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

Utah Supreme Court

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Morgan and Payne; Attorneys for Respondents;

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In the Supreme Court of the State of Utah

FILED

STATE OF UTAH, by and through
its ROAD COMMISSION,

Appellant,

vs.

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

Respondents.

NOV 30 1933

Clerk, Supreme Court, Utah

CASE
NO. 9544

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	Page
ADDITIONAL STATEMENT OF FACTS.....	1
STATEMENT OF POINTS	6
ARGUMENT	7
POINT I	
THE VIEW BY THE JURY OF THE CON- DEMNED PREMISES DID NOT PREVENT THE STATE OF UTAH FROM OBTAINING A FAIR AND IMPARTIAL TRIAL	6, 7
POINT II	
THE STATE OF UTAH WAS NOT DENIED A FAIR AND IMPARTIAL TRIAL BY QUESTIONS ASKED ON CROSS-EXAMINATION OF STATE'S WITNESS, WILBUR HARDING.....	6, 10
POINT III	
THE LOWER COURT DID NOT REFUSE TO RECEIVE EVIDENCE ON BEHALF OF THE STATE OF UTAH, APPELLANT, RELATING TO ZONING RESTRICTIONS OF THE SUBJECT PROP- ERTY	6, 21
POINT IV	
JURY INSTRUCTION NO. 7 OF THE FOURTH DISTRICT COURT WAS NOT AN INCORRECT STATEMENT OF THE LAW AND DID NOT CON- STITUTE PREJUDICIAL ERROR	6, 24
CONCLUSION	29

TABLE OF CONTENTS (Continued)

Page

AUTHORITIES CITED

45 ALR 2nd 1124, 1130.....	8
Am. Jur., Proof of Facts, Vol. 4, 452, 453.....	28
Institute on Eminent Domain, 1961, Southwestern Legal Foundation, Dallas, Texas, Pages 99-103, 110-111	18
4 Nichols, Eminent Domain, 298, Sec. 14.1 (2); 312, Sec. 14.21; 328-337, Sec. 14.231, 14.232 and 14.24; 352-354, Sec. 14.243; 356-358, Sec. 14.243.....	27, 28
5 Nichols, Eminent Domain, 183, Sec. 18.45(2).....	11

CASES CITED

Atchison, Topeka and Santa Fe RR Co. v. Southern Pacific RR Co., (1936 Cal.) 57 P. 2nd 575.....	19
City and County of Denver v. Quick, 113 P. 2nd 999, 134 ALR 1120.....	28
City of Los Angeles v. Cole, 28 Cal. 2nd 509, 170 P. 2nd 928	17
City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 P. 1083	19
County of Los Angeles v. Faus, 48 Cal 2nd 672, 312 P. 2nd 680 (1957).....	17
Covina High School Dist. of L. A. County vs. Jobe, 174 Cal. 2nd 340, 345 P. 2nd 78 (1959).....	17, 19
Curley v. Mayor of Jersey City, 83 NJL 760, 85 A. 197, 43 LRA, NS 985.....	18
Dimmick v. Utah Fuel Co., 49 Utah 430, 164 P. 872..	24
Employers' Mutual Liability Insurance Co. v. Allen Oil Co., 123 Utah 253, 258 P. 2nd 445, 450.....	25
Hayward v. Richardson Construction Co. (Mont. 1959) 347 P. 2nd 475.....	10

TABLE OF CONTENTS (Continued)

	Page
Oklahoma Ry Co. v. State ex rel Highway Dep't	205
Okla. 325, 237 P. 2nd 878, 881.....	17
Palace Laundry Co. v. Royal Indemnity Co., 63 Utah	
201, 224 P. 657.....	16
Palladine v. Imperial Valley Farm Lands Ass'n, 65	
Cal. App. 727, 225 P. 291, 303.....	19
People v. Vinson, 99 Cal. 2nd 100, 221 P. 2nd 161....	19
Southern Pac. Co. v. Arthur, 10 Utah 2nd 306, 352 P.	
2nd 693	20
State v. Noble, 6 Utah 2nd 40, 305 P. 2nd 495.....	27
State v. Peek, 1 Utah 2nd 263, 265 P. 2nd 630.....	10, 18
Waterworks v. Drinkhouse, 92 Cal. 532, 28 P. 681....	19
Weber Basin Water Conservancy District v. Ward, 10	
Utah 2nd 29, 347 P. 2nd 862.....	20
Weber County v. Ritchie, 98 Utah 272, 93 P. 2nd 744	17

STATUTES CITED

Utah Rules of Civil Procedure, Rule 51.....	24, 28
---	--------

In the Supreme Court of the State of Utah

STATE OF UTAH, by and through
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Appellant,

vs.

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

Respondents.

