

1962

State of Utah v. Mario H. Christensen and Rintha G. Christensen : Brief of Appellant

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,

Appellant,

vs.

MARION H. CHRISTENSEN and
RINTHA G. CHRISTENSEN, his
wife,

Respondents.

FILED

Supreme Court, Utah

Case No.

9544

BRIEF OF APPELLANT

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IN THE
SUPREME COURT
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STATE OF UTAH, by and through
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vs.

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RINTHA G. CHRISTENSEN, his
wife,

Respondents.

Case No.
9544

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The above entitled case is brought before this Court for its consideration by an appeal of the State of Utah, acting through its Road Commission, from the judgment

and order of the Fourth Judicial District Court in and for Utah County. The case was initiated by the State of Utah, under its inherent power of eminent domain to acquire property of the respondents for the construction of a state highway facility in Utah County.

DISPOSITION OF CASE BY LOWER COURT

The Fourth Judicial District Court, the Honorable Joseph E. Nelson presiding, on the 8th day of March, 1961, entered judgment against the State of Utah and in favor of the respondents in the sum of \$5,500.00, as compensation. The State of Utah on March 17, 1961, moved the lower court for a remittitur of the verdict and, in the alternative, a new trial; the said court, on May 15th, 1961, denied both motions.

RELIEF SOUGHT

It is submitted, by this appeal, that the judgment of the District Court should be reversed and the case remanded for new trial.

STATEMENT OF FACTS

On January 18, 1960, the State Road Commission of Utah filed a complaint in the Fourth District Court for Utah County to acquire, by eminent domain processes, real property owned by the respondents herein,

Marion H. Christensen and Rintha G. Christensen, his wife, said property being situated in American Fork City, and being more particularly described in the complaint as Parcel No. 15-6:272:A (R. 3). An answer was filed (R. 14) by the respondents on October 13, 1960, thereby setting the case at issue for trial. The questions relative to jurisdiction, public use and necessity, and the right to condemn were admitted by the respondents (R. 14), and the only issue before the court was the amount of compensation to be paid to the respondents for the acquisition of their property interests (R. 17). On March 6, 1961, the issues were joined and a trial had, before a jury of eight, with respect to (1) the fair market value of the land acquired and (2) the damages accruing to the remaining property of respondents, caused by the severance of the portion expropriated and the construction of the public improvement in the manner proposed (R. 75). On March 8, 1961, the jury returned its verdict against the State of Utah and in favor of the respondents in the following amounts:

(1) The value of the 0.54 acre of land as of January 18, 1960	\$1,080.00
(2) Severance damages	4,420.00
TOTAL VERDICT	\$5,500.00

(R. 75.)

The total tract of the respondents, prior to the expropriation, constituted 1.10 acres (Tr. 9), of which

0.54 acre was acquired by the State of Utah for the highway facility (Tr. 9).

After the jury was empaneled and opening arguments presented by counsel, the jury was permitted to view the premises acquired by the appellant and the Christensen land remaining (Tr. 15, Line 20). Among those present at the time the jury viewed the premises were the *Christensens*, their attorneys, the bailiff and deputy sheriff, and attorneys for the State of Utah (R. 83). During the course of the jury view, Rintha G. Christensen, one of the respondents, addressed the jury orally and informed them that it was difficult to see the property being taken by the State of Utah (the highway being at that time partially constructed) and the remaining property (R. 83); further, that the jury could not get an entire picture of the sheep operation that the respondents conducted and that it was much prettier in the springtime when the “cute” little lambs were in the pasture area (R. 84). Mr. Aldrich, Special Assistant to the Attorney General, one of the attorneys for the State of Utah, informed Mrs. Christensen that the law did not permit the jury to be addressed by the landowner during the view—

“to which Mrs. Christensen replied in context—how was the jury to realize the extent to which she and her husband had been hurt if she didn’t explain to the jury what they had before the highway was constructed and what they had thereafter.”

(R. 84.)

Thereafter, Mrs. Christensen attempted to answer a question asked by an individual juror and Mr. Aldrich again informed her that only the bailiff should respond to the question (R. 84).

