

1963

# Zion's First National Bank v. Spencer C. Taylor et al : Brief of Appellants

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *Porcupine Reservoir Co. v. Lloyd W. Kepper Corp.*, No. 9961 (Utah Supreme Court, 1963).  
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APR 16 1963

# IN THE SUPREME COURT OF THE STATE OF UTAH

FILED  
28 1963

PORCUPINE RESERVOIR COM-  
PANY, a corporation,

*Plaintiff and Respondent,*

vs.

LLOYD W. KELLER CORPORA-  
TION, a corporation; AVON LAND  
AND LIVESTOCK COMPANY,  
a corporation; H. A. SUMMERS,  
and CELLA SUMMERS, his  
wife; H. A. SUMMERS, JR., and  
MRS. H. A. SUMMERS JR., his  
wife,

*Defendants and Appellants.*

Supreme Court, Utah

Case No.  
9961

## BRIEF OF APPELLANTS

Appeal from the Judgment of the  
1st District Court for Cache County  
Honorable Lewis Jones, Judge

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(b) THAT THERE IS NO STATUTORY PROVISION FOR ADDITUR IN CONDEMNATION PROCEEDINGS.

(c) THE COURT USURPED THE DEFENDANTS' CONSTITUTIONAL AND STATUTORY TRIAL BY JURY AND SUBSTITUTED A NEW VERDICT BY THE COURT WITH THE AID, CONSENT AND REQUEST OF THE PLAINTIFF ONLY..... 9

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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PORCUPINE RESERVOIR COM-  
PANY, a corporation,

*Plaintiff and Respondent,*

vs.

LLOYD W. KELLER CORPORA-  
TION, a corporation; AVON LAND  
AND LIVESTOCK COMPANY,  
a corporation; H. A. SUMMERS,  
and CELLA SUMMERS, his  
wife; H. A. SUMMERS, JR., and  
MRS. H. A. SUMMERS JR., his  
wife,

*Defendants and Appellants.*

Case No.  
9961

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## BRIEF OF APPELLANTS

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### STATEMENT OF NATURE OF CASE

This is an action in eminent domain, the defendants representing three different interests and all three interests were tried simultaneously before the court and jury at one sitting.

## DISPOSITION IN LOWER COURT

The three cases were tried before a jury. There were three special verdicts rendered by the jury. Each verdict was composed of two parts: (1) the value of the land taken and, (2) severance damages. On two of these verdicts the severance damages awarded were less than the amounts testified to by any witness. The defendants moved for a new trial. The court, on motion of the plaintiff, by the theory of additur, attempted to add sufficient monies to the severance damage in each of the two cases so as to bring the severance damage to the minimum testimony of any witness at said hearing, the result being that the judgment entered in the one case was based upon the jury's verdict, but, the amended judgment entered in the other two cases was based upon the court's verdict.

## RELIEF SOUGHT ON APPEAL

Defendants seek an order from this court vacating the judgments in all three cases and directing that a new trial be granted.

## STATEMENT OF FACTS

Porcupine Reservoir Company, a corporation, being a private corporation of the state of Utah, sought



to condemn certain lands belonging to the defendants in Cache County. A fee simple title was sought in and to the reservoir area and an easement was sought where the diverting works would be situated. The defendants, through their counsel, requested separate trials and said request was denied by the court. The jury was impanelled to hear all three cases simultaneously. The property owners and two expert witnesses, Thomas Baum and Haven Barlow, testified as to value and damages for the defendants. Two witnesses, Alden Adams and Marcellus Palmer, testified as to damages and value for the plaintiff. The testimony of all witnesses as to value and damages, by stipulation of counsel, was reduced to exhibits and received in evidence. The cases took five (5) days to try with exhibits numbering one (1) to sixty-three (63) inclusive being offered. The jury retired for its deliberations and in less than two hours returned its verdict, but, in two of the three cases, brought in a verdict on severance damages for less than that testified to by any witness.

## ARGUMENT

### POINT I.

#### THAT THE COURT ERRED IN DENYING DEFENDANTS' REQUEST FOR SEPARATE TRIALS.

The record is silent as to the official request made that separate trials be granted but on (R. 236) we

have the decision of the court in regard to the same, which is:

“The court: It would be the same thing as to Mr. Keller. We’re trying them all together now. No such thing as separate lawsuits. We simply haven’t got the time to try them separately.”

This is the answer given by the court to defendants’ request, which evidently was made off the record, that defendants have the matters tried separately. The court, as you see, absolutely foreclosed the defendants from separate trials. When the court did so, this situation resulted: There were three separate parties with their separate interests in this lawsuit, with problems arising in different directions; a jury of lay people are brought in who are forced off from their jobs and in some cases are resentful, and then attempt to feed into them the separate problems of each of the defendants, who are having their property taken away from them against their will; you attempt to explain and picture to them, the damages that will accrue to each of the defendants, put on an expert witness who talks about one case for a few minutes, changes over and talks about another and then changes over and talks about the third and then you come back and cross examine him on each of these cases on which he has given testimony. It becomes mentally impossible for the jury to grasp, separate and comprehend the various problems presented to them. You couple the foregoing with the objections that counsel from both sides make from time to time, the rulings either for or against the objections made.

Then add to that the problem of the total amount of money and damages. This all becomes cumulative and staggering in the minds of the jury. The rights of each individual are lost track of and in their place is the cumulative figure which the jury instinctively holds against each individual.