CASE
NO. 9544

BRIEF OF RESPONDENTS

ADDITIONAL STATEMENT OF FACTS

The respondents in this case, Marion and Rintha Christensen, are elderly people who have been in the farming and sheep-raising business at their property in American Fork, Utah, since before 1930. They have specialized in maintaining 400 -450 head of sheep for the last ten years on their set-up consisting of over 27 acres of hay, grain, corn and pasture on their farm, together with 1.34 acres containing a home, granary, four sheds and pasture located in the south part of American Fork City, three-fourths of a mile north of the farm acreage. The year-

round sheep operation was operated solely by respondents and they utilized the protective lambing sheds (converted chicken coops) with pasture on their home property to early-lamb 150-175 ewes at a time in March and April of each year to obtain favorable marketing conditions. They also used the sheds and pasture with available electricity and water to shear and dock the sheep in the spring. After the herd was taken to range in June, the ten valuable rams of respondents were kept on the home pasture the balance of the year. Respondents could conveniently trail the sheep back and forth the three-fourths mile between the farm and the home set-up by using a rear entrance and gate which they had used for over twenty-five years (Tr. 16-28, 47-52, 69, 152-156, 197).

Respondents used their truck to put feed in the man-gers for the sheep they were caring for in the pasture at the home property. Without the pasture to feed and graze the 175 head of lambing ewes and to shear the sheep, they could not use the sheds on the property. The State of Utah condemned practically all of the pasture, leaving only the buildings, and made it impossible to accommodate any large number of sheep for tending and care on the home property and the condemnation cut off the access trail to the south, making it unfeasible to drive the sheep around the underpasses to travel between the farm and the home property. Lack of feed and room made it impossible to pasture the ten buck rams at all. No other pasture grounds north of the freeway were available to respondents for utilizing their sheds and facilities on their home location (Tr. 20, 28, 43, 48, 156-160).

On damages, there was a wide variance regarding severance between the witnesses for the owners (respondents)

and witnesses for the State. The evidence in behalf of respondents showed that usefulness and value of the sheds and buildings remaining (not movable nor salvagable) had been destroyed by the taking of the pasture ground and the proximity of the highway had damaged the house with the attendant factors of traffic noise, dust, dirt, headlights, etc. The grade of the road was five feet higher than the ground surface in back of respondents' house and the road ascended 25 feet higher two blocks east and west of said house to go over the underpasses (Tr. 9-11, 73-83, 90-94, 121-126). The witnesses for the State both testified there was **no damage** to the remaining land and buildings except for trivial amounts of \$420.00 (Harding) for leaving the property unsquare (Tr. 180) or of \$620.00 (Stein) for reducing the size of the building lot (Tr. 219).

A summary of the evidence of respondents and their expert witnesses on values and damages entitled to compensation from the State of Utah, follows, to-wit:

Marion and Rintha Christensen (Tr. 39-40, 164):

(1)	.54 acre taken.....	\$1,350.00
(2)	Damages to home, sheds, buildings and remainder land	\$6,932.00
		<hr/>
(3)	Total damage	\$8,282.00

Denzil A. Brown (Tr. 57-58):

(1)	.54 acre taken.....	\$1,080.00
(2)	Damages to home, sheds, buildings and remainder land	\$5,694.48
		<hr/>
(3)	Total damage	\$6,774.48

Milton Harrison (Tr. 90-91):

(1)	.54 acre taken	\$1,080.00
(2)	Damages to home, sheds, buildings and remainder land	\$5,940.00
(3)	Total damage	\$7,020.00

Afton Payne (Tr. 121, 125-126):

(1)	.54 acre taken	\$1,080.00
(2)	Damages to home, sheds, buildings and remainder land	\$5,698.50
(3)	Total damage	\$6,778.50

The jury viewed the premises (Tr. 15) before the taking of evidence from the witnesses, but no complaint was made by appellant of any irregularities with the jury at the view until after the verdict was rendered and appellant filed a motion for a new trial (R. 78). The affidavit (filed after trial) of the Federal road employee, Faxon (R. 83-84) shows on its face that Attorney Aldrich for the State of Utah was present and participated prior to the trial at the jury view in the conversations alleged to have been improper. A counter-affidavit by said respondent Rintha Christensen (R. 24-26), among other things, categorically denies she ever addressed the jury at large and denies the Affidavit of said Glen S. Faxon, Jr. The Court after the view (Tr. 16) admonished the jury: "You are instructed again that anything you may have heard anyone say relative to the property, either by attorneys or the Bailiff or anyone else, you are not to consider as evidence in the case." The trial then proceeded.

The zoning question regarding respondents' property presents no problem because all of the witnesses testified it was zoned agricultural - residential at the time of condemnation and that this allowed the continuing usage for sheep operations as conducted by respondents in the past and that this was the highest and best use of the property (Tr. 45-46, 73, 83, 95-96, 110, 132-138, 153, 172-174, 219, 231). Marion Christensen testified he could not raise poultry there now (at time of trial) because he hadn't raised them there for past two years and thus were zoned out (Tr. 27). The state was not prevented from presenting evidence of zoning as both of the State's witnesses, Harding and Stein, **did testify** that the property could be used for poultry raising at date of **condemnation** (Tr. 177, 219-220). The State, by counsel, said they wanted the knowledge of their witness and not the American Fork ordinances as evidence, though Harding admitted on voir dire he had the ordinances and would produce them. The State failed to produce the ordinances and yet had their witness explain the zoning regulation (Tr. 174-175).

The State even had respondents' witness, Denzil Brown, testify on cross-examination that the sheep usage of the property had become non-conforming (though permitted) by asking whether if this use were ever **discontinued for a period of time**, could it thereafter be used for sheep production (Tr. 73).

