Promontory lands with which the suits are concerned is indicated in color on said Exhibit 1. Please observe how extensive are the lands of Mr. Adams and the Federal Government in Little Valley. All of the Hunter-Arthur lands on Promontory were under lease to Mr. Adams for his sheep operations during the five years just prior to the trial. (Tr. 191, 252)

Point II of this brief is directed to this item of damages awarded respondents, namely "severance" damage. In attempting to prove such loss, the respondents omitted an indispensable element of proof. They failed to prove that no land comparable to that taken by appellant was available for them to purchase. Mr. Chournos, testifying for Mrs. Hunter and Mrs. Arthur as well as for himself, talked of the importance in the whole sheep operations of all Little Valley and the total pit area (including part of Delbert Adams' land and Government lands). (Tr. 154) Chournos testified that Little Valley is "the best place we got to go" to run the sheep east and west, "we" meaning "anybody." (Tr. 160-161) At all times he emphatically stated that he was talking of the pit from one end to

the other. (Tr. 155, 187-188) But neither Mr. Chournos nor Hunter-Arthur established at the trial that they were unable to obtain lands in the nearby vicinity similar to their small tracts used for appellant's fill material. On the contrary, Chournos testified that about a year before the present suit he had purchased some Hunter land situated on Promontory about two to three miles north of Little Valley. (Tr. 188-189) His witness, Mr. Keller, testified that other lands, including Hunter-Arthur property, immediately adjoining Little Valley on the north were comparable to Little Valley. (Tr. 236)

The decisions of this court point out the necessity of proof that similar lands were unavailable. In the case of *Provo River Water User's Ass'n. vs. Carlson, et al*, 133 Pac. 2d 777, 103 Utah 93, the Association condemned some 18 acres of pasture land as part of the Deer Creek Reclamation Project, and the defendant owner claimed severance damage to some properties a mile and a half from the condemned land. The defendant's theory was that a "unity of use" existed between the pasture land and the dairy project on the remaining lands, and that the taking of the pasture depreciated his remaining lands. He contended that all of his lands must be treated as "one large parcel"; that his lands used for the dairy operation were more valuable as a dairy unit when used with the pasture condemned than if used without it. The Supreme Court, in reversing the damage award, held that the lower court erred in submitting to the jury the so-called severance damage, for a number of reasons. The court stated that all of the Utah decisions have "predicated both severance damages and damages to lands not taken, on some physical

injury to lands not condemned, such as lowering or raising the level of a street . . . or restriction of the remaining area in size or shape, so as to render it less valuable for purposes to which it was formerly adapted. . . .” Then the court stated that it was not necessary to decide, under the facts of the case, whether the lands must be contiguous or must be physically impaired by the project to allow severance damages, but based its decision chiefly upon the defendant owner’s failure to show that the pasture taken was not “the only pasture land available within a mile and a half of the remaining property.” Even if no similar uncultivated pasture land were available, defendant would not be entitled, said the court, to severance damages if there are other farm lands available for purchase which would produce relatively the same results. “Even some of defendant’s own farm lands could be cultivated into pasture.” If defendant could purchase other pasture land or other land convertible into pasture “within a distance from his remaining land, comparable to that of the condemned tract, and such other land would provide relatively the same kind of forage . . . it could not be contended that his other properties could be impaired or depreciated by taking the pasture.”

Another Utah decision, *State vs. Cooperative Security Corporation of L. D. S. Church*, 247 Pac. 2d 269, 122 Utah 134, involved a condemnation of about 8 acres of defendant’s farm land comprising 131 acres. The court ruled that severance damages based on the theory that the defendant’s farm was a unit operation, could not be awarded. Defendant must first establish proof “that no comparable land is available in the area of the condemned

land.” This it failed to do. The Supreme Court cited the above *Provo River Association* case in support of its decision.