Then you add and create another problem in this: The Kellers' year around operation is extensive and must be shown and explained to the jury. It is natural for the jury to believe that the Kellers are extremely well-to-do because of their vast holdings. Defendants strongly feel in this case that the jury made up their minds to see that the amount awarded to the Kellers was held to a minimum, and in their desire to carry this out they even lowered it below the minimum.

I ask this question: How much of that demonstrated resentment, when three cases are being tried before the jury, might be carried over into the other cases? Then you are also faced with this: If you have an indifferent jury you are stuck with them for all three cases. The jury certainly proved its indifference when, with sixty-three (63) exhibits and five (5) days of testimony, it could sit down and determine the rights of three different litigants in less than two (2) hours. The only defendant who was awarded more severance damages than the minimum testimony was a widow lady and her son; the other two defendants were completely disregarded. It is the contention of the defendants that to force three defendants into one trial in an eminent

domain proceeding because the court adopts the attitude, "we simply haven't got the time to try them separately" is a far cry from justice. Defendants submit that to try three lawsuits of this nature simultaneously is not equitable, is not fair and is unjudicious. The defendants further contend that to be forced to try their cases in this manner is an abuse of discretion by the trial court.

## POINT II

THAT THE COURT ERRED WHEN IT DENIED DEFENDANTS' MOTION FOR A NEW TRIAL; BASED ON INADEQUATE DAMAGES <sup>being</sup> AWARDED <sup>since the damages are</sup> IN TWO OF THE THREE CASES WHICH WERE TRIED SIMULTANEOUSLY, WERE LESS THAN THE TESTIMONY OF ANY WITNESS.

We have tabulated below the testimony of each and every witness, insofar as the value of the land taken, severance damage and total, and have listed the jury verdict under each of the titles of the defendants so that the court can see at a glance the result of the five (5) days' testimony and the jury verdict, and it is as follows:

## Defendant Keller Corporation

	Land Taken	Severance	Total
Ex #4 Owner's testimony			
(def)	\$14,670.00	\$18,000.00	\$32,670.00
Ex #35a Haven Barlow			
(def)	11,900.00	8,250.00	20,150.00
Ex #38 Thomas Baum			
(def)	11,194.00	10,240.00	21,434.00
Ex #43a, 43b Alden Adams			
(pl)	2,195.00	3,884.20	6,080.00
Ex #57 Marcellus Palmer			
(pl)	2,287.50	4,855.25	7,145.00
Rec. Jury Verdict	3,663.00	3,200.00	6,863.00

## Defendant—Summers

Ex #30, 30a, 30b Owners testimony			
(def)	\$9,372.00	\$15,712.00	\$25,084.00
Ex #36, 36a, 36b Haven Barlow			
(def)	9,187.00	11,130.00	20,317.00
Ex #37 Thomas Baum			
(def)	7,706.00	14,884.00	22,317.00
Ex #44a, 44b Alden Adams			
(pl)	1,641.10	5,184.00	6,825.00
Ex #59 Marcellus Palmer			
(pl)	1,226.10	2,009.00	3,235.00
Rec. Jury Verdict	2,879.00	5,680.00	8,559.00

## Defendant—Avon Land and Livestock Company

Ex #34, 34a, 34b Haven Barlow			
(def)	\$6,814.00	\$1,732.00	\$8,546.00
Ex #39 Thomas Baum			
(def)	6,450.00	3,128.00	9,758.00
Ex #42a, 42b Alden Adams			
(pl)	2,439.40	2,000.34	4,450.00
Ex #58 Marcellus Palmer			
(pl)	1,550.90	1,732.66	3,285.00
Rec. Jury Verdict	3,678.00	1,574.00	5,252.00

The court will notice that in the tabulation of the Keller Corporation, the jury verdict for severance damages was \$3,200.00. The minimum severance damage testified to by any witness was that of Alden Adams, a witness for the plaintiff of \$3,884.20.

In the Avon Land and Livestock Company tabulation the jury verdict for severance was \$1,574.00. The minimum testimony of two people was that of Marcellus Palmer for \$1,732.66 and Haven Barlow for \$1,732.00. Mr. Adams in this case, however, testified \$2,000.34, yet he was the witness in the Keller case that was low, Mr. Palmer, in the Keller case, being nearly \$1,000.00 higher.

The defendants believe that when the jury returned a verdict contrary to the evidence and lower than the testimony of any witness, it was shown on the face of it that there was error in the form of influence of passion or prejudice, or of refusal of the jury to follow the court's instructions. In any event there was no evidence which would justify the verdict. The defendants assert, as a matter of right under such verdict, it was the court's duty to grant a new trial in all three cases. Defendants further believe that a new trial should be granted in all three cases for the reason that if the jury demonstrated in two cases, either passion or prejudice, or refusal to follow the instructions of the court that this is prima facie evidence that the same disregard of the rights of the defendants, in some degree, was carried into the other case. Inasmuch as the law, in re-

gard to Point II, and the cases which will be cited in Point III, will be applicable to both points, counsel feels it would be wise to list Point III and give the cases and text, then we will have mutual application.