The Court, in its Instruction No. 7 to the jury (Tr. 272, R. 61), indicated that damage to the remaining land and the use to which said remainder was being put by respondents were elements to be considered in fixing the damages, **if any**. This instruction was not considered injurious

by appellant as it was not urged as error in its Motion for Remittitur, and/or Motion for New Trial (R. 76-79) nor in the Notice of Appeal setting forth the "matters and points of error" (R. 87-88).

The trial judge considered the arguments and written briefs filed by the parties in the matter of the appellant's Motion for Remission of Verdict by Remittitur, and in the Alternative, a Motion for New Trial, and duly refused any remission of the amount of the verdict, denied said Motions and upheld the jury verdict assessing the defendants' compensation and damages, which verdict was based on the great weight of evidence and within the issues of the case as follows:

(1)	Fair market value of .54 acre of land as of January 18, 1960	\$1,080.00
(2)	Damages accruing to the de- fendants' remaining property not taken by reason of its severance	\$4,420.00
		<hr/>
(3)	TOTAL VERDICT	\$5,500.00

(R. 72-73, 75, 82, 85-86)

STATEMENT OF POINTS

POINT I

THE VIEW BY THE JURY OF THE CONDEMNED PREMISES DID NOT PREVENT THE STATE OF UTAH FROM OBTAINING A FAIR AND IMPARTIAL TRIAL.

POINT II

THE STATE OF UTAH WAS NOT DENIED A FAIR AND IMPARTIAL TRIAL BY QUESTIONS ASKED ON CROSS EXAMINATION OF STATE'S WITNESS WILBUR HARDING.

POINT III

THE LOWER COURT DID NOT REFUSE TO RECEIVE EVIDENCE ON BEHALF OF THE STATE OF UTAH, APPELLANT, RELATING TO ZONING RESTRICTIONS ON THE SUBJECT PROPERTY.

POINT IV

JURY INSTRUCTION NO. 7 OF THE FOURTH DISTRICT COURT WAS NOT AN INCORRECT STATEMENT OF THE LAW AND DID NOT CONSTITUTE PREJUDICIAL ERROR.

ARGUMENT

POINT I

THE VIEW BY THE JURY OF THE CONDEMNED PREMISES DID NOT PREVENT THE STATE OF UTAH FROM OBTAINING A FAIR AND IMPARTIAL TRIAL.

The State of Utah requested the view of the premises by the jury before the chief evidence had been presented in the case (Tr. 13-15). After the view the court admonished the jury at the beginning of the presentation of the evidence (Tr. 16) as follows:

"You are instructed again that anything you may have heard anyone say relative to the property, either

by attorneys or the Bailiff or anyone else, you are not to consider as evidence in the case."

The State of Utah made no record at any time during the progress of the trial of any irregularities allegedly occurring at the jury viewing of the premises, but did complain after the jury verdict was received through an affidavit (R. 83-84) by a Federal Bureau of Roads employee, Glen E. Faxon, setting forth alleged irregularities of which Attorney Aldrich for the State of Utah had full knowledge at the said jury viewing of the premises. No motion to impanel a new jury or declare a mistrial was ever made by anyone in this case.

If nothing else occurred, the State should be deemed to have waived its right to a mistrial, if any, by not taking timely objection to alleged irregularities or not moving for a new jury or for a mistrial.

However, the said affidavit by Faxon, alleging misconduct was controverted and denied by an affidavit of respondent, Rintha Christensen (R. 24-26), which also sets forth certain irregular conduct of appellant's Attorney Aldrich in personally pointing out to the jury and showing the jury the premises before respondents appeared on the premises with their attorneys. If the parties proceeded to trial and knowingly submit the case to the jury after such view, they both should be bound by the jury verdict and could not be heard to complain thereafter, especially after the warning and instruction by the court to the jury to disregard anything they heard anyone say relative to the property at the view.

Respondents deny any prejudicial misconduct, but see annotation 45 ALR 2nd 1124, 1130, setting forth cases that

prejudicial misconduct at a jury view may be waived by failure of the losing side to make a timely objection; or that misconduct may be corrected by an instruction from the Court to disregard anything the jury may have learned as a result of such misconduct; or that misconduct by both sides offsets each other.

The discretion of the trial judge (who knew all the conditions of the jury view) in not granting the State of Utah any relief upon the basis of such alleged irregularities should be upheld. The question was argued and briefed for the lower Court by the parties prior to the denial of the appellant's Motion for a New Trial after the verdict had been entered (R. 76-86). In addition, the substantive matters alleged by said Faxon to have been said by Rintha Christensen were not prejudicial. Appellant complains only that it was prejudiced by the presence of said respondent and that she had to be cautioned by State's attorney. This, the appellant never complained about until after the trial, while knowing all the facts during the progress of the trial. Appellant didn't even cross-examine Mrs. Christensen on her testimony which set out all the facts allegedly stated by her improperly at the view (R. 165).

There was no issue whatever in the case respecting loss of profits as mentioned on P. 12 of appellant's brief. Rather, respondents contended (and the jury agreed) that the evidence showed the usefulness and value of the sheds and buildings for accommodating large numbers of sheep had been destroyed by appropriating virtually all of the pasture and leaving only the buildings (Tr. 20-21, 124-125, and States' Exhibit No. 1).