The above objection herein being made to the so-called severance damage applies equally to respondents’ proof of the amount of such damage supposedly suffered. Mr. Chournos related that the lands remaining to respondents after all the fill material was removed were thereby made 20% less valuable. He gave a figure of \$1400.00 as the annual loss of value to his remaining land and the Hunter-Arthur lands. He determined his figure from rentals Hunter-Arthur received under a five year lease of their Promontory lands to Delbert Adams. (Tr. 170-171, 184-185, 191) Then Mr. Keller, another witness for respondents, testified about the amount of the “severance” damage from the whole pit area, and tied it to the same rentals received from Mr. Adams. (Tr. 229 and 232) One fatal defect in their testimony is that those two witnesses assumed there was no similar land available to the respective respondents. The above cited case of *The Provo River Water User’s Association, supra*, ruled directly upon that point. In that decision the Utah Supreme Court found reversible error in the lower court’s admission of testimony that defendant’s remaining lands had a greater market value as a farming unit by using the condemned pasture than without such pasture. “There were several fatal objections to such opinion testimony. First, the opinion testimony was based on the premise not established by evidence, that there were no other pasture lands available within the same distance and no farm land which could be converted into pasture to provide the necessary forage

for cattle during the summer. Second, if another tract of equal value and productivity as a pasture were obtained to replace the pasture taken by plaintiff, the combined value of all of (defendant's) properties when used in connection with a pasture, would be wholly immaterial and irrelevant."

POINT II

(b) THE DAMAGES TESTIFIED TO BY RESPONDENTS' WITNESSES WERE FROM APPELLANT'S OPERATIONS UPON LANDS NOT OWNED BY RESPONDENTS.

As this brief has already indicated, the only "severance" damage which respondents attempted to establish at the trial was expressly related to the whole pit area #2, situated mostly upon Mr. Adams' land, and some lesser amount upon United States lands. (See the maps, Exhibit #1 and appellees' Exhibit #4) Mr. Chournos' testimony conclusively shows he used such a basis for his opinion of both his and the Hunter-Arthur damages. He stated that he had "to consider the whole thing (pit)" and did not know the severance damage resulting to respondents from the excavations on their respective lands. (Tr. 192-193). He referred to Little Valley and the whole pit area as his and the other respondents' own lands for the sheep operations. In testifying about the alleged damages to their sheep business, he emphasized that he was speaking of "all the pit from one end to the other." (Tr. 154-155) Mr. Chournos talked of the "forage damage," "hazards" and the "interference" to the sheep from the whole pit in Little Valley. (Tr. 155-156, 164-165, 171, 178) Mr. Keller, respondents' other witness on "severance" damage, likewise referred only to the big pit area. (Tr. 227, 230, 233) In fact, he evidently was referring to the period of time when he held and used much of the Chournos, Hunter and Adams lands, including Little Valley. (Tr. 202) Respondents ignored the fact that the

excavations and the resulting difficulties of which they complained occurred chiefly upon someone else's land and to someone else. (Tr. 188) Respondents thereby are seeking payment for damages belonging, if at all, to others. It is significant in this regard that Mr. Chournos admitted Mr. Adams, and not Chournos, rightly had used Little Valley and the big pit area for his sheep operations during the last five years, including about a year since the pit was there. (Tr. 198-199) Furthermore, no evidence was presented that any respondent had the slightest right to go upon Mr. Adams' lands in Little Valley.

The courts of our land have established that the owners are not entitled to damages from the condemnor's use of a third party's lands and that it is reversible error to permit the same, or testimony thereof. A leading case frequently cited by the courts is the United States Supreme Court decision of *Campbell vs. United States*, 69 L. Ed. 328; 266 U. S. 368. There, the Government had taken approximately 2 acres of the owner's land out of some 69 acres he held, and the entire tract taken by the Government comprised 1300 acres. The United States constructed upon the lands of plaintiff and the other owners "roads, railroads, buildings, a sewerage system and such other things as are incidental to a large industrial plant." The Supreme Court affirmed the Circuit Court's ruling which denied the owner the right to compensation for the use made of the adjoining owner's land, with these words:

"Plaintiff (owner) had no right to prevent the taking and use of the lands of others . . . if the land taken from plaintiff had belonged to another, or if it had not been deemed part and parcel

of his estate, he would not have been entitled to anything on account of the diminution of his estate. . . .”

The court observed that the damages resulting to the remainder of plaintiff's lands were separable from those caused by the use made of the lands acquired from the other owners. “The liability of the United States is not greater than would be that of private users (carrying on the same activities of the condemnor).”

At 170 A. L. R., Page 721, is an annotation on this point, and it is there stated that the general rule denies the owner compensation for the reduced value of the remainder of his land caused by the acquisition and use of adjoining lands of others for the same project. There follows a list of citations from the courts of California, Colorado, Idaho, and Massachusetts.

An Idaho decision, *O. W. R. & N. Co., vs. Campbell*, 202 Pac. 1065, involved a condemnation for the construction of a railroad. The owner complained that the railroad operations on another's land taken caused water to run through defendant's land and polluted his fresh water stream on the remainder of his land. The statute, like the law of Utah, provided for compensation for damages to property not actually taken, but injuriously affected. The court denied recovery, ruling that the owner could not be awarded damages caused by construction of the railroad on lands outside of defendant's lands.