At the trial of the matter, after the respondents had rested their case in chief, the State of Utah called Wilbur Harding of American Fork to testify (Tr. 165). After being qualified, Mr. Harding testified that the value of the 0.54 acre being acquired by the State of Utah was \$1,080.00 (Tr. 178, Line 17), that severance damage was \$420.00 (Tr. 178, Line 24), and that total compensation approximated \$1,500.00 (Tr. 179, Line 1). The value of the land expropriated by the State of Utah was based upon a computation of \$2,000 per acre (Tr. 180, Line 6), the highest and best use being residential (Tr. 172, Line 15). The opinion of Mr. Harding, in connection with the value of the land actually taken was identical to that of the three witnesses who appeared in behalf of the respondents—Denzil A. Brown (Tr. 57), Milton Harrison (Tr. 90, Line 17), and Afton Payne (Tr. 122, Line 14).

On cross examination, J. Rulon Morgan, attorney for respondents, asked Mr. Harding if it were not true that the owner of property, immediately to the west of Christensens, had been paid *severance* damage of \$3,500.00 by the State, due to proximity of the new highway (Tr. 200). The lower court allowed the witness to answer, over objection, whereupon Mr. Harding answered he did not know (Tr. 200). Thereafter, counsel

for respondents continued his inquiry into the amount of severance damage paid in the amicable settlement with the property *owner* on the West. Specifically, the transcript reveals that the following examination was conducted:

MR. MORGAN:

“Q. This is going to be a six-lane freeway, is it not?

“A. That’s right.

“Q. Has there been any traffic on this highway so far, other than construction equipment, so far as you know?

“A. No, sir.

“Q. Isn’t it true, Mr. Harding, that the estate right next to this property line just to the west, *that there was a severance of \$3500.00 paid to that owner because of proximity of this highway?*

“MR. ALDRICH: Your Honor, what has been paid or what might be paid in some other case has no bearing in this case, and it’s improper.

“The COURT: I’ll let him answer. Go ahead.

“THE WITNESS: A. I don’t know.

BY MR. MORGAN:

“Q. *Have you inquired to the west, as to how much they got for proximity of the highway to their home?*

“MR. ALDRICH: I have a continuing objection to all of this line of testimony, because this is highly prejudicial.

“THE COURT: You may. The objection is sustained. You may proceed.

BY MR. MORGAN:

“Q. *Did you appraise the property on the west that I have referred to?*

“A. Yes.

“Q. *For the State?*

“A. I did.

“Q. What was your *appraisal* to the property on the west?

MR. CAMPBELL: We are going to object to this line of testimony.

“THE COURT: Sustained.

BY MR. MORGAN:

“Q. *Was there any severance damage to this property to the west?*”
(Tr. 200-201. Empasis added.)

It was the testimony of the respondents, during their case in chief, that the subject property, as of the date of condemnation, was zoned so that the sheep operation conducted on the property of the respondents constituted a non-conforming use (Tr. 46, L. 18) (Tr. 110, L. 29) (Tr. 136).

During the presentation of its case, the State of Utah attempted to adduce testimony from its witnesses that the zoning ordinances of American Fork City, at the date of condemnation, did not prohibit the use of respondents' property for a sheep operation, but that between the date of condemnation and the date of trial, the ordinances of American Fork City were altered, modified, and thereafter specified that the utilization of respondents' property as a sheep operation was a non-conforming use (Tr. 174-175; Tr. 222, Line 12). An offer of proof was made by the State of Utah (Tr. 176, Line 1). The court sustained an objection to the admissibility of testimony concerning the ordinances (Tr. 176, Line 9; Tr. 222, Line 15).

The court, in its Instruction No. 7 to the jury, directed that it might consider severance damage to the remaining land. The court then suggested several items which, in its opinion, constituted severance damage, such as irregular or inconvenient shape of the remaining land, *cutting off access to a highway, annoyances from noise, vibrations, dust, odors, obstruction of view*, and lessened value of the remainder as a site for the purposes for which the land was being used (R. 61). The jury was further directed that it should take into consideration the use of the remaining land of respondents for pasturing, protection of sheep and for shearing and lambing, in connection with the owners' sheep *business operation* (R. 61).

STATEMENT OF POINTS

POINT I

STATEMENTS MADE BY THE LAND-OWNER TO THE MEMBERS OF THE JURY, DURING THEIR VIEW OF THE CONDEMNED PREMISES, WERE PREJUDICIAL AND INFLAMMATORY AND PREVENTED THE STATE OF UTAH FROM OBTAINING A FAIR AND IMPARTIAL TRIAL.