Hayward v. Richardson Construction Co. (Mont. 1959) 347 P. 2nd 475, holds that a losing party must obtain an adverse ruling from the court regarding improper matter going before the jury, before he is in a position to contend on appeal that trial court committed error; and also that where there has been misconduct in the trial without an opportunity to object in advance, the aggrieved party may move the court for a mistrial or *venire de novo*, and failing in that, he will be deemed to have taken his chances with the jury.

POINT II

THE STATE OF UTAH WAS NOT DENIED A FAIR AND IMPARTIAL TRIAL BY QUESTIONS ASKED ON CROSS EXAMINATION OF STATE'S WITNESS WILBUR HARDING.

At the outset, it should be understood that the questions complained of (not the answers) were asked of appellant's expert witness, Wilbur Harding, upon cross-examination by counsel for respondents. Also, be it remembered that Mr. Harding was not an ordinary witness, but an expert hired and paid by appellant to make appraisals and be a professional witness for the State of Utah Highway Department as a part of his business.

The case of State v. Peek, 1 U. 2nd 263, 265 P. 2nd 630, holds that "as long as cross-examination tends to disclose the truth, it should never be curtailed or limited." In an extensive opinion in the Peek case, this court justifies the wide latitude allowed for cross-examination, especially of value witnesses and opinion witnesses to show their familiarity or lack of familiarity with the value of

similar property. The opinion notes that value on **similar** property may be inquired into on cross-examination even in jurisdictions which exclude such evidence on direct examination. Such cross-examination may include the details of such sales and the items used by the witness in arriving at his valuation. Quoting from 5 Nichols on Eminent Domain, 183, Sec. 18.45 (2), the opinion states the following:

“The scope of the cross-examination of experts and other witnesses who have testified to value in land damage cases is very broad, since cross-examination is often the only protection of the opposing party against the unwarranted estimates that a certain class of mercenary experts is wont to indulge in A witness who has given an opinion of value may, however, in the discretion of the court, be asked questions on cross-examination, for the purpose of testing his opinion, which would be improper upon direct examination

“The opinion of a witness may be impeached by showing that his acts are inconsistent with his words, as for example by showing that he has offered the same or similar property for sale at a price far different from what he now says it is worth, or he may be asked whether he has not made inconsistent statements upon the same point upon other occasions.”

In the cross-examination of the “expert” Willbur Harding that appellant complains of (Tr. 200-201) it was brought out that said Harding had in fact appraised the adjacent similar property for the State of Utah, but respondents were not allowed to inquire upon cross-examination what, if anything, the expert had previously allowed in his opinion or appraisal for proximity of the high-

way next to the property in question. Certainly respondent should be able to test the credibility of such a witness or impeach him if he has been inconsistent or taken a different position than he is now testifying to before the jury. Harding had previously testified that there was no proximity damage because of the condemnation and construction of the highway and that his total severance damage value of \$420.00 was allowed because the back of the lot was irregular in shape rather than squared (Tr. 178-180). He also testified that the land and buildings could be utilized for the same purposes as before the taking of the .54 acre pasture; that there was no noise damage from proximity of the highway because of the location of the property in an area not the most desirable and that sales in the area since the construction of the highway were for their former prices without any depreciation because of the highway. He testified of residential values in the area of \$2,000.00 per acre and comparables in the area at \$2,000.-00 per acre for the highest and best use to which he could put the property. He also gave sale prices for contiguous property abutting the highway facility after it was known that the highway was to be built and also after it was in fact completed and that said properties sold (in his opinion) for the same thing that they would have sold for had the highway not been put in (which accounted for the adjacent properties to the east and to the south of the property in question) though the buyer was not stated except to say part of one parcel was taken by the State of Utah (Tr. 185-187).

On cross-examination, Harding admitted he differed from respondents' appraisers on severance and that he did

not get any information from respondents or go through their home to make his appraisal (Tr. 188-191). Also he admitted he didn't know respondents owned additional property and two sheds than he first thought when he made his appraisal before the condemnation, which appraisal was unchanged at trial permitting only the \$420.00 severance for irregular shape of the lot; that he knew respondents were in the sheep business having unknown numbers of sheep operated on a split operation between home and farm properties; that the highest and best use of the property was what it was being used for and that there was traffic use out of the south end of the property past the ice plant to the south; that he was not in the sheep business but knew some about sheep but no experience with large numbers of sheep; that he did not know the number of trucks that will pass this property when six lanes opened up, but had an opinion regarding the effect of lights, noise and fumes from diesels on the remaining property (Tr. 191-199).

The jury had been to the property to see how it lay with respect to the surrounding area. Harding had testified of the values of the properties to the east and to the south of the subject property and respondents had a right to inquire into his knowledge of the disposition of the adjacent property to the west that was similarly situated with respect to the proximity of and severance by the highway. For testing the credibility of the witness, Harding, who says there is no proximity damage in this case, cannot respondents examine his reasons and values given for land similarly situated of which he had knowledge and experience, but which he pointedly omitted from his direct testi-

mony in explaining the values of the surrounding properties, part of which were taken for the same highway project?

One of the primary issues of this case was whether or not there was **proximity** damage to this property caused by construction of the highway. All the evidence up to the time Mr. Harding was sworn to tell the truth was that there was proximity damage, but Mr. Harding said there was not. Would the reasons given by Harding to explain why he previously allowed proximity for the property next door west as opposed to why he did not so allow for the property in question be improper? They could certainly be explained and differentiated on these side by side appraisals and this would go to the weight of the evidence and not that it was inadmissible or improper. How could the appellant know what the answers of the witness were going to be before he answered? The answer is that appellant must have known the witness was going to discredit himself or be embarrassed if he answered.