A Colorado case in point is *Keller vs. Miller*, 165 Pac. 774, wherein the condemnation was for a right-of-way to construct a drainage ditch upon defendant's land. The

state statute allowed damages to the owner as a result of the condemnation of lands, taken, or injuriously affected, though not taken. The court denied the defendant any compensation for injury to the remainder of her lands from construction and use of the ditches on the lands of others. The decision quotes from *Lewis, Eminent Domain, Section 569*: “‘Damages to the remainder by what is done elsewhere than on the part taken are not to be considered.’”

In *Public Service Co. vs. Loveland*, 245 Pac. 493, the Colorado court refused to allow damages allegedly suffered to the owner’s remaining land by the electric power plant’s activities on lands belonging to others. The opinion cited the Keller case *supra*, and observed that “there must be a limitation upon the extent of the damages recoverable.”

In the California case of *Department of Public Works vs. Emerson*, 57 Pac. 2d 955, the condemnation was for a right-of-way to construct a highway over part of defendant’s lands. The owner claimed severance damage for failure to provide a cattle crossing for access to water available through a former crossing under the old highway. Neither the old crossing nor the water supply was on the property of the defendant owner. The court observed that the rule established in California is that the owner cannot recover damages suffered as a result of the railroad’s operations and obstructions on another owner’s property. The court quoted from the above cited case of *Keller vs. Miller* as follows: “The detriment for which the owner may recover compensation is that which will result from the operation of the works upon his land alone.”

POINT II

(c) THE SO-CALLED "SEVERANCE" DAMAGES TESTIFIED TO BY RESPONDENTS' WITNESSES CONSISTED OF DAMAGES SUPPOSED TO HAVE RESULTED TO A BUSINESS CARRIED ON BY RESPONDENTS, OR THEIR LESSEE, NAMELY SHEEP OPERATIONS.

Much of respondents' evidence of "severance" damage is actually attempted proof of interference with the sheep business. Even a cursory reading of Chournos' testimony shows that fact. (Tr. 154-188) The witness and his counsel frequently refer to "sheep operations" and loss to such operations from the gravel pit in Little Valley. Let us give an example or two from the Chournos testimony given upon direct examination. Mr. Chournos, referring to all of the lands he owned, including the 20,000 acres on Promontory Point, testified as follows:

"Q. Now, Mr. Chournos, all of these lands you have mentioned and roughly described, are they used in the one sheep operation?

A. Yes.

Q. To round out a year-long operation, all of these lands are used by you?

A. Yes.

Q. Are they all necessarily used by you? Is it necessary to have all of them in order to carry on your operation?

A. Yes.

Q. Do these Promontory lands fit into and form a part of that over-all year-long sheep operation?

A. Yes." (Tr. 142)

“Q. All right now, Mr. Chournos, I asked you what importance, if any, the Little Valley area plays in your lambing operation.

A. Well, Little Valley is one of the key valleys in that whole area. It’s better for feed and it’s not too steep.” (Tr. 154)

“Q. But I want you to tell us everything you can about how Little Valley has been used in your lambing operations. Are you through telling us that?

A. Well, it’s been used—In the fall of the year we use the east side, and then certain time later on we’ll go over the top, down into Little Valley and down to the shore, the mouth of Little Valley. It’s pretty valuable, and the way it is now, you take that pit, that’s around two miles long. You take a bunch of ewes and lambs—” (Tr. 155)

Speaking of his alleged damages, Mr. Chournos stated:

“Q. Mr. Chournos, you have described your own lands and the way you operate your own sheep. I now ask you what damage, if any, has been done your own operations by the removal of this gravel from the area in Little Valley.

A. It will affect me in the same way.” (Tr. 174)

The trial court itself, in addressing defendants’ counsel and the jury at the beginning of Mr. Chournos’ testimony, referred to respondents’ sheep business in the following language:

THE COURT: “Well, but you’ll have to prove they’re in the sheep operation business. Let’s take one at a time. I may ask you a question about severance damages, gentlemen, if these people can

establish that their operation has been interfered with. Now there's a whole lot of ramifications to that, but just to introduce the subject to you now, it looks like we're going over on that question of severance damage." (Tr. 151)

Injury or loss to business is not a proper element of condemnation damage, whether by "severance" or otherwise. This court and a large majority of other jurisdictions have disallowed such an element. In *State vs. Noble*, 6 Utah 2d 40; 305 Pac. 2d 495, a suit for condemnation of property, including sand and gravel, the court rejected proof of the productivity of the fill material from the property and stated:

"The measure of damage is (said to be) the market value of the property and not the output thereof. The accepted formula for determining fair market value is not how much would the property produce over a period of fifteen years, but what would a purchaser willing to buy but not required to do so, pay and what would a seller willing to sell but not required to do so, ask."