### POINT III

THAT THE COURT ERRED WHEN IT ADOPTED PLAINTIFF'S THEORY OF ADDITUR, SAID ERROR BEING AS FOLLOWS:

(a) THAT IN A STATUTORY CONDEMNATION PROCEEDINGS, THE TAKING OF DEFENDANT'S PROPERTY IS PROTECTED BY THE CONSTITUTION AND STATUTES WHICH MUST BE STRICTLY COMPLIED WITH.

(b) THAT THERE IS NO STATUTORY PROVISION FOR ADDITUR IN CONDEMNATION PROCEEDINGS.

(c) THE COURT USURPED THE DEFENDANTS' CONSTITUTIONAL AND STATUTORY TRIAL BY JURY AND SUBSTITUTED A NEW VERDICT BY THE COURT WITH THE AID, CONSENT AND REQUEST OF THE PLAINTIFF ONLY.

The Statutes involved are as follows: Article 1, Section 22 of the Constitution of the State of Utah reads:

*“Sec. 22. Private property for public use: Private property shall not be taken or damaged for public use without just compensation.”*

Section 78-34-10, Utah Code Annotated 1953, reads:

*“Sec. 78-34-10, 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:

(1) The value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

(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) .....

(4) .....

(5) As far as practicable compensation must be assessed for each source of damages separately.”

Article 1, Section 10 of the Constitution of Utah reads as follows:

*“Sec. 10, Trial by jury: In capital cases the right of trial by jury shall remain inviolate. In*



courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourth of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

In the case before the court a demand for a jury was made and the jury fee paid, and as a consequence the defendants were entitled to their trial by jury. Rule 38 of the Utah Rules of Civil Procedure reads:

"(a) *Right Preserved.* The right of trial by jury as declared by the Constitution or as given by statute shall be preserved to the parties."

Rule 39 of the Utah Rules of Civil Procedure reads:

"(a) *By Jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. . . ."

Counsel has searched in vain, but there is no statute providing for additur by the court to the jury verdict. We do have the constitutional provision that private property shall not be taken, however, without just compensation. We do have the provision that we have a right to trial by jury. We do have a rule that says a jury trial shall be preserved. Eminent domain proceedings, such as we have in the case before the court are strictly statutory in nature and do not exist as a common law action. That is to say, without a statutory enactment there would be no such action as eminent domain. Consequently, we have this query: If the jury's

verdict is less than the testimony of any witness, and the court so recognizes it, has the court the right in the State of Utah to say, the jury made a mistake in its verdict, but I have the right to substitute my theory of additur? Does the court, by such a theory, take away the defendants' right to trial by jury? Can it say, whether you like it or not, you'll now have a trial by the court? There is no case in the State of Utah exactly in point, certainly not the case of *Boden vs. Suhrmann*, 327 P2d 826, which involved a common law action and not a proceeding in eminent domain. There are, however, a great number of cases in other states, which do have application. First, I want to quote from Nichols on Eminent Domain, Third Edition, Vol. 5, page 101:

“Where, however, the amount of the award is not supported by any evidence and is, in fact, contrary to the evidence adduced at the trial, the appellate court may set aside the award even though the award is based in part on a view of the premises by the triers of the facts.” (See numerous cases cited).

Continuing on page 104 of the same volume, we have:

“ . . . If outside the range of the testimony such awards have generally been set aside.” See numerous cases cited).

Further quoting from page 107 under the title, “Increase or reduction of award,” we have the following:

“ . . . Generally, however, *in the absence of express statutory authority the trial court is without power to increase or diminish the amount of the ward as determined by the jury or by com-*

*missioners.* In condemnation proceedings the trial judge has not the power of control over the proceedings and verdicts possessed by the trial judge in common-law actions. He may, of course, confirm or set aside the award reported to him, but he cannot give binding instructions, and the jury is the judge of both law and facts. Under our constitutional provisions if the judge reaches the conclusion that the award is excessive, he may not himself reduce the award and as so reduced confirm it. Under such circumstances he should refuse to confirm, and order a new trial. It is the constitutional right of an owner in most jurisdictions not only to receive just compensation for the property taken from him, but also to have the amount of that compensation awarded to him by a jury. If the court changes the amount of the verdict in the absence and without the consent of the jury, or the parties, there is a new verdict rendered, not by a jury, but by a court acting without a jury. *This is violative of the rights of the owner because, in the exercise of the power of eminent domain, which takes the property of an owner from him without his consent, the limitations prescribed by the constitution should be strictly observed, and the statutes passed in pursuance thereof should be strictly complied with.* The fact that the verdict does not conform to the evidence, or is rendered through mistake and inadvertence, is a cause for setting aside the verdict, or, if not discovered until after judgment is entered, is a cause for setting aside both the verdict and judgment, but it does not give the court power to correct the verdict. The verdict is the jury's not the court's, and the power of the court in such cases is limited to seeing that the jury return a verdict correct in form and

substance. It may not, after the verdict has been returned and the jury discharged, change it, over the objections of either of the parties, in matters of substance." (See the great number of cases cited.) (*Italics ours*).

Quoting again on page 110 of the same volume under the heading "Inadequacy or Excessiveness of Award," we have:

"As heretofore pointed out, where the report of the commissioners or the verdict of the jury is either inadequate or excessive, although the court is generally without power to modify the report or verdict, it may set such report or verdict aside." (See numerous cases cited).