However, the witness did not answer anything damaging except that he did not know. It should be noted that the observation by Attorney Aldrich was not an objection but an observation which the lower court need not make a ruling upon. The court had previously warned Mr. Aldrich that he could rule only on objections and motions, not observations (Tr. 18-19).

The amount stated of \$3500.00 in the question was much less than the testimony of respondents' witnesses for the amount of severance damage in the instant case and thus could not be prejudicial as far as the jury was concerned. However, counsel for respondents were unable to

get any information from Mr. Harding on the question as he did not answer and the trial judge sustained the objections to further questions.

In view of the direct evidence about value of adjacent properties, we think that we were entitled to elicit from Harding whether there was **proximity** damage he allowed to the west property resulting from the location of the highway across the south side of both properties. It is everyday practice to ask leading questions of an adverse witness on cross-examination and to show previous inconsistent or contradictory opinions of an expert witness.

The court noted himself that no harm had been done on page 201 of the transcript where he observed he had sustained appellant's objections and that the witness had not answered the line of questions objected to. If the damage of this questioning was so prejudicial, why did not counsel ask for a mistrial or other relief out of the hearing of the jury? No motion for any relief was ever made by appellant except upon Motion for Remittitur and for New Trial, after the verdict which the trial judge, in his discretion, denied and upheld the **full jury award** which was based on the great weight of the evidence. Obviously, the trial judge felt there was no prejudice to appellant here, even using hindsight.

Respondents felt they had a right to inquire of this adverse witness the full basis for his opinion that there was no proximity damage to this property. The trial court did not allow respondents to test his credibility nor impeach him and the respondents have just cause to complain rather than appellant.

The court was correct in allowing Harding to answer

if it were not true that the adjacent property owner was paid a substantial sum as damages for proximity of this highway. It would have been contrary to and at variance with the direct testimony of this adverse witness that there was no other severance damage than the leaving of an irregular back lot line.

At least the asking of the questions in an attempt to impeach or test an adverse witness cannot be error or prejudicial. One would be afraid to fight for the truth if the mere asking the question (even a controversial one) is subject to recrimination. It was not asked to establish value or a comparable sale, but to show that the witness, Harding, knew of or himself had allowed substantial proximity damages for property similarly situated. The State of Utah was not even mentioned in the question.

The cases cited by appellant under this point do not deal with cross-examination or where the questions are designed to test credibility or impeach an adverse witness. Most of the citations deal with cases where counsel ask questions before a jury when they know it to be improper or when they are acting in bad faith. *Palace Laundry Co. v. Royal Indemnity Co.*, 63 Utah 201, 224 P. 657 says in a decision by Judge Frick:

“It is next insisted that the judgment should be reversed for the misconduct of plaintiff’s counsel in propounding a certain question to one of the defendant’s witnesses. If judgments were reversed because opposing counsel propound improper or useless questions to his adversary’s witnesses, few, if any, judgments could be permitted to stand.”

Held, such contention was without merit. This case has never been overruled or modified in Utah.

Oklahoma Ry. Co. v. State ex rel Highway Dep't 205 Okla. 325, 237 P. 2nd 878, 881:

"The burden is on the appellant to show that the error was prejudicial. Before such misconduct of counsel can result in a reversal of the judgment, it must appear that substantial prejudice resulted therefrom and that the jury were influenced thereby, to the material detriment of the party complaining."

And, if the verdict was otherwise amply supported by competent evidence, there was no substantial error.

The Ritchie case cited by appellant, Weber County v. Ritchie, 98 U. 272, 96 P. 2nd 744, is not applicable to the case at bar for the reason that it involved an attempt to put on direct evidence of a price paid by a condemning authority but the price stated by the witness included unsegregated damage amounts in addition to the value of the land such that it was inappropriate to show the comparable value of the land alone.

The old rule concerning exclusion of sales to a condemning authority is as stated by appellant's brief. However, the new rationale and holdings of the more recent cases follow the dissent of Judge Carter in the California case cited in appellant's brief on page 17 thereof, City of Los Angeles v. Cole, 28 Cal. 2nd 509, 170 P. 2nd 928, which case was overruled by County of Los Angeles v. Faus, 48 Cal 2nd 672, 312 P. 2nd 680 (1957) and followed by Covina High School Dist. of L. A. County v. Jobe, 174 Cal. 2nd 340, 345 P. 2nd 78 (1959). The Faus case stands for the proposition that in a condemnation proceeding, evidence of prices paid for similar property in the vicinity, including prices paid by condemner, was admissible on di-

rect examination **and** cross-examination of witness who was presenting testimony on issue of value of condemnee's property. The decision also states that in overruling a line of contrary decisions that the former rule is no longer the majority rule and was contrary to logic, unrealistic and obsolete. However, the sale must be genuine, and the price must be actually **paid** or substantially secured.