Quoting from a California case, *City of Los Angeles vs. Deacon*, 7 Pac. 378, the Supreme Court commented:

"Evidence of realized profits derived from (the business) receives the same treatment as general business profits, and similar reasons are advanced for the exclusion of the testimony."

A case cited by Nichols is *Oakland vs. Pacific Coast Lumber and Mill Company*, 153 Pac. 705, wherein the city brought eminent domain proceedings for some shore land

containing docks and the owner's lumber yard. The owner's lumber mill, equipment and operations were mainly upon its property some 400 feet from the condemned area. The owner insisted that the taking of the one parcel interfered with its complete mill business and that all of its property was operated as a unit, even though not contiguous. It also contended that under the laws of California it was entitled to recover damages for the "proved injury to its mill business." The state statute provided at that time that the owner was entitled to damages for the property taken and also damages "which will accrue to the portion not sought to be condemned by reason of its severance from the portion condemned." The California Supreme Court held that the statute did not permit recovery for injury or loss to the lumber business. Here the owner claimed that the taking of the wharf property had adversely affected its whole lumber operation by making more difficult the handling of lumber. The opinion stated:

"It is quite within the power of the Legislature to declare that a damage to that form of property known as business or the good will of a business shall be compensated for; but, unless the Constitution or the Legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is *damnum absque injuria* and does not form an element of the compensating damages to be awarded."

As in this California case, the Utah statute makes no provision for damage to a business, and that it is in reality what respondents claim when they speak of their sheep

operations and the adverse affect of the gravel pit upon that business.

In the United States Supreme Court case of *Bothwell vs. United States*, 254 U. S. 231, 65 L. Ed. 238, the Federal Government condemned a large tract of land in Wyoming, upon which was conducted a stock raising business. Prior to the condemnation for the Pathfinder Dam the owner had run more than 1000 head of cattle upon the property. The owner had already obtained compensation for the value of the land flooded by the dam waters. In the subject proceeding before the United States Court of Claims, the owner asked for a loss suffered upon a forced sale of the cattle and destruction of his cattle business resulting from the Government's condemnation. The Supreme Court ruled that the owner could not recover such loss of the business. The court stated:

“Appellant's position in respect of the items in question is no better than it would have been if no condemnation proceedings had been instituted. . . . There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation.”

The court cited the case of *Mitchell vs. United States*, 267 U. S. 341, 69 L. Ed. 644, wherein the Government condemned certain lands used for the growing of corn. The owners were unable, as a result of the taking, to re-establish themselves in the former business of growing the special type of corn. The Federal Statute provided for just compensation as determined by the President, and gave the owner the right to bring suit for whatever additional payment he felt he should receive. The owners sued to

obtain damages for loss of the business. The Court held that the owners could not get such compensation under the act or under the United States Constitution. The opinion stated:

“The settled rules of law, however, precluded (the President’s) considering in that determination consequential damages for losses to their business, or for its destruction. . . . There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.”

The Ninth Circuit Court of Appeals, in *U. S. vs. Honolulu Plantation Co.*, 182 F2 172, passed upon a situation quite analogous to ours. The Government condemned some land used by defendant, along with other lands, for the raising of sugar cane. The Company had a working agreement for that purpose with the owners of the land condemned. The plantation (Company) claimed “severance” damages because of the “loss of value of its properties as an operating concern, resulting in an over capacity of the sugar mill and refinery.” The appellate court, in reversing the trial court upon this item of damage, stated:

“Since Plantation had no property interest in the lands condemned, this claim is for business losses. Since the right to recover such losses does not exist by law . . . the contracting parties could not create by agreement between themselves such a right valid against the United States. . . . By adulteration, the experts for Plantation evolved a clever amalgam of two proper doctrines as a basis

for compensation. It is a rule that, in condemnation of part of a tract owned in fee simple, just compensation is the market value of the tract as a whole, before condemnation, less the market value of the portion which remains after the taking of the part. The rule applies exclusively to condemnation of fee simple title of a tract in one ownership. It is a rule that, if market value cannot be established by sales of comparable property, consideration of other factors may be necessary to establish just compensation. But it must not be forgotten that the market value of real property is the criterion, and losses to a business are not for consideration. . . . Where part of a tract in fee ownership is condemned, the loss in market value of the remainder cannot be augmented by consideration of the damage caused thereto by the taking or prospective use of lands held by third parties in fee simple as part of the same project. Nor can the fact that an enterprise upon one parcel depends upon other lands in fee ownership of third parties for supply of an essential material be used to connect the two for purposes of compensation.”