In the case of *City of Grand Rapids vs. Coit*, 113 NW 362, this is an action in Eminent Domain for the condemnation of certain land for a street. It is a case exactly in point, for the jury brought in a verdict for less than the testimony of any witness, and the court applied the theory of additur to bring the verdict within the testimony, and refused to grant a new trial. The appellate court, in reversing the lower said, said on page 363, righthand column:

" . . . The lowest value placed by a witness upon the land known as Parcel #1 was \$335.00; the highest \$1,195.30. The compensation awarded by the jury was \$304.15. See *Grand Rapids vs. Perkins*, 78 Michigan 93, 43 NW 1037. This award the petitioner exercising the option given it by the court, consented to increase to the sum of \$339.15. The theory of the attack upon verdicts claimed to be excessive or inadequate is

that they are not supported by evidence. The remedy is a new trial. The practice of refusing a new trial if the owner of the verdict will remit the recovery to an amount which the evidence, in the judgment of the trial court, will support, is one of long standing. In cases where the evidence affords a standard or rule for calculating the sum which should be awarded, the practice, whether the verdict is excessive or is inadequate, is open to no objection. Where the award depends upon conflicting testimony, and especially where the allowance to be made rests, of necessity, in the sound judgment of the jury, this asserted and admitted power of the courts is sparingly exercised. In any case, the one in whose favor the verdict is rendered is given the option to remit or submit the issue to another jury. The general rule is that, when a trial court determines that the damages, awarded upon conflicting evidence, are inadequate, a new trial will be granted, and that the court cannot render judgment for an amount greater than the verdict; nor can a new trial be refused on condition that the defendant pay a sum fixed by the court. 14 Ency. Pl & Pr 755; Lorf v. City of Detroit, 145 Mich. 265, 108 N.W. 661. In condemnation proceedings, the petitioner is not, as to the compensation to be awarded, a plaintiff. The court was in error in refusing a new trial."

In the matter of State v. Hammerquist, 293 N.W. 539, we have a case of a default judgment being entered against the party, thereafter, a guardian was appointed of the party and they petitioned that the judgment be set aside. The court then took it upon himself to increase the verdict and made an order that unless the

State paid the amount within sixty days that the default judgment would be set aside and the matter be tried. At the end of sixty (60) days the payment had not been made but the State sought an additional order granting an additional thirty (30) days. From this order an appeal was made. The court said on page 541, righthand column, as follows:

“The order entered below operates to require the defendants to accept a compensation fixed by the court. This is an action involving a jury question a court is without authority to increase the verdict and thus substitute its finding for that of the jury, has been settled by this court. *Walters v. Gilham et ux.*, 52 S.D. 82, 216 N.W. 854. Our conclusion that the learned trial court erred in that respect in this proceeding might well rest upon that holding and the constitutional safeguard of the trial by jury from which it springs. Article VI, Section 6, Constitution of South Dakota. However, our constitution further provides that ‘Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury.’ Article VI, Section 13. The plain command of this specific limitation upon the exercise of the power of eminent domain concludes the issue. Such is the current of authority. In *re Owen and Memorial Parks in City of Detroit*, 244 Mich. 377, 221 N.W. 279, 61 A.L.R. 190, 194, 18 Am. Jur. 1108.”

In the case of *Showalter v. State*, 63 P2d 189, we have an Arizona case where the amount of the jury verdict was less than that testified to by plaintiff’s own wit-

nesses. The court said on page 190, righthand column, as follows:

"Mr. Jack Williams, whose business is house moving, stated that he had been engaged in house moving and changing the fronts of buildings along Van Buren Street and vicinity for quite a while; that he had moved a number of buildings back; that he was familiar with the cost of such work; that at the request of the highway department he had figured upon the cost of repairing the store building and the service station on defendant's lots and placing them in as good condition as they were originally. He estimated the total for such work to be \$1,242.10, segregated as follows: Removing and replacing everything in connection with the gas station, \$320.75; reconditioning the front of the story building, \$481.85; extending the back of the building, so that it would be its original length, \$439.50. This is the lowest estimate of the cost of repairing and reconditioning the store building and service station and, when added to the value of the land at \$135, the lowest value placed thereon, would be \$1,377.10. Thus, according to the evidence of plaintiff's own witnesses, the verdict was \$117.27 less than defendant should have recovered."

The court also said, on page 192, as follows:

"For the reason that the verdict and judgment are insufficient under the evidence, and the error in admitting evidence, the judgment of the lower court is reversed, and the cause remanded, with directions that the defendant be granted a new trial."

In the matter of the State Highway Commission vs. System Investment Corporation, a Wyoming case decided May 3, 1961, found in 361 P2d 528, we have a situation that is a little different insofar as the taking is concerned. The Wyoming laws provide for the appointment of commissioners to make a return to the court and then there is a petition to file to confirm the report. The court, under the statute, had authority to confirm the report or disaffirm it and appoint new commissioners if it deemed it proper. However, the court in that instance, like the lower court, did in the case before this court, took it upon itself to make its own Findings and Decree, except in the Wyoming case the increase was very substantial. This Wyoming case carefully reviewed the contention of the appellant, page 531, righthand column, as follows:

“ . . . They contend that the trial judge had no power to personally increase or decrease the award of the commissioners. In other words, they contend that the court in itself increasing the award acted in excess of its jurisdiction . . . ”

Again on page 532, lefthand column, we have:

“The textwriters and other writers seem to be agreed that the trial judge has no power to increase or decrease the award of the commissioners except by express statutory authority. An annotation on the subject is contained in 61 A.L.R. 194, where the writer states at P. 195:

‘In the absence of clearly stated statutory authority, the trial court does not have the right generally to increase or decrease the



amount of an award granted by commissioners or a jury of viewers.'