POINT II

QUESTIONS ASKED BY COUNSEL FOR RESPONDENTS ON CROSS-EXAMINATION OF WILBUR HARDING, WITH RESPECT TO SEVERANCE DAMAGE PAID BY THE STATE OF UTAH TO ANOTHER LANDOWNER ALONG THE SAME HIGHWAY PROJECT, WERE PREJUDICIAL AND INFLAMMATORY, AND THE STATE OF UTAH WAS THEREBY DENIED A FAIR AND IMPARTIAL TRIAL.

- (A) *The lower court committed prejudicial error in overruling the initial objection of the State of Utah.*
- (B) *Such questions were asked in bad faith and their prejudicial effect was not cured.*

POINT III

REFUSAL OF THE LOWER COURT TO RECEIVE EVIDENCE, ON BEHALF OF THE STATE OF UTAH, RELATING TO ZONING RESTRICTIONS ON THE SUBJECT PROPERTY AT OR ABOUT THE DATE OF CONDEMNATION, WAS PREJUDICIAL ERROR.

POINT IV

INSTRUCTION NO. 7 OF THE FOURTH DISTRICT COURT WAS AN INCORRECT STATEMENT OF THE LAW AND CONSTITUTED PREJUDICIAL ERROR.

ARGUMENT

POINT I

STATEMENTS MADE BY THE LANDOWNER TO THE MEMBERS OF THE JURY, DURING THEIR VIEW OF THE CONDEMNED PREMISES, WERE PREJUDICIAL AND INFLAMMATORY AND PREVENTED THE STATE OF UTAH FROM OBTAINING A FAIR AND IMPARTIAL TRIAL.

The affidavit of Glen E. Faxon (R. 83) evidences the fact that during the time the jury was permitted to see and view the premises involved, one of the landowners, Rintha G. Christensen, was present and addressed the jury at large, relative to the difficulty in appraising the gravity of the conditions caused by the highway development. This conduct upon the part of the respondents is in direct transgression with the rule of this Court and the case law in the United States. Rule 47(j), Utah Rules of Civil Procedure, sets out the conditions and agendum under which the jury view shall be conducted:

“When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. *While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.*” (Emphasis added.)

Not only were the statements made by Rintha Christensen connected to the substantive issues of the trial, but they were directed to elements not compensable or cognizable under the rules of eminent domain. The assertion of Mrs. Christensen impliedly indicated to the jurors that the *sheep business and operation* conducted by the landowners had been damaged by the expropria-

tion of the State of Utah and signified that the operation, itself, was not as profitable as it had been prior to the construction of the highway facility. With respect thereto, the law is altogether clear that alleged loss of profits is not a compensable factor to be considered. *Riddle v. State Highway Comm. of Kansas*, 184 Kan. 603, 339 P. 2d 301 (1959); *Dusevich v. Wisconsin Power & Light Co.*, 260 Wis. 641, 51 N. W. 2d 732.

The leading object of a jury view is to provide aid and assistance to the panel in order that the members might better apprehend the testimony elicited at the hearing. *Weber Basin Water Conservancy District v. Moore*, 2 U. 2d 254, 272 P. 2d 176 (1954). The view does not qualify as part of the evidentiary proceeding and may not be utilized by the panel as independent evidence in its deliberation. *Redd v. Airway Motor Coach Lines*, 104 U. 9, 137 P. 2d 374 (1943); *P. A. Sorenson Co. v. Denver & R. G. W. R. Co.*, 49 U. 548, 164 P. 1020 (1917); *Bancroft Realty Co. v. Alencewicz*, 7 N. J. Super. 105, 72 A. 2d 360; *Townsend v. State of Wisconsin*, 257 Wis. 329, 43 N. W. 2d 458; *Dempsey-Vanderbilt Hotel v. Huisman*, 153 Fla. 800, 15 So. 2d 903; *Valenti v. Mayer*, 301 Mich. 551, 4 N. W. 2d 5. The statement of the respondent was, therefore, improper by its very nature and made at a time when the jury was under the strict supervision and control of the bailiff (Tr. 15).