These recent cases follow the rationale of the *Curley v. Mayor of Jersey City* case, 83 NJL 760, 85 A. 197, 43 LRA, NS 985, "in the absence of extraordinary circumstances, we are unable to see, as a general rule, why private sales to parties having the right to condemn do not come quite as near representing in their results true market value as do such sales made between parties neither of whom have this power." Most sales involve parties who are under pressure of one kind or another to either buy or sell for their own particular reasons. The fact of a sale being to a condemning authority is a "matter going to the weight or value of the evidence, not its admissibility." See Institute on Eminent Domain, 1961, Southwestern Legal Foundation, Dallas, Texas, Pages 99-103, 110-111, which sets out the foregoing new legal development and also recites that cross-examination of an expert witness almost never is grounds for reversing a judgment from a lower court.

The rule has always been that even where the rule prevails that comparable sales are not admissible on direct examination, that evidence of such sales may be brought out on cross-examination for the purpose of discrediting a witness. *State v. Peek*, *supra*. Thus, cross-examination of condemnor's witnesses on what they had valued other lands was proper for the purpose of testing the accuracy

and honesty of their valuations of the land in their direct examination, *City of San Luis Obispo v. Brizzolara*, 100 Cal. 434, 34 P. 1083. Also, how much condemnor had paid for other lands was not admissible as evidence in chief, but only by way of cross-examination for the purpose of testing the fairness or honesty of the opinion of the witness given upon his direct examination, *Waterworks v. Drinkhouse*, 92 Cal. 532, 28 P. 681.

Atchison, Topeka and Santa Fe RR Co. v. Southern Pacific RR Co., (1936) Cal. 57 P 2nd 575, held evidence of prices paid for other lands than those sought to be condemned was proper on cross-examination of plaintiff's witnesses in eminent domain proceedings. *Palladine v. Imperial Valley Farm Lands Ass'n*, 65 Cal. App. 727, 225 P 291, 303, held cross-examination on value of other lands is proper to test credibility and to impeach opinions of witnesses, but not for fixing the value of the land. In *People v. Vinson*, 99 Cal. 2nd 100, 221 P. 2nd 161, cross-examination of expert witness was allowed to test his knowledge, and to test the weights to be given to his opinion and to impeach his opinion as to values stated by inquiring the prices which are asked or have been paid for other similar lands.

The Covina High School District v. Jobe case, *supra*, held that the asking and answering of leading questions on cross-examination of expert witnesses regarding price paid by another school district in settlement pending condemnation litigation was not reversible error; that in condemnation proceedings wide latitude should be allowed on cross-examination of expert witnesses to test their reasons and validity of their opinions as to value; that cross-examina-

tion, and by leading questions, of school district's expert witnesses on specific prices, values and amounts paid for other parcels was permitted for the limited purpose of testing witnesses and was not evidence of market value. The case also recites, "Had the plaintiff been of the opinion that the asking of the question on cross-examination constituted error, it might have been well for it to have made a motion for a new trial which it did not do. We think there was no abuse of discretion."

Our Utah Court has held in *Southern Pacific Co. v. Arthur*, 10 Utah 2nd 306, 352 P. 2nd 693, that prices paid for similar property is admissible to show value of property taken in condemnation proceedings, and as showing source of knowledge upon which opinion evidence is based. In *Weber Basin Water Conservancy District v. Ward*, 10 Utah 2nd 29, 347 P. 2nd 862, this court held the purpose of cross-examination was to test credibility and whatever may tend to explain, modify or contradict the direct evidence; and that though trial judge has discretion to control cross-examination, he should not prevent inquiry into matters having direct bearing upon the vital issues of the case.

In the case at bar, an attempt was being made to test the credibility of and impeach the opinion of appellant's expert witness Harding who said there was no proximity damage resulting from the construction of this highway. Respondents' witnesses had already established by their testimony their estimate of the market value, proximity damage and severance damage involved. Appellant wants a new trial now for even suggesting a conflict in the knowledge or opinion of its expert witness on the grounds that

the question alone was misconduct, bad faith, prejudicial and embarrassing to appellant and said expert. Appellant and Mr. Harding should be embarrassed in saying there was no proximity damage or substantial severance in this case. These damage values of proximity and severance of the property were the main issue of the case and it certainly cannot be error to attempt to cross-examine an adverse expert on this question and his previous testimony.

POINT III

THE LOWER COURT DID NOT REFUSE TO RECEIVE EVIDENCE ON BEHALF OF THE STATE OF UTAH, APPELLANT, RELATING TO ZONING RESTRICTIONS ON THE SUBJECT PROPERTY.

Counsel for appellant is incorrect in stating that the lower court refused evidence on zoning restrictions of the subject property. It is not pointed out where in the transcript that testimony was refused on pertinent zoning regulations. As set out in respondents' brief under Additional Statement of Facts, we have set forth with transcript references that all the witnesses of both appellant and respondents, consistently testified that **at the time set for compensation**, January 20, 1960, the condemned property was zoned residential-agricultural which allowed for keeping sheep and that this was the highest and best use of the property. Appellant's expert witnesses, Harding and Stein, were specifically allowed by the court to testify that the Christensen property could be used for chicken raising at the time said premises were condemned (Tr. 177, 220); and also that **after** said condemnation, the zoning ordinances were changed (Tr. 175, 222). Apparently appellant is

complaining that the lower court did refuse to allow said Harding and Stein to testify that under the new zoning ordinance continued sheep usage "was, at best, non-conforming" (Appellant's Brief, P. 25; but compare with "objectives" Tr. 176).