"In 5 Nichols, *Eminent Domain*, p. 72 (3d ed.) the author says:

'Generally, however, in the absence of express statutory authority the trial court is without power to increase or diminish the amount of the award as determined by the jury or by commissioners. . . .'

"The author cites cases from eleven different jurisdictions. It is stated in Jahr, *Eminent Domain*, p. 402 (1953):

'In the absence of statutory authority, the court has no power to modify an award contained in the report of the commissioners. The court's power is generally limited to confirmation or rejection . . . '

"The same rule was laid down in Mills, *Eminent Domain*, Art. 246 (2d ed.), as early as 1888. To the same effect is 18 Am. Jur., *Eminent Domain*, Art. 366 (1938). The cases cited by these authorities we think sustain the statements made by them. Apparently our statute was taken from Missouri. In the case of Mississippi River Bridge Co. vs. Ring, 58 Mo. 491, 495, 496, it appears that the trial court attempted to reduce the award made by the commissioners. The court stated:

' . . . I think the statute does not warrant such a proceeding. The court may take evidence to review the report, to see whether it should be approved, or rejected and set aside and new commissioners appointed. But I can nowhere find that it was ever designed, that

upon reviewing the case upon exceptions, the court is authorized to make any alteration, either by adding to or deducting from it . . . ”

The court went on further in a very exhaustive reference to different cases on page 533, lefthand column, referring particularly to the New Mexico case of State ex rel. Weltmer v. Taylor, 42 NM 405, 79 P2d 937. That case cites 61 A.L.R. 194. On the same page, many other cases are cited, including federal and state cases, and on page 534, lefthand column, it states:

“If the party condemning the land should take exceptions without demanding a jury, the landowner might well prefer to have the jury pass on the matter but would have no opportunity to ask that. In short, we can find no sound reason why we should not follow the great weight of authority in holding that the trial judge has no power to increase or decrease the award of the commissioners. The judgment herein must, accordingly, be reversed.”

Then again, in another Wyoming case, being Colorado Interstate Gas Co. v. Uintah Development Co., 364 P2d 655, this being an eminent domain case, and calling the court's attention to the left-hand column, page 657, it states:

“Turning then to a consideration of the power of the court to modify or change the award of the appraisers, it is sufficient to say that we have very recently dealt with this subject in an opinion written by Chief Justice Blume in State Highway Commission vs. System Investment Corporation, Wyo., 361 P2d 528, 534-535. In that

opinion Justice Blume pointed out that text-writers and other writers seem to be agreed that the trial judge has no power to increase or decrease the award of the appraisers except by express statutory authority. It is not necessary to review the authorities cited by the learned Chief Justice on that point."

It is the contention of the writer that it makes no difference whether it's a commission that determines the amount of the value of the land taken and the resulting damages or whether it's a jury so determining, a court still cannot modify or change the same. On this same subject, *State vs. Taylor*, 79 P2d 937, on page 940, right-hand column, it states:

"There is no specific authority in the statute which authorizes the court, in passing on such exceptions, to substitute its judgment on the question of damages for that of the commissioners; and in the absence of specific authority, the court's power is limited to either confirming the report or ordering a second appraisalment. That provision of the statute seems to have been adopted from Missouri and in passing upon the same question, the Supreme Court of Missouri in *Mississippi River Bridge Co. vs. Ring*, 58 Mo. 491, held that the authority of the court a reappraisalment. See annotation 61 A.L.R. 194, where the cases are collected."

I find in the case of *State Highway Commission vs. Bloom*, a South Dakota case found in 93 N.W. 2d 572, and particularly on page 581, the following:

"Under the provision of the South Dakota

Constitution which guarantees a trial by jury in all actions at law it is for the jury to determine the damages to be assessed. Art. VI, Section 6, Constitution of South Dakota. And as to a condemnation proceeding, Art. VI, Section 13, of the Constitution specifically provides that: 'Private property shall not be taken for public use, or damages, without just compensation as determined by a jury . . . ' So in an action involving a jury question a court may not substitute its findings for that of the jury by increasing the verdict. *Walters v. Gilham*, 52 SD 82, 216 N.W. 854. Nor can a court in a condemnation action increase an inadequate award made by the jury. *State v. Hammerquist*, 67 S.D. 417, 293 N.W. 539. But the province of a jury is not invaded when a court in the exercise of its judicial power determines as a matter of law that a verdict or an award is not sustained by the evidence or is against the law."

*Linzell vs. Ohio National Bank*, 137 N.E. 2d 520, is a highway condemnation proceeding, and on page 522, starting at the left-hand column, we have:

"The remaining assignments all relate to the adequacy of the verdict. An examination of the record on this subject reveals that the jury awarded the sum of \$5,125.00 as compensation for the two buildings which were to be taken. The record discloses that five witnesses testified, all of whom appeared as experts, and placed the following valuations on the buildings: (1) Mr. Daley, \$14,600; (2) Mr. Lowman, \$14,000; (3) Mr. French, \$10,700; (4) Mr. Weiler, \$10,000; and (5) Mr. Royer, \$12,000. It therefore appears that the verdict was \$4,875 less than the lowest expert opinion, and \$9,475 less than that

of the highest. The finding was in complete disregard of the evidence, and nothing appears further in the record concernig the value of these buildings. The valuation fixed by the jury falls far below any rational appraisal of estimated damages found in the record. Inadequacy of damages appears to be a ground on which new trial may be granted.