It is correct to say that during the period when the jury visits the property, only the custodial officer or the

court, itself, should speak to the members, answer their questions, or point out physical features and characteristics of the land. *Yeary v. Holbrook*, 171 Va. 266, 198 S. E. 441 (1938). The fact that Mr. Aldrich, attorney for the State of Utah, was required to advise Mrs. Christensen to refrain from speaking with the jury created an undue and unjustified feeling of sympathy and emotion in favor of the landowners. It could well have been reasoned by the members of the jury that it was enough that the State of Utah take the respondents' property involuntarily, without the additional fact of preventing Mrs. Christensen from making a statement with relation thereto. That Mr. Aldrich was obliged to admonish the landowner not to answer a question of a juror at the view, produced further seeds of sympathy in favor of the landowners and bias against the State of Utah. The authorities in this country sustain the rule that an improper statement made by a party to a juror, during the course of the jury view, will serve as grounds for a new trial if such statement relates to a substantial issue in the case. In *Yeary v. Holbrook*, supra, the Supreme Court of Appeals of Virginia said:

“If the jurors, or any one of them, listen to a statement (not argument of counsel) of a person made to them about a material matter in the trial of the case when such person is not on the witness stand, the conduct is improper, and Wigmore says it violates the rule against hearsay. And, further, ‘upon the same principle, the making of statements by a witness at a view, or even

the pointing out of the places by a witness or other unauthorized person at a view (which amounts to giving testimony) is a violation of the rule. Here, also, the only question can be whether the impropriety is, under the circumstances, sufficient ground for setting aside the verdict.' 3 Wigmore on Ev., sec. 1802 (2).'' (198 S. E. at 447.)

The Idaho Supreme Court, in commenting upon the appropriateness of parties attending the jury view and conversing with the jury, in *Alesko v. Union Pacific Ry. Co.*, 62 Ida. 235, 109 P. 2d 874, said:

“To obviate any such reoccurrence herein the view should be had only in the company and presence of the attorneys, judge, and bailiff in charge of the jury. Any interested parties, particularly appellant or witnesses, should not be allowed in the vicinity at the time of the view, or to talk with the jury.”

In the case at bar, the remarks of Mrs. Christensen, as disclosed by the affidavit of Mr. Faxon, resulted in a plea of sympathy being aimed at the jury even before the respondents had opened their case; her remarks and retorts could not have been otherwise than prejudicial to the interests of the State of Utah, coupled with the fact that they dealt with elements for which no recovery is allowed. The landowners should not have been with the jury during the view in the first instance. Their presence, standing alone, might not have been fatal but the

conversation carried on with the jury constituted express prejudice, warranting reversal of the judgment.

POINT II

QUESTIONS ASKED BY COUNSEL FOR RESPONDENTS ON CROSS-EXAMINATION OF WILBUR HARDING, WITH RESPECT TO SEVERANCE DAMAGE PAID BY THE STATE OF UTAH TO ANOTHER LANDOWNER ALONG THE SAME HIGHWAY PROJECT, WERE PREJUDICIAL AND INFLAMMATORY, AND THE STATE OF UTAH WAS THEREBY DENIED A FAIR AND IMPARTIAL TRIAL.

(A) *The lower court committed prejudicial error in overruling the initial objection of the State of Utah.*

Testimony developed at the trial revealed little difference between the case of the respondents and that of the State of Utah with respect to the appraised value of the 0.54 acre required for the public improvement. The witnesses for the landowners appraised the land taken at \$1,080. Wilbur Harding, expert for the State, evaluated the tract expropriated at \$1,080; Edwin Stein appraised the tract at \$620. The major issue under litigation centered about the quantum of damage attributed to the remaining land of the respondents brought about

by the condemnation of the 0.54 acre, i. e., severance damage.

It was with respect to an aspect of severance damage (proximity of the highway facility to the remaining land) that a series of questions were asked of Mr. Harding on cross examination by defendants' counsel which branded the entire proceeding with an air of prejudice and prevented a fair hearing from taking place. Such examination had relation to the amount of severance damage paid by the State of Utah to a neighboring property owner in settlement and the text of events is set forth in the Statement of Facts herein, page 6. In determining the natural consequences of this line of examination, it is appropriate to consider the status of the law with respect thereto.