Discussing the question of injury to a business, *Nichols, Eminent Domain, Third Edition, Volume 4, Section 13.3 at page 255* states:

“The case is no different when the business is destroyed by taking the land on which it is conducted. It is well settled that when land occupied for business purposes is taken by eminent domain (the owner) or occupant is not entitled to recover compensation for the destruction of his business or the injury thereto by its necessary removal from its established location.”

In *Volume 4, Section 13.3(1)*, the same authority says:

“The general rule in this country is that such business and the fruits thereof are too uncertain, remote and speculative to be used as the criterion of the market value of the land upon which business is conducted.”

POINT II

(d) RESPONDENTS' DAMAGES WERE ARRIVED AT BY ADDING THE VALUES OF DIFFERENT USES FOR THE LAND TAKEN.

The special verdicts in cases #8071 and #8191 awarded respondents compensation for the gravel taken from their lands in Little Valley. Those verdicts also contain an award of compensation for an item loosely referred to by the lower court and respondents as “severance damage.” Under that name, the court permitted respondents to recover damages claimed for loss of the pit area as a pasture or “forage” land, a lambing ground, a pathway for sheep to and from water and to other pasture areas belonging to somebody. (Tr. 147, 152-164, 171) Thus respondents were allowed to show a use or value of the lands for fill material and, over appellant’s objection, an inconsistent use or value for the sheep business. Furthermore, the court admitted testimony of respondents which purported to show an actual severance damage to the remaining lands of each respondent supposedly resulting from the gravel pits. (Tr. 177, 183, 233) In addition, the court, over objection, received evidence that the gravel pit constituted a nuisance and thereby

damaged respondents. For instance, respondents' counsel and witness Chournos talked of the resulting "hazards," "death trap" to sheep, the steepness of the pit banks, cost of leveling them, etc. (Tr. 164-167, 178) (Such testimony has nothing to do with severance damage and has no proper place in these condemnation suits).

Aside from the fact that all of the above outlined testimony referred to the whole pit situated mostly on third parties lands, prejudicial error in that testimony is that it permitted respondents to show and recover for inconsistent uses of their property taken, namely, as a gravel pit and as sheep land. The fact that respondents did not place a separate monetary value upon the lands used by appellant and upon various items of sheep land damage claimed, but lumped them into one general sum called "severance damage," does not alter the picture. The lower court itself during the trial recognized the principle involved but did not follow its early admonition to Mr. Oman that respondents would have to elect as to their damages. (Tr. 168, 171) If such proof of all these uses is to be permitted, appellant here will be required to pay more than once for the same land, and the meaning and intent of the Utah laws of just compensation will be defeated.

The court decisions of this country have decried such a result.

In *Volume 29, Corpus Juris Secundum, page 1025*, appears this statement in the annotation:

"If land is valuable for two purposes and use for one excludes use for other, only value for one use may be recovered,"

citing *Monongahela West Penn Public Service Co. v. Monongahela Development Co.*, (W. Va.) 132 S.E. 380. In that decision the owner was permitted in the lower court to introduce evidence of the value of the land taken, both as a unit and as divided into lots. The court stated:

“Recovery is sought by the owner on both a lot and a section basis. This cannot be allowed. . . . Of course, this rule would not apply where land was valuable for two purposes and its use for one purpose would not interfere with the use for the other.”

The court cited the Montana case of *Railway Company vs. Warren*, 12 Pac. 641. There, the condemnation was for a railroad right-of-way and the land taken covered defendant owner's mining claim for which he asked compensation. The owner was permitted at the trial to prove also that the land had a value for town lots. The court's instruction was that the defendant could not recover for the value of the land both as a mining claim and for town lots. The Montana Supreme Court approved this instruction, stating that “we cannot presume the jury disregarded the instruction, for it does not so appear from the testimony.”