"In *Toledo Railways & Light Co. v. Mason*, 81 Ohio St. 463, 91 N.E. 292, 28 L.R.A., N.S., 130, the syllabus provides:

'1. In an action to recover damages for personal injuries, a new trial may be granted on the ground of the inadequacy of the damages found by the jury, when it appears upon the facts proved that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim.

'2. On error in the circuit court to the overruling of a motion for a new trial on the ground of the inadequacy of the damages found by the jury for an action for personal injuries, the circuit court may reverse the judgment of the court of common pleas and grant a new trial, on the ground that the verdict is not sustained by sufficient evidence.'

"(5) The rule in Ohio with reference to the inadequacy of verdict seems to be well epitomized in 13 Ohio Jurisprudence, 306, Section 194, to wit:

'A study of the results reached in the reported cases seems to justify the statement that the courts generally grant relief if convinced that the verdict substantially exceeds or falls below any rational appraisal or estimate of the dam-

ages, even thought the inference of passion, prejudice, partiality or improper motive on the part of the jury is no more natural or reasonable than the inference of mistake or misapprehension on their part.'

"(6) Counsel for the appellee urged that in considering this assignment of error the court should look only to the total verdict which was for the sum of \$68,875. However, in arriving at this verdict the jury failed to place a proper valuation on the two buildings. Section 5519.03 of the Revised Code requires that the jury make a separate finding of the value of the buildings. The Legislature must have enacted this requirement for the sale purpose of testing the general verdict, and if this valuation is against the manifest weight of the evidence then the general verdict has also the same deficiency. We, therefore, conclude that the verdict is against the manifest weight of the evidence; the judgment is reversed and th cause is remanded for further proceedings according to law."

This case is cited in detail for the reason that counsel for the plaintiff urged to the lower court that the court should look only to the total verdict and disregard the fact that the severance is lower than that testified to by any witness. Counsel urged this, even though the statutes require they separately determine the severance damages.

In re West Waite St., Seattle 155 P 165, we have an action in eminent domain. It appears from reading the case that the court furnished the jury a printed form of verdict. A judgment was entered and

amount paid. Approximately one year after the verdict they discovered an error in the verdict. A petition was filed alleging the verdict was in error by inadvertance and mistake and asked it be corrected. Upon presentation of the petition the court granted the same ex parte and modified the adverse judgment as requested. The adverse parties, upon discovering the order and modification moved to set it aside, but on a hearing it was denied and the matter was appealed. On page 166, left-hand column, we have:

“On the merits of the controversy we are clear that the court was in error. The fact that the verdict does not conform to the evidence, or is rendered through mistake and inadvertence, is a cause for setting aside the verdict, or, if not discovered until after judgment is entered, is a cause for setting aside both the verdict and judgment, but it does not give the court power to correct the verdict. The verdict is the jury’s, not the court’s, and the court’s power in such cases is limited to seeing that the jury return a verdict correct in form and substance. It may not, after the verdict has been returned and the jury discharged, change it, over the objection of either of the parties, in matter of substance.”

In the *Houston Lighting and Power Company vs. Adams*, 309 SW2d 537, this was a case in eminent domain. It appears from reading the case that the jury became hopelessly mixed up and entered some verdicts that were incorrect. The court then took it upon itself to correct the verdicts by remittitur and we find on page 543, the following:

“We think in the case here that we not only have the question of excessiveness, but we have the question of the right of the trial judge to substitute his finding for that of the jury, which is contrary to our judicial history, where testimony of probative force is tendered on the issue. His duty is to grant a new trial. We do not think our views are in conflict with *World Oil Co. vs. Hicks*, 129 Tex. Civ. App., 75 S.W. 2d 905. See also *Dallais Ry. & Terminal Co. vs. Farnsworth*, 148 Tex. 584, 227 S.W. 2d 1017.”

This Texas case is cited for the reason that it was very plain in the Texas case that an error through misunderstanding on the part of the jury had been made and the court decided to take it upon itself to correct that error and substitute its opinion. This is exactly what the court has done in our case. The jury's figures are below the minimum testified to by any witness. The court has taken it upon itself, by the theory of additur, to add sufficient amounts of money to the verdicts to bring them up to the minimum testimony. This is not a jury verdict but rather the court's verdict that has been substituted by the court attempting to usurp the power and function of the jury. It is entirely wrong and contrary to any principal of equity and justice and the statutes of the State of Utah. It was an expedient solution by which the court attempted to avoid hearing the cases over again. If a jury refuses to follow the instructions and the evidence and brings in a verdict which is outside of the evidence entirely, then, a new trial should be granted. Briefs were presented to the court and there was not one case presented in favor of the Porcupine Res-



ervoir Company saying that in eminent domain proceedings where they take the property away from the people by a statutory proceedings, that additur is proper; yet numerous citations were given from other states where additur in such cases was not proper.