Testimony in connection with the sale of independent but comparable property is admissible in this jurisdiction as an indirect measure of the fair value of the property under consideration. *So. Pacific Ry. Co. v. Arthur*, 10 U. 2d 306, 352 P. 2d 693 (1960); *State through its Engineering Commission v. Peek*, 1 U. 2d 263, 265 P. 2d 630 (1953). However, in order that a sale be eligible for admissibility, it must be shown that it was a *voluntary* one, i. e., transacted between a willing buyer and a willing seller. *So. Pacific Ry. Co. v. Arthur*, *supra*; *Application of Court of New York Authority, et al.*, 28 N. J. Super. 575, 101 A. 2d 368. A sale that is made under threat, compulsion, or impending litiga-

tion does not partake of voluntariness and involves a buyer and/or seller who is by implication, obligated to enter into the agreement. Thus, it is said, with some judicial unanimity of declaration, that a sale made between a landowner and a condemning authority may not be received in evidence in a proceeding wherein the condemnor seeks to acquire other lands. *Weber County v. Ritchie*, 98 U. 272, 96 P. 2d 744 (1939); *U. S. v. 13,255.53 Acres*, 158 F. 2d 874, C. A. 3rd, (1946); *City of Los Angeles v. Cole*, 28 Cal. 2d 509, 170 P. 2d 928 (1946); *Cook County v. Draper*, 387 Ill. 149, 56 N. E. 2d 410; *Dantzler v. Mississippi State Highway Comm.*, 190 Miss. 137, 199 So. 367. The reasons for the exclusion of a sale to a condemning authority is laid down by Nichols, *Eminent Domain*, Vol. 5, page 293, Sec. 21.33.

At the very outside, it might be apologetically argued that the questions directed to Mr. Harding by counsel for respondents related to the sale of comparable property from a private landowner to the State of Utah—a statistic, itself, that requires its rejection. In point of fact, the inquiries were leveled at the *amount of severance damage* that the State of Utah had paid to the landowner, whose property abutted the Christensen tract on the west. By any standard, the questions were improper and the measure of any test would find the examination highly inflammatory and prejudicial to the public authority. It takes not an expert in land evaluation to draw the rather basic conclusion that severity of severance damage on distinct parcels of property will

never be parallel. The impact of a public taking on remaining tracts is a variable factor, dependent upon the size of the condemned parcel, the size of the remaining tract, the best use of the property, the angle of taking, proximity of the public structure to private improvements, and a host of other elements. Under what principle of evidence were the series of questions propounded to the State's witness, Harding? It is submitted that there is none, that the purpose of the examination was to embarrass the State of Utah and its witness and to allow the jury to infer therefrom.

This Court in *Weber County v. Ritchie*, supra, read into the record its position concerning the admissibility of severance damage paid by the public authority to another landowner :

“Appellants (landowner) offered in evidence the testimony of another landowner of the vicinity. They sought to prove the value of the Ritchie land taken by proving what this other owner had received from the County for his land for the same project. However, on voir dire it was disclosed that the sum of money this landowner received *included damages to his remaining land*. The court ruled out the testimony of this witness upon the ground that it was not proper evidence of value. Under the authorities we think this was correct. Although the decisions divide upon the question of admissibility of amounts paid by the condemnor for other lands, there is little disagreement that *compromise settlements, including damages, are not admissible*. The proposed tes-

timony did not segregate the sale price from the *damages*. It is questionable whether the price, had it been segregated, would have been proper testimony under the definition of market value as applicable to condemnation proceedings. * * *” (96 P. 2d 744.) (Emphasis Ours.)

The net result of this line of examination is several-fold.

(1) The jury is to assume that there is some validity attached to the question. It is presumed that the interrogatory, “Isn’t it true, Mr. Harding * * * that there was a *severance* of \$3,500 paid to that owner because of the proximity of this highway?” propounded by counsel, was not a figment of the imagination. By line of succession, the succeeding presumption is that the State of Utah paid the neighboring landowner \$3,500 for severance damage to his property but yet is only willing to pay the Christensens a sum less than \$500.