The decisions and authorities usually state that the owner is entitled to show all available uses and can recover for the “highest use”; but they uniformly hold that the owner cannot show a separate value or damage for each use and add the total as a basis of recovery. For example, he cannot have the value of the land as a gravel pit, and also a value or damage for another use. *Nichols, Eminent*

Domain, Third Edition, Volume 4, page 105. As stated in the decision of *Morton Butler Timber Co. vs. the United States*, 91 F 2nd 884, the owner cannot "prove separately the values of various uses to which the land is adapted, and then add the separate items of value to obtain the compensable value of the land taken by eminent domain." That case involved land containing timber, and the owners attempted to prove separately the stumpage value of the timber. The court rejected such proof. That decision approves a Tennessee case, *Alloway vs. Nashville*, 13 S. W. 123, in the following words:

"The court declined to permit all the capabilities of the property to be priced separately and the aggregate to be calculated as the true value, for they do not exist independently of each other, and cannot all be realized at the same time."

Also, *Volume 1, Orgel On Valuation, page 151*, states that "property has but one market value, not one for one use and another for another use."

The Utah Supreme Court in *Moyle vs. Salt Lake City*, 176 P. 2d 882, 111 Utah 201, has recognized the rule of recovery for the highest and best use in a case involving water condemnation.

In our situation, the damage, if any, to sheep operations results from respondents' alleged loss of use of the gravel pit area for grazing and other sheep uses. In other words, they claim that the areas taken were worth so much to each respondent as sheep land and as part of the whole grazing unit; that by taking the fill material, appellant has destroyed that use of the particular area.

Appellant submits that recovery in this case for either permanent or temporary damage to lands not taken or to the sheep operations, together with compensation for the fill material, constitutes reversible error.

POINT II

(e) RESPONDENTS PRESENTED NO COMPETENT EVIDENCE OF THE MARKET VALUE OF THEIR REMAINING LANDS CLAIMED TO HAVE BEEN DAMAGED.

The lower court committed reversible error in submitting to the jury the question of "severance" damage for the additional reason that no market value of the lands of either respondent was ever established at the trial. This is true whether the alleged damage is considered to be under Section 78-34-10(2) or 10(3) of the Utah statute. The rule is that where possible, any injury to land not taken must be proven by showing a definite loss of the market value resulting from the condemnation. We have indicated that the decisions of Utah and elsewhere so hold. See *State vs. Cooperative Security Corp. of L. D. S. Church, supra*, involving farm lands, and wherein this court declared:

"The compensation to which an owner is entitled for severance damage . . . is the difference in the fair market value of his property before and after the taking."

In *State vs. Noble, supra*, our court ruled that the property "must go to the condemnor for its fair market

value.” The federal case of *U. S. vs. Honolulu Plantation, supra*, in declining to allow severance damage in the case, used this forceful language:

“Strict proof of the loss of market value to the remaining parcel is obligatory.”

In each “severance” case now before the court, the only testimony relating to money damage or depreciation of respondents’ lands came from Mr. Chournos and Mr. Keller. They based their opinions on the annual rental Mr. Delbert Adams paid the Hunter-Arthur people for the last five years. Each witness applied a percentage figure to that rental for a year’s damage, and then multiplied the result by an arbitrary number of years (20), to reach a “permanent damage” figure. (Tr. 171-175, 191, 232) We submit that such an artificial, deceptive method has nothing to do with market value of the respondents’ lands at any time. This court needs no authority to persuade it of the fallacies contained in such testimony. Mr. Chournos, by use of the above method of evaluating damage, erroneously concluded that even though the Hunter-Arthur Promontory lands contained some 5,000 acres less than those of Chournos, the monetary damage was the same because the Hunter interest holds “a little more land close to . . . the pit.” (Tr. 187) Such speculation is not at all relevant to the market value of the lands.

In some jurisdictions evidence of the condemned property’s rental income under closely similar conditions is admitted by the courts when presented by a qualified witness as an element of a market value of that property. We submit that is not the situation in the present cases.

It should be noted here that the testimony of both Mr. Chournos and Mr. Keller on the amount of severance damages includes the areas condemned by appellant, who is therefore being made to pay again for the gravel pit area.