We believe the court erred and did not give this the judicial determination it should have had. Our court tries a great number of cases in the First District, and it is overloaded. Our judge has an ability to get the decision rendered and the case disposed of. However, when mistakes like this are made they should be looked squarely in the face. When property is taken away from someone against their will, speed and the necessity of completing the court calendar should have no bearing. Everything possible should be done to prevent inequity and injustice.

The case of Williamson County v. Brock, 10 N.E. 2d 654, is another case where the jury disregarded the evidence and returned a verdict for less than any sum testified to. The trial court failed to grant a motion for a new trial. The appellant court said in the righthand column of page 655, as follows:

"Unless the verdict of a jury, in a condemnation proceedings, appears to have been the result of passion or prejudice, or of a clear and palpable mistake, it will not be disturbed where the amount fixed is within the range of the evidence and the jury has viewed the premises. Forest Preserve District v. Dearlove, 337 Ill., 555, 169 N.E. 753. But where the jury disregards the

testimony and awards an amount that is either excessive or too small, as shown by the testimony of the witnesses, we have not hesitated to set such verdicts aside. *Super-Power Co. vs. Sommers*, 352 Ill., 610, 186 N.E. 476. This verdict and judgment for \$15 for land taken were in total disregard of the testimony. The court erred in denying the motion of appellant for a new trial."

The case of *Meyers v. City of Daytona Beach*, 30 S2d 354, is another example of where the jury disregards the evidence and returns a verdict for less than the testimony of any witness. On page 355, the right-hand column, we have:

"As to Parcel #15, the verdict was for \$360 whereas the lowest value fixed by any witness was \$400. The award falls far short of full compensation and must be reversed. The award must be sustained by evidence. The jurors may view the property and use their judgment in evaluating the evidence, but, no matter how learned they may be, they are not at liberty to disregard the evidence."

## POINT IV

THAT IF ADDITUR WERE PROPER, THE COURT, BY ITS PROCEDURE AND APPLICATION ACTED ARBITRARILY AND CAPRICIOUSLY AND WITH UTTER DISREGARD OF THE EVIDENCE AND SUCH ACTION WAS AND IS ANALGOUS TO A QUOTIENT VERDICT.

When the court decided not to grant a new trial, it had received the memorandum of plaintiff (R. 97-102). In this memorandum and on the fifth page thereof counsel for plaintiff said:

"Also it should be noted that the severance damage figure in the Keller case is only \$664.00 lower than that of the lowest figure of an expert, and in the Avon case the severance damage figure is only \$158.00 lower than that of Mr. Palmer."

The court, without even checking these figures, said in his memorandum of decision (R. 104-105):

"The order may be that unless the plaintiff, within ten days from today, consents that separate verdicts as to Keller and Avon may be increased by \$664.00 and by \$158.00 respectively, the motion for a new trial may be granted."

The plaintiff immediately had a consent to additur prepared and signed by the plaintiff (R. 106), which reads, in part, as follows:

"Comes now the plaintiff above named and consents to the increase of the verdict respecting the Lloyd W. Keller Corporation to the extent of \$664.00 and consents to the increase in the verdict in favor of the Avon Land and Livestock Company to the extent of \$158.00."

Now, if the court will check the testimony of Alden Adams (Ex. 43a and 43b) relating to the Keller Corporation, it can be seen that his opinion as to severance damage was \$3,884.20. This was the lowest testimony of any witness relating to the Keller Corporation sev-

erance damage. The testimony of Marcellus Palmer (Ex. 57) relating to the Keller severance damage was the next lowest testimony and was for \$4,855.25 severance. The jury verdict for Keller damage was \$3,200.00. Hence we have the court's theory of additur:

\$3,200.00	Jury's verdict
\$+ 664.00	Additur
<hr/>	
\$3,864.00	Judge's verdict

Then to go one step further:

\$3,884.20	Lowest testimony
<del>-\$3,864.00</del>	Judge's verdict
<hr/>	
\$ 20.20	Amount by which Judge's verdict is under lowest testimony.

The important point to be gained from this computation is not the amount by which the judge's verdict was below the lowest testimony, but rather, the obvious error in the manner used to arrive at a fair value based on the theory of additur. The value added was the figure used in the plaintiff's memorandum. It was intended to bring the verdict up to the lowest amount testified to by any witness. The figure used was obviously an error made by the counsel for the plaintiff and was carried into effect by the court. If a fair and careful evaluation of the evidence was made by the court, then why was not the error corrected? If the court was going to accept the testimony of one witness over another in the one

case it would seem more consistent to accept the same witness's testimony in both cases. However, this was not done. In the Avon Land and Livestock Company case, Alden Adams' testimony as to severance was nearly \$300.00 more than the testimony of either Barlow or Palmer (Ex. 42a, 42b, 34, 34a, 34b and 58) but the increase allowed by the court was simply up to the lowest testimony given by any witness.

The situation may be reversed and the court could have accepted the testimony of Palmer and Barlow if he had received a judicial impression as to the accuracy of their testimony, in which event the theory of additur would have resulted in the following in the Keller case:

(1)	\$4,855.20	Palmer's severance (Ex. 57)
	3,200.00	Jury's verdict
	<hr/>	
	\$1,655.20	Proper additur

or,

(2)	\$8,250.00	Barlow's severance (Ex. 35a)
	\$3,200.00	Jury's verdict
	<hr/>	
	\$5,050.00	Proper additur

The court did not exercise reasonable judgment or there would have been some consistency in whose testimony was to be followed.