(2) Counsel for the State of Utah was placed on the horns of a dilemma, in that an objection could either be interposed to the line of questions, or in the alternative, counsel could remain silent. By raising an objection, the question of the cross examiner is given emphasis and attention; the logical interpretation by the jury from the objection made is that the State of Utah is concealing information and does not want it to be brought out. The objection, itself, inscribes the question asked, in the minds of the jurors. The remaining alternative available to counsel for the State is, ipso facto,

to remain silent and allow the question to come in without an objection. This approach, of course, opens the door to a holocaust of irrelevant matter and is a poor substitute for obtaining a fair hearing under the established rules of procedure. The State pursued the only realistic approach by way of objections, and it should not be subjected to a penalty of bearing the implications of such objections.

(3) The witness, Harding, was unduly embarrassed and it would be inferred, by the layman, that the witness had not taken into consideration all the *comparable* sales of property in the vicinity of the condemned tract. It is improper to present to a witness a question which has no factual basis and to pursue further examination predicated thereon. *Bragg v. C. E. Whitten Transfer Co.*, 125 W. Va. 722, 26 S. E. 2d 217.

In *Entzminger v. Seigler*, 186 S. C. 194, 195 S. E. 244 (1938), a case wherein counsel for the defendant persisted in pursuing a line of questioning not only irrelevant but also prejudicial, the Supreme Court of South Carolina cited the problem facing opposing counsel:

“It is plain that this testimony could in no way have enlightened the jury on any legitimate issue in the controversy. It is equally clear that these questions tended to seriously prejudice the plaintiff’s case before the jury. And where the damage done is ineradicable, the presence of good faith or inadvertence is of little moment.

* * * *

“While it is true that the objections interposed to the questions complained of were sustained, yet by reason of that very fact, they may have been, and probably were, the more prejudicial to the plaintiff. * * * By objection and by argument, the matter was particularly called to the attention of the jury. The probable and, no doubt, logical result of improper questioning is to give the jury the impression that the facts assumed actually exist, and that the reason why the opposite party objects to the questions is that he is trying to keep such facts from the jury.”

In the instant situation, the objection to the initial question of counsel for respondents was overruled by the court (Tr. 200).

This was prejudicial error because the ruling suggested that the substance of the question was proper. The entire line of questioning engaged by counsel for respondents with relation to severance damage paid by the State was of such a nature that their prejudicial effect was not erased thereafter.

(B) *Such questions were asked in bad faith and their prejudicial effect was not cured.*

The attempt of counsel for respondents to inject, into the legitimate pursuits of the trial, interrogatories relating to severance paid to another landowner along the same highway project, resulted in a denial of a fair and impartial trial. The train of questions, beginning at

Tr. 200, Line 7 and continuing to Tr. 201, Line 6, were pointed toward the same matter, only the phraseology being different. Three of the questions were propounded by respondents' counsel after an objection thereto had been sustained. This venture may only be classified as performed in bad faith.

The courts of this country relentlessly condemn efforts of counsel to utilize the courtroom as a weapon against the adversary by inserting unfounded and improper questions into the hearing. *Louisville & N. R. Co. v. Payne*, 133 Ky. 539, 118 S. W. 352. Thus, it is announced in 39 Am. Jur. 80, New Trial, Sec. 65:

“Misconduct of counsel may consist in attempting to get before the jury matters not in issue and not properly matters for the consideration of the jury by means of asking witnesses improper questions or making improper offers of proof. In recent years there has been a decided increase in the number of cases in which complaint has been made of prejudice suffered by reason of such misconduct, and frequently a new trial is sought and granted on this ground, particularly where an attorney persistently pursues a wholly unjustified and prejudicial course of interrogation, notwithstanding the objections made by counsel for the opposing party litigant and sustained by the court. * * * While the granting or withholding of the desired relief is to be determined with a view to the effect of the facts which have been brought to the jury's attention, many authorities hold that a new trial

will be ordered where it appears that counsel for the prevailing party solicited improper answers from a witness or pursued an improper and prejudicial course of interrogation, for example, where incompetent questions which assume the existence of damaging facts have been put with such persistency as to make it evident that the questions, and not the answers, are considered important. So, it will constitute ground for a new trial if counsel, in disregard of the court's ruling that a certain line of evidence is inadmissible, persists in attempting to get such evidence before the jury, to the prejudice of the unsuccessful party. As has been pointed out, in many instances of misconduct in propounding questions concerning matters which counsel has no right to inquire into, the opposing counsel, if he makes objection, is necessarily placed in the false light of suppressing significant evidence and attempting to deceive the jury into rendering an unjust verdict. The good or bad faith of counsel, and the extent of his bad faith where it exists, are elements to be taken into consideration, but are not necessarily controlling; good faith is not a shield to a litigant whose counsel seriously errs in the matter under consideration."