No witness for respondents indicated he was acquainted with a market value for the properties, and respondents made no effort to show any market value or even a reasonable substitute for it, such as a qualified appraisal. That a market value existed for the lands was made evident by respondents' own witnesses and by Mr. Adams. Mr. Chournos in 1957 had purchased a one-half interest in some Hunter-Arthur Promontory grazing land just to the north of Little Valley. (Tr. 188-189) About four years ago he exchanged some of his range lands situated to the west of Great Salt Lake for considerable range acreage on Promontory Point. (Tr. 214-215) Mr. Adams placed a value of \$5.00 per acre on his lands. (Tr. 332). Mr. Keller testified that he sold his lands on Promontory some years ago to Mr. Adams, and that he was familiar with the lands of all the respondents. (Tr. 221) But he was asked nothing about market value or even a value.

An amazing illustration of the prejudicial error of the lower court in admitting certain testimony unrelated to property values (including fill material) or any other phase of the issues in our case is found in the cross-examination by respondents' counsel of Mr. Bagley, the Project Engineer for appellant's whole fill construction job at Promontory. Over appellant's objection, he was asked and permitted to answer a question as to the "expenditure of huge sums of money" on the whole project.

(Tr. 303). What has that to do with the case, except to prejudice the jury!

It is respectfully submitted that the respondents and the court, by completely ignoring the established and fair rules of valuation in land condemnation cases, are guilty of reversible error.

POINT II

(f) THE TESTIMONY DOES NOT ESTABLISH ANY SEVERANCE OF RESPONDENTS' LANDS AS THAT TERM IS USED IN THE COURT DECISIONS AND THE STATUTES.

Examination of the maps (Defendants' Exhibit 1 and Plaintiff's Exhibit 4) in the cases here on appeal conclusively shows that severance of either respondents' remaining lands by the gravel pits on their respective properties is a physical impossibility. The Hunter-Arthur pits are on the extreme south end of their Promontory lands, and much of their remaining lands are not adjacent or contiguous. Chournos' 7.38 acres actually taken for the pit excavation was already isolated from his other lands by large tracts belonging to Mr. Adams, the Government and the Hunter-Arthur interests.

The testimony of respondents' own witnesses is that the pits did not prevent livestock from passing through Little Valley, east and west as well as north. (Tr. 210, 235, 236) Mr. Adams, whose sheep had exclusive use of the Little Valley area when the pits were made and for some three years before, testified that his sheep had gone through

and around the gravel pit area without serious interruption, and had lambled near the gravel pits in Little Valley. (Tr. 256, 257, 276, 277) The pictures of the borrow pit #2 introduced into evidence by respondents as Exhibits 5, 6 and 7 show that the pit area is passable to sheep and contains roads through it. Mr. Keller admitted that Chournos' sheep could go from the east side to the west part of Promontory Point through a pass or valley just to the north of Little Valley. (Tr. 235)

The jury, the court and attorneys drove through the length of the pit area in Little Valley the first day of trial. (Tr. 15, 20, 21) Appellant, as stipulated at the trial, has surrendered all possessory and other rights to all the lands taken under the law suits here on appeal. (Tr. 150-151) Respondents therefore have the use again of their respective lands in that area.

What the respondents truthfully seek in their respective claims for severance damage is compensation to each one for an alleged damage resulting from but one source, namely, the complete pit area in Little Valley. Obviously, that is an unjust claim.

Furthermore, the record here contains no competent evidence that either Mr. Chournos or Hunter-Arthur used all their Promontory lands, including the Little Valley area taken, as a unit. As noted, Mr. Adams alone had his sheep operations there under a herd line arrangement with Mr. Chournos, and there is no evidence that the respondents' remaining lands suffered any physical impairment, loss or other injury from the gravel excavations made on their respective properties.

Much has been written upon the nature of severance damages, and there exists a divergence of opinion among the courts as to what is severance and what is severance damage. See *Orgel, Volume 1, supra, Chapter 4*, and particularly *paragraphs 53 and 54*. At *page 254* thereof the author states:

“It would seem, therefore, to be unfair discrimination to reimburse a property owner for all similar damages done to his property simply because a portion of it, however small, may have been condemned. Bearing this point in mind, the courts have attempted, some of them more vigorously than others, to distinguish between damages which a particular owner has suffered because a part of his property has been taken, and damages which this same owner may have suffered along with adjacent property owners because public works, detrimental to the remainder of his property, have been located in the neighborhood.”

Orgel pointed out that what the court should be interested in is to prevent one award “from overlapping and giving double damages.”

This court, in *State vs. Cooperative Security Corp. of Church of Jesus Christ of Latter-day Saints, supra*, in discussing the claimed severance of a pasture land from the main farm area, referred to the rule of a unity of operation or use between the different parcels. The case turned upon another point, however, i.e., failure of the owner to show the unavailability of similar land.

