

1963

## State v. Woolley et al : Brief of Appellant

Utah Supreme Court

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A. Pratt Kesler; Attorneys for Appellant;

Clifford L. Ashton; Howard L. Edwards; Attorney for Respondents;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through  
its ROAD COMMISSION,

*Plaintiff and Appellant,*

— vs. —

FRANK A. WOOLLEY, et al.,  
*Defendants and Respondents.*

Case  
No. 9966

**FILED**

OCT 3 - 1963

## BRIEF OF APPELLANT

Appeal From a Judgment and Order of the Third  
District Court, in and for Summit County, Utah,  
HONORABLE A. H. ELLETT, *Judge*

A. PRATT KESLER  
Attorney General

NORMAN S. JOHNSON  
Assistant Attorney General

ROBERT S. CAMPBELL, JR.  
Special Assistant Attorney  
General

*Attorneys for Appellant*

CLIFFORD L. ASHTON  
HOWARD L. EDWARDS

65 South Main Street  
Salt Lake City, Utah

*Attorneys for Respondents*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, by and through  
its ROAD COMMISSION,

*Plaintiff and Appellant,*

— vs. —

FRANK A. WOOLLEY, et al.,

*Defendants and Respondents.*

} Case  
No. 9966

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## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

This is an appeal from a judgment and order of the Third District Court, in and for Summit County, Utah. That judgment was based on a verdict rendered in a condemnation lawsuit tried in the district court sitting in Coalville, Summit County, on April 25, 1963, before the Honorable A. H. Ellett, sitting with a jury. The issues in the case were the compensation to be awarded to defendants for the taking of their land for Highway Project No. 1-S0-4(8) 190, and the necessity for that taking.

## DISPOSITION OF CASE BY LOWER COURT

The Third Judicial District Court, in and for Summit County entered judgment against the State and in favor of the respondents in the sum of \$20,000. The State of Utah moved for a remittitur of the verdict and, in the alternative, a new trial; the trial court denied both motions.

## RELIEF SOUGHT ON APPEAL

It is submitted that the judgment of the District Court as to the jury verdict of \$20,000 should be reversed and the case remanded for new trial.

## STATEMENT OF FACTS

The material facts in this matter are not in dispute. On February 9, 1963, the State Road Commission filed a complaint in the Third District Court for Summit County to acquire by eminent domain proceedings real property owned by the respondents herein, Fank S. Woolley, et al. An answer was duly filed by the respondents, thereby joining the issues for trial. The issues raised were the necessity for taking and the value of the land taken. Trial was held before the Honorable A. H. Ellett, sitting with a jury on April 25, 1963. On that same date, the court affirmed the necessity for taking and the jury returned its verdict against the State and for the respondents in the sum of \$20,000. A Motion for Remittitur and in the alternative, for New Trial was filed by the State on May 9, 1963. That Motion was denied by the

trial court and this appeal followed. The property, owned by the defendants since 1954, (Tr-44) and subject of this condemnation suit, consists of 77 acres, more or less, and at the time of taking was being used for grazing, storing, and stockpiling clay. (Tr-41) It contained no improvements. It is located between the present state road designated as U. S. Highway 30 and the Union Pacific Railroad right of way line which runs parallel to the road along the north side of the highway. The property is a long narrow strip having a depth varying between 500 feet, more or less, and 100 feet, more or less, and continues for a distance of approximately five miles to the Wasatch turn-off. (Tr-11) An adjoining parcel of property with a few building improvements located on the Utah-Wyoming border was purchased by the State of Utah some five years prior to the trial. (Tr-81) As a result, the subject property does not, and did not at the time of taking, continue to the state line. The project itself is a part of the overall interstate 80 project and involves the widening of the present facility. At the trial, the respondents called as witnesses Frank S. Woolley himself, the defendant, John Aaron and James Tozer, as evaluation witnesses. All three of the respondents' witnesses testified as to the value of the property taken. The State called Winston R. Neiman, a right of way design engineer, to testify as to the necessity of taking. The State then called as evaluation expert witnesses Fred Froerer, Haven Barlow and Alden Adams. In addition, upon motion of state's counsel, the jury was permitted to view the property.

## ARGUMENT

### POINT I.

THE TRIAL COURT ERRED PREJUDICIALLY IN EXCLUDING COMPARABLE SALES PRICES WHICH WERE OFFERED AS EVIDENCE OF VALUE AND AS OPINION FOUNDATION BY THE STATE'S EVALUATION EXPERT WITNESS, FRED FROERER.