The trial of this case was had in March, 1961, approximately three months after appellant's witness, Stein, said the new zoning ordinance went into effect (Tr. 222) and about fifteen months after the property had been acquired by appellant under eminent domain. Respondent, Marion Christensen, correctly testified, without objection from appellant, and also under cross-examination, that the **non-usage** of the property for chickens for two years prior to the time of trial made it impossible to raise chickens **now** under the new ordinance (Tr. 27, 45-46). Whether or not the new ordinance made **sheep usage** on said property "non-conforming" was immaterial on the question of damages and the trial court was quite correct in refusing to allow appellant's witnesses to state in what way the zoning ordinances have been **changed or modified** since the date set for fixing the amount of compensation (Tr. 175-176, 221-222). Besides, Stein testified that he didn't even take into consideration the zoning ordinance change in his appraisal (Tr. 222) and Harding testified in his opinion the property could be utilized for the same purpose after the construction of the highway as it was utilized for before said condemnation (Tr. 179).

In other words, the evidence is uncontroverted that the condemned premises could be used for raising sheep or chickens at the time of said condemnation. There simply is no issue regarding the zoning status of the property

and the court allowed full disclosure of the understanding of the witnesses regarding effects of zoning regulations on the market value of the property as of January 20, 1960, the time of the taking herein, and the only time which is pertinent to the affixing of damage values.

Apparently the only purpose of appellant in raising the point at all during the trial was an attempt to confuse the jury on the meaning of the term "non-conforming" with regard to continuing usage of the premises for sheep (Tr. 45-46, 73, 83, 111, 134) whereby on cross-examination (and in argument to the jury) appellant raised the question of sheep usage now as being "non-conforming" and if discontinued it could not be resumed.

Or, perhaps appellant designed for the respondents to take the money they could not obtain for their damages and rush out to buy several thousand chickens to put in their sheep shed buildings before the new restrictive zoning ordinance came into effect. The operation of the respondents was for raising sheep since 1947 and if the value of the improvements is destroyed for such usage, appellant cannot force respondents to undertake a hazardous chicken operation merely to utilize existing facilities. However, the court allowed appellant to put in this evidence allowing chicken usage by both its witnesses, Harding and Stein. How can appellant complain on lack of evidence concerning zoning? Sheep usage is admittedly permitted under the conditions existing January 20, 1960, for residential-agricultural zone or continuing thereafter under a changed zone. The evidence on zoning was important only to show what the expert appraisers for both litigants took into consideration in evaluating the damages compensable and

would be thus important only to determine the weight to be given the opinions by the jury.

POINT IV

JURY INSTRUCTION NO. 7 OF THE FOURTH DISTRICT COURT WAS NOT AN INCORRECT STATEMENT OF THE LAW AND DID NOT CONSTITUTE PREJUDICIAL ERROR.

This last point raised by appellant seems to be an afterthought of counsel to find error in the record for the purpose of this appeal. The issue concerning the alleged prejudicial error of Instruction No. 7 was not even mentioned by appellant for grounds for relief in its Motion for Remittitur or its Motion for New Trial (R. 76-79) nor in its Notice of Appeal setting forth the "matters and points of error" (R. 87-88). We think it should be disregarded on this ground alone.

However, the objection to this instruction by State's Attorney Aldrich (R. 282) specifically objects to the second paragraph thereof relating to damages to respondents' sheep operation. Any other objection to the instruction is general and is therefore not entitled to consideration. *Dimmick v. Utah Fuel Co.*, 49 U. 430, 164 P. 872, holds that where an exception is taken to only a portion of an instruction, the court on appeal cannot consider complaints of other portions thereof. An objection to an instruction which states it is contrary to the law and evidence of the case does not comply with the requirements of Rule 51 of Utah Rules of Civil Procedure; and since the purpose of the rule is to bring to the attention of the court specific errors to give an opportunity to correct the same, the ob-

jection should be specific enough to give the trial court notice of every error in the instruction, which is complained of on appeal. *Employers' Mutual Liability Insurance Company v. Allen Oil Co.*, 123 U. 253, 258 P. 2nd 445, 450.

Under these cases, objections for the first time in appellant's appeal brief are not well taken as to the second sentence of said instruction involving cutting off access to a highway, vibrations, dust or obstructing of view.

The theory of the appellant in this case, again, was that there was no interference with respondents' sheep operation by the taking by the State of Utah of the pasture ground for a highway and leaving the buildings in an undamaged condition. This instruction properly sets out the issue giving both theories of damage, namely, what are the elements to be considered in fixing the damages, **if any**, to the remaining land of the defendant. These damages may include such items as the cutting of remaining land into irregular or inconvenient shapes such as was testified to by State's witnesses Harding and Stein. Or it may include cutting off access to a road (enjoyed by respondents with their sheep at the rear of the premises for 25 years) or noise, dust and attendant damages of the thruway testified to by respondents and the expert witnesses. Or it may include as an element the use of the property for **sheep operations** as set forth by all the witnesses (if the usage of the remainder thereof was impaired by the taking).