Now, isn't the reason why a quotient verdict is frowned upon because it takes away the judgment of

the jury and reduces it to a mere mechanical operation. That is, add all the figures and divide the total by the number testifying to arrive at your verdict. Doesn't it give the same kind of mechanical result to say that I will take the lowest figure without regard to who, or how many, different parties might have to be considered to get the lowest testimony? This is, in the opinion of the writer, arriving at a mechanical verdict and is, in theory, similar to a quotient verdict. Opinions of experts can vary so greatly on the same subject matter, for instance, see the schedule of testimony under Point II, page 7 of this brief, for the difference in severance damage as testified to on the Summers' property, between plaintiff's own witnesses, Alden Adams and Marcellus Palmer. One is \$5,184.00 and the other is \$2,009.00; percentagewise a difference of about 150%. Yet, these are the two parties the court wishes to take the lowest figures from on the severance damage on its theory of additur.

## POINT V

THAT THE COURT ERRED WHEN IT REQUIRED DEFENDANTS TO WAIVE INTEREST BEFORE GRANTING A POSTPONEMENT OF THE TRIAL DATE. (SAID POSTPONEMENT OF TRIAL DATE WAS REQUESTED FOR THE REASON A KEY WITNESS WAS A STATE SENATOR AND WOULD BE ATTENDING A SESSION OF

## THE LEGISLATURE AT THE TIME SET FOR TRIAL).

Plaintiff had received an order of the court granting it possession of the property and pursuant to said possession had converted the same into a reservoir, excluding the defendants entirely from the property. Under the statutes of the State of Utah and particularly Section 78-34-11, U.C.A., 1953, which reads as follows:

*"When right to damages deemed to have accrued—For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next proceeding section. No improvements put upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages."*

In checking 111 A.L.R. 1304, as to interest in eminent domain proceedings, these cases seem to hold that the interest is a part of the *just compensation* guaranteed by the Constitutions of the various states, which prohibits the taking of private property for public use without just compensation. In this particular case the court said (R. 233):

" . . . On the other hand, the court has toyed with the idea. Mr. Skeen, that if you wanted to

try the condemnation case first, the court had in mind, was toying with the idea of making a conditional order permitting a continuance providing they waive the accrual of interest beyond that date."

Again (R. 234) we have:

"THE COURT: Well, now, what do you say, Mr. Mann? You'll get a continuance in your condemnation case. We'll lift out of the partition suit that part that's under the water and appoint referees to try and go out and see if they can divide what's left. If they can't, then the court will, under the statute, order a sale of what's left for cash.

MR. SKEEN: If the court please, I wonder if we could confer for five minutes with our clients. I'd like to.

THE COURT: What I've said, gentlemen, you'll understand is subject to modification. I'm merely trying to get over this situation. All right. Now, if you want to insist on the condemnation I will ask them to waive the interest. If you insist on the partition, then I propose to lift out of the partition suit that which is under condemnation. We'll take a ten minute recess."

Again, (R. 239-240) we have:

"THE COURT: Now I will rule on the evidence, assuming that I'm still in the case as of that time, based on what authorities you dig out. So what do we do now? We continue the partition case, suspend—

MR. SKEEN: Suspend the interest.



MR. MANN: Let's have an understanding on the interest. The interest will be suspended and let's get it in the record, from March fifth to May first.

THE COURT: That's all right.

MR. SKEEN: Yes.

MR. MANN: Because that's the only difference that you can be out anything."

Now, the time involved is a short period and the amount of interest is a small amount, but I ask this question: Why should the court take away *just compensation* from a property owner who is having his land taken away from him against his will, in favor of the party who is seeking to take the property and has been in actual possession of the same and is using it as his own, and hasn't paid a thing for it? The defendants are only seeking a few weeks' continuance from the trial date so as to have the services of an expert at the trial. The expert is a State Senator and the Senate is and will be in session at the time set for the trial. All counsel was doing was asking that the matter be continued until the session was over and the Senator would then be available to give his testimony. It takes many weeks for an expert to accumulate his data. It takes many views of the premises. The expense to the litigant for the services of an expert witness can run into \$100.00 per day. The interest involved for the period of time in question would not equal the expense the defendants would be out, if they had abandoned the services of the expert who was prepared and ready to testify. But

to seek another expert and escort him through and over the project and get him ready for the trial setting would be next to impossible. We believe that when justice demands a continuance, the court should not take away *just compensation* from the defendants involved and actually give it to the plaintiff. We think the court erred.

## CONCLUSION

The trial court erred in failing to grant defendants' motion for a new trial. There is absolutely no power vested, or authority granted, either statutory or otherwise, whereby the court has the right to apply the theory of additur in an eminent domain proceedings. The Constitution of the State of Utah gives the defendants a right to a trial by jury. The defendants exercised this right, and the jury committed error. Therefore, defendants are entitled to a new trial with a new jury. When these errors are combined with the requirements by the court that all three cases be tried together and that interest be waived under the circumstances set forth herein, all in the aggregate, resulted in a miscarriage of justice. We sincerely believe that all three defendants are entitled to a new trial.

Respectfully submitted,

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