In another Utah decision, *Provo River Water Users' Assn. vs. Carlson, et al, supra*, involving a claim for a sev-

erance of a farm tract caused by the condemnation of one parcel for a railroad, resulting in the flooding of some of the land, the court commented:

“All of the cases in this court, which we have been able to find, have predicated both severance damages and damages to lands not taken, on some physical injury to lands not condemned. . . .”

As discussed in Section II (c) of this brief, what respondents and the lower court call “severance damage” is really a claim of interference or injury to a livestock business, which, if it *is* capable of proof, is not compensable under our law.

Appellant respectfully submits that there is no competent evidence to support the verdict and judgment for severance damage in the cases now before this court.

POINT III

THE VERDICTS ARE EXCESSIVE AND THE RESULT OF PREJUDICE OF THE JURY.

In the case of *State vs. Noble et al, supra*, the court stated:

“Our Constitution forbids the taking of private property for public use without just compensation. To just compensation and to that only are the defendants entitled.”

The verdict in each of the cases here on appeal was for the sum of 3¢ per cubic yard for the fill material taken, making a total of \$57,283.47 in the Hunter-Arthur suit; \$61,580.94 in the Nick Chournos suit; and \$36,686.97 in the Oman and Chournos placer claim suit. In addition, the jury awarded Nick Chournos and wife \$3,200 for the temporary “severance” damage for one year’s occupancy by appellant, and the sum of \$32,000 as permanent “severance” damage. In the Hunter-Arthur suit the award was also for \$32,000.00 for the alleged permanent “severance” damage. All the awards were in answer to a form of special verdict submitted to the jury by the court. We submit that these verdicts constitute excessive damages resulting from prejudice of the jury. They represent very unjust compensation.

The lower court itself, upon the hearing of appellant’s motion for a new trial, remarked that the “severance” damage awarded “shocks the conscience of the court.” (Tr. 393) As stated earlier in this brief, the court then conditionally granted a new trial unless respondents remit

one-half of the "severance" amounts, but appellant refused to accept such a compromise. Appellant's opinion is that each verdict for the fill taken is just as shocking.

One example of the jury's prejudice is the award to Mr. Chournos of temporary "severance" damage in the amount of \$3,200. That sum is almost double any figure given by respondents' witnesses, including Mr. Chournos himself. Mr. Keller, with the aid of respondents' counsel, gave the figure of \$1,750, and Mr. Chournos gave a figure of \$1,400. (Tr. 171, 222)

Much of the testimony elicited from Mr. Adams upon respondents' cross-examination, was calculated to prejudice the jury upon the fill material and the "severance" damage items. Over objection of appellant, Mr. Adams was constrained to testify about the total amount of money he had received and expected to receive from appellant company for his fill material, and what he was being paid by the appellant upon a lease of some adjacent area used for roads and certain operations related to the whole construction job, all of which was completely irrelevant to the only issues before the trial court, namely, the damage suffered by respondents. (Tr. 335, 336) Some of Mr. Bagley's testimony obtained upon respondents' cross-examination, was only for the purpose of prejudicing the jury against appellant by trying to show the immensity and cost of the whole job and the convenience and saving resulting to appellant from the availability of respondents' fill material. (Tr. 303-304) Those matters likewise are irrelevant to the issues before the court.

A large part of the questions directed to Mr. Chournos by respondents' counsel, and his answers, were intended

to show not "severance" damage, but to create a resentment and deep prejudice by the jury against appellant. Reference has heretofore been made to Chournos' testimony and Mr. Oman's questions about the hazard of the gravel pits to the sheep operations. We call the court's attention to other such matters contained in much of that testimony. (Tr. 176-180)

When we measure each land owners' total award in these cases by the small area actually used for the gravel pit, and when we consider the nature of the uncultivated winter grazing land involved, we can arrive at but one logical conclusion: The jury's verdict in each case was so excessive as to be the result of their prejudice against appellant.

CONCLUSION

Our Utah Supreme Court is the final and best protection appellant has against the unjust award given to respondents in each case now before the court. Such a result amounts to a heavy penalty to any party called upon, because of some public use, to exercise the right of eminent domain.

For the reasons and upon the grounds presented in this brief, the judgments of the lower court in the cases here on appeal should be reversed.

Respectfully submitted,

RAY, QUINNEY & NEBEKER,
W. J. O'CONNOR, JR.,

*Attorneys for Plaintiff
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