The cases cited by appellant's brief on page 27 thereof, stand for the proposition that an instruction which explains the evidentiary value of some facts **to the exclusion of others** constitutes commenting on the evidence by the

court. Yet Instruction No. 7 is then complained of not that it excludes any facts, but that it includes too much. It should be remembered that appellant's theory of the damages was that there was no damage to the remainder property from the items mentioned in the instruction except for the first items set forth therein of cutting the land into irregular (Harding) or inconvenient (Stein) shapes. The instruction further provides in two places that the damage to the remaining land may be none by using the term "if any" in connection with the fixing of damages.

Counsel is incorrect in stating on P. 28 of appellant's brief that the construction of the public improvement did not limit or restrict any access to the defendant's property, which they enjoyed prior to the taking. Respondents testified of the access they enjoyed, as did appellant's own witness, Harding, who had been in the real estate business in American Fork for 16 years, that respondents have taken their sheep to their farm on the road south of the condemned property for as long as he could remember (Tr. 21-26, 158-159, 166, 197). Respondents' testimony also reveals they could not drive their sheep to their home property now at all with the freeway built as it is and the city restrictions preventing such use of city streets north of the freeway.

Counsel for appellant also errs in claiming damages were allowed by Instruction No. 7 for a business, loss of profits or prospective damages to a business concern. The instruction is clear that the items to be considered for damages, if any, was the use of the land as a unit for sheep raising purposes and the lessened value of the remainder as a site for the purposes for which the land was being

used. No evidence of damages to profits or incomes was received by the court. An analysis of the values on damages (relating to the sheep operation) reveals that the amounts were obtained by the respondents' expert witnesses principally by depreciating the costs of the lambing sheds and granary as totally useless for continued sheep operations and non-salvagable (See appraisal summary references in Additional Statement of Facts, *supra*). Respondents and their expert witnesses testified the property and buildings could no longer be used for sheep operations after the taking and appellant's witness Harding said it could—that was the issue.

State v. Noble, 6 U. 2nd 40, 305 P. 2nd 495, cited by appellant, deals with loss of future profits from sale of sand and gravel deposits on land condemned and has no bearing on this case question of severance damages to the remaining tract.

"The owner is not limited to recovery of the value of only that part of the tract which was physically appropriated. The entire tract is considered as a whole and the effect of the condemnation and the projected use evaluated so that determination can be made of what he had prior to the proceeding and what he had left thereafter." *Nichols on Eminent Domain*, Volume 4, P. 298, Sec. 14.1(2). "Just compensation guaranteed by the constitution implies not merely the value of so much land separately from its connection with the whole tract, but the injury or loss to the whole estate caused by taking from it the part which is so appropriated." *Ibid*, P. 312, Sec. 14.21. See also Pages 328 to 337, Sec. 14.231, 14.232 and 14.24. "The size and shape in which the remainder of the parcel is left is

sometimes such that the land cannot be put to its most advantageous use. It is generally agreed that it may be shown to what uses the property might have been put prior to the taking and the limited use to which the remainder may be devoted subsequently as a result of such taking. Evidence is admissible that the remainder area is no longer capable of use for a particular purpose or that its facility therefor has been impaired." Ibid, Pages 352-354, Sec. 14.243. "Such depreciation may result also from the manner in which the severance is effected, or from the fact that necessary or desirable facilities are thereby rendered inaccessible or difficult of convenient access." Ibid, Pages 356-358, Sec. 14.243.

Anyway, an exception exists to the general rule against showing profits from use of land, when the income or profits represent the proceeds from the sale of **livestock** cared for and fed on the land in question, because the income is derived from the use of the land and not as profits from a **business** conducted thereon, *City and County of Denver vs. Quick*, 113 P. 2nd 999, 134 ALR 1120.

Any alleged improper words in the instruction relating to obstruction of view, odors or vibrations, etc. were certainly not prejudicial because these points were not stressed by either party (though there was some evidence on it) and were not considered of much consequence on the issue of damages. This wording on damages was largely incorporated from Am. Jur., Proof of Facts, Vol. 4, Pages 452-453.

Rule 51, Utah Rules of Civil Procedure, required that if the court states any of the evidence, it must instruct the

jury that they are the exclusive judges of all questions of fact. This the lower court did in Instruction No. 13 (Tr. 277) and such instruction would remove any prejudice that allegedly might flow from Instruction No. 7.

CONCLUSION

The dramatic language in appellant's brief characterizing the evidence and the "holocaust" of errors simply does not compare with the truth, if the transcript of the case is studied to see what really occurred during the trial. The evidence presented by appellant was largely negative, but the jury verdict was based on the positive evidence of damages presented by respondents. Appellant has failed to show any prejudice or that the verdict was not sustained by the evidence. As a matter of law, the trial court has sustained the verdict of the jury and the judgment.

Respondents are elderly people deprived of their property without recompense for nearly two years by appellant. It would be manifestly unfair for them to have to submit to the expense and stress of a new trial, now requested by appellant, except for the most gross injustice to appellant resulting from the trial. Appellant never asked for relief from any such assumed gross injustice warranting a mistrial or new jury panel. Most of the matters here on appeal by appellant are routine and frivolous in the hope that a second trial would prove more favorable to the condemning authority. A comparatively small amount of money is involved and respondents are in danger of being litigated to ruin. Appellant has the land and respondents' money therefor, so that respondents are unable to replace what has been taken.

The jury verdict and judgment of the trial court below should be affirmed in the interest of substantial justice.

Respectfully submitted,

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