See also *Johns v. Shinall*, 103 Colo. 381, 86 P. 2d 605 (1939); *McCrae v. McCoy*, 214 S. C. 343, 52 S. E. 2d 403; *Stoskoff v. Wicklund*, 49 N. D. 708, 193 N. W. 312. It is of no moment to say that, of the six questions asked by counsel for the respondents, the lower court sustained an objection to five of them. The law is well settled that a party engaged in prejudicial examination may not defend against a plea for new trial on the theory that

the objections were sustained to his questions. *Entz-minger v. Seigler*, supra; 88 C. J. S. 329, Trial, Sec. 162(b). It is interesting to note that counsel for respondents never made any offer of proof, whatsoever, in connection with the amount of severance damage allegedly paid to the neighbor by the State of Utah; interesting to note that the name of the landowner abutting the Christensens' tract on the west was never mentioned by counsel for respondents; interesting to note that nothing was said relative to the type of property for which the severance damage payment was allegedly made. Counsel's statement of \$3,500 stands alone and unfounded by fact.

It could be well argued, and is submitted herein, that the jury verdict of \$4,420 for severance damage reflects the effect of the improper examination of counsel.

POINT III

REFUSAL OF THE LOWER COURT TO RECEIVE EVIDENCE, ON BEHALF OF THE STATE OF UTAH, RELATING TO ZONING RESTRICTIONS ON THE SUBJECT PROPERTY AT OR ABOUT THE DATE OF CONDEMNATION, WAS PREJUDICIAL ERROR.

Testimony of the respondents, brought forth during their case in chief, asserted that the property of the re-

spondents, at the date of condemnation, was zoned by American Fork City so that the sheep business conducted upon the Christensen premises constituted a non-conforming use; and that the reason the respondents could not utilize the coops on the remaining property for a poultry operation was that the zoning regulations prohibited such use. The State of Utah, to establish its own case in connection with the value of the property before and after the taking, and to *rebut* the case of respondents, offered to prove that the zoning ordinances of American Fork City at the date set for assessment of compensation did not forbid the application and devotion of the Christensen property for the chicken business; that, in actuality, the zoning ordinance which respondents relied on was enacted and effective several months after January of 1960 (Tr. 175 and 222). The lower court sustained objections to the testimony of both Mr. Harding and Mr. Stein in this regard and, in so doing, committed prejudicial error. The objectives, as explained to the lower court (Tr. 176), in introducing evidence concerning the ordinance passed after the date of condemnation, were:

(1) To aid in the determination of the gravity of severance *damage*. The ordinance prohibited use of the respondents' property for either sheep, poultry, or dairy operation so that the use of the respondents' property for pasturing sheep was, at best, non-conforming. In turn, this was indicative of a change in the highest and best use of the prop-

erty from a small farming operation to a residential plat within the municipality.

(2) *To rebut* the case of respondents. The witnesses for respondents, without exception, including the landowners themselves, testified that, as of January 18, 1960, the ordinance restricting the use of the condemned tract was in effect. The fact of the matter refuted this testimony.

It is submitted that this testimony should have been received not only for rebuttal, but also to establish the case of the State. *Malia, et al. v. Seeley*, 89 U. 262, 57 P. 2d 357 (1936); 1 Wigmore on the Law of Evidence, 3rd Ed., 425, Sec. 34; 88 C. J. S. 212, Trial, Sec. 101. The fact that the State was thwarted in its efforts to accomplish both resulted in prejudice to its interests.

POINT IV

INSTRUCTION NO. 7 OF THE FOURTH DISTRICT COURT WAS AN INCORRECT STATEMENT OF THE LAW AND CONSTITUTED PREJUDICIAL ERROR.

The lower court in its instruction to the jury on determination of severance damage stated:

“Instruction No. 7

“You are instructed that when a parcel of land is taken by eminent domain, the owner is not restricted to compensation for the land actually

taken; he is also entitled to recover for the damage, if any, to his remaining land. These damages may include such items as the cutting of remaining land into irregular or inconvenient shapes, *cutting off access to a highway, annoyances from noise, vibrations, dust, odors, obstruction of view*, and lessened value of the remainder as a site for the purposes for which the land was being used.

“You are further instructed that the use of, accommodation for pasturing, protecting and keeping sheep for general purposes and for sheering and lambing in season in connection with *the owner’s sheep business operation*, to which the property was being put to at the time of taking by the State Road Commission of Utah, are elements to be considered in fixing the damages, if any, to the remaining land of the defendant.” (Emphasis Ours.)

Instruction No. 7 is inaccurate, misleading, and a misstatement of the law, relating to damages compensable under the laws of eminent domain. First of all, the second sentence of such instruction draws to the attention of the jury specific elements of damage and tends to elucidate and emphasize particular factors. An instruction stressing individual evidentiary matters is considered improper, for it amounts to a comment on the evidence by the court. *Meecham v. Allen*, 1 U. 2d 285, 262 P. 2d 285 (1953); *Addy v. Stewart*, 207 P. 2d 498 (Ida. 1949).

The instruction further charges the jury that it may consider, as severance damage, cutting off access to a

highway. The testimony in the case is altogether clear that the acquisition of the .54 acre by the State and the construction of the public improvement did not limit or restrict any access to the defendants' property, which he enjoyed prior to the taking. While it is true that the highway facility is designated as a limited access improvement (the freeway is a new highway), the abutting landowner has no right of access to it, and no compensation may be awarded for the restriction of access. *City of Los Angeles v. Geiger*, 94 Cal. App. 2d 348, 210 P. 2d 717 (1949); *Schnider v. State of California*, 38 Cal. 2d 439, 241 P. 2d 1 (1952); *State Highway Department v. Burk*, 200 Ore. 211, 265 P. 2d 783 (1954); *State Highway Department v. Calkins*, 50 Wash. 2d 716, 314 P. 2d 449 (1957).

Further evidence of error in said instruction is found in the second sentence thereof, for it authorizes the jury to consider other factors, which have no supporting basis in the transcript or the testimony adduced at the trial. Pointedly, there was no evidence submitted by the respondents relative to the depreciation in the value of the remaining property, caused by vibrations from the public improvement, nor was there evidence indicating that dust accumulations would lessen the value of the remaining tract. An instruction given, which does not find its basis upon testimony produced and received at the trial is improper and prejudicial. *Mehr v. Child, et al.*, 90 U. 348, 61 P. 2d 624 (1936); *Mantonya v. Brathie, et al.*, 33 Cal. 2d 120, 199 P. 2d 677 (1948).

With respect to that part of the instruction concerned with the compensability for obstruction of view, it is submitted that the law of eminent domain in this jurisdiction does not recognize such, for the factor is aesthetic in nature, and does not affect substantive land values. A landowner does not have an easement of view across neighboring property and the State of Utah may construct upon the land it acquires such improvements as it sees fit, without compensating the abutting property owner, so long as easements of air and light are not unreasonably restricted. (Concurring opinion in *State Road Commission v. Rozzelle*, 101 Utah 464, 120 P. 2d 276.)

The second sentence of Instruction No. 7 directs the jury that, in determining severance damage, it may consider the effect of the acquisition of the State Road Commission upon the owners' sheep business operation and the use of the land for shearing and lambing. The conclusion is manifest that said instruction relates to the business operation of the respondents, conducted upon the land prior to the filing of the complaint of the State of Utah, and the effect that the condemnation had upon business. Little time need be spent in citing authorities to this Court that loss of profits or prospective damages to a business concern are not compensable elements in eminent domain. *State v. Noble*, 6 U. 2d 40, 305 P. 2d 495 (1957). The business is distinct from the value of the remaining tract. Nichols on Eminent Domain, Volume 4, p. 255, Sec. 13.3.

The instruction, in its entirety, was erroneous and the jury was allowed to consider elements not compensable and not a part of the lawsuit.

CONCLUSION

The judgment of the lower court, by reason of error committed during the trial of the matter, should be reversed and remanded to such court for new trial on the issues of compensation.

Respectfully submitted,

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