In a condemnation lawsuit the jury has the task of establishing the fair market value of the land taken (*Southern Pacific Co. v. Arthur*, 10 U. 2d, 306, 352 P. 2d 693 (1960)). Market value is the price at which property will sell in the open market free of any compulsive conditions, and actual consummated sales, if made under normal and fair conditions, and if in fact comparable, have considerable probative merit as to this issue. (*State v. Peek*, 1 Utah 2d 263, 265 P. 2d 630 (1953)). They also support, or show the basis for expert opinion. (*Ibid.*)

In *State v. Peterson*, 12 U. 2d 317, 366 P. 2d 76, (1961), a case which also involved a condemnation suit brought by the State Road Commission, the landowner appealed to this Court from a jury verdict, setting forth as prejudicial error the fact that the trial court had refused to permit his expert witness to support an opinion that the lands in dispute were worth \$950.00 per acre by tesitfying to other sales of land in the locality. This Court held that the exclusion of the price paid for the property was error, and stated that it was saved from being prejudicial only because the price and other facts



about one of the two comparable sales was elicited on cross-examination of the State's witnesses. This Court cited as authority *State v. Peck*, 1 U. 2d 263, 265 P. 2d 630, (1953). In that case, the trial court had excluded, on both direct and cross-examination, evidence of the purchase price paid in recent sales of property similar to parts of appellants' property. This, among other factors, was held to be prejudicial error. Speaking specifically of comparable sales prices, this court said:

“Without this evidence the jury is deprived of a valuable source of information on the value of the property, and are greatly handicapped in evaluating the weight and credibility which should be given to the opinion evidence.”

The Court said further that the amount of such evidence can be limited by the trial court, but the amount only. In the instant case, the trial court excluded the price per se, without conditioning its exclusion upon the lack of similarity between the property and the subject property. The transcript reveals the following on direct examination of Fred Froerer. Counsel for the State asked:

“Q. From your appraisal have you been able to form an opinion as to the value of the property taken as of the date of taking, property here in dispute?”

THE COURT: And that date is February 14, 1963.

Q. February 14, 1963.

A. Yes, I have.

Q. What basis or approach did you use in arriving at this figure or at this appraisal rather opinion?

A. What basis?

Q. Yes, what basis?

A. By comparison to other properties of like kind and the sale of those properties that have been evidenced in fact by the recording of the sale of—or the recording of the deed of transfer and inquiry with individuals who I assumed to be acquainted with the market and land in this area.

Q. Could you tell us — did you find such sales, comparable sales?

A. I found on investigation at the Uintah County, Wyoming, records, if I can consult my notes, the sale of 180 acres of land adjoining the city of Evanston on the west, which would be between the city of Evanston and the Wyoming-Utah border, that a deed was recorded in Book 244, page 136, from Florence B. Elsinore and others—

MR. ASHTON: If the Court please, we object to any other isolated transactions as having no probative value as to the market value of this particular piece of property at any given time, and there are many other considerations that enter into transactions.

THE COURT: That's right, as far as offering that as proof of value, but he is offering that as to the source of knowledge, qualification.

MR. ASHTON: I don't mind him saying what he checked into, but as to giving what prices were paid, I object to that.

THE COURT: I didn't understand he was going to give that price. I suppose you wouldn't be permitted to, and I didn't know counsel was going to try to get that.

MR. JOHNSON: I understand these comparable sales are proper approach in arriving at proper market value.

THE COURT: I think it might be brought on cross-examination, but if that is the thing that he's based his opinion here on, I suppose that he is entitled to tell the jury how many such transactions he's checked into and that he's used them as a source of knowledge on which he is expressing his opinion here.

MR. ASHTON: I am certain that is correct, Your Honor, but if he gives any particularization of any one of these transactions as to price, for the reasons the court has already given in ruling on my matters, that is not admissible.

THE COURT: Let's leave that price out and go ahead with your examination.

Q. Did you discover a number of comparable sales, Mr. Froerer?

A. I wouldn't say a number, other than with an interview with Mr. Robert Hamlin, the abstractor at Evanston, and in interviewing him, he had served as an appraiser for the State of Wyoming and for the State of Wyoming and Utah in regards to the location of a reservoir site at Randolph, and the lands in particular there were considered to be comparable to the land in the subject, and the valuations placed under that particular project I used in forming an opinion of the value of this property."

This exclusion by the trial court of comparable sales prices was prejudicial error.

## POINT II.

THE TRIAL COURT ERRED PREJUDICIALLY IN ALLOWING THE RESPONDENT TO BRING BEFORE THE JURY THE FACT THAT FEDERAL FUNDS WERE INVOLVED IN THE CONDEMNATION.

19 / On cross-examination, counsel for the defendants injected into the trial, over objection, the element of federal participation in this condemnation and its costs (Tr.-96). It is a fact that federally-aided highway projects in this bridge state are funded in the main by taxes collected from the more populous regions of the nation and as a result would affect considerably less directly the pocketbooks of local Utah jurors than a fully state-supported public project. Hence, the mention of federal funds in this type of a case is not unlike the mention of insurance before a jury in a personal injury case. It in effect sets up a deep pocket out of which the landowner can be compensated above and beyond that which he deserves. This, of course, in a personal injury case, is error. (*Gittens v. Lundborg*, 3 U. 2d 292, 284 P. 2d 1115 (1955).)

The federal fund question has been ruled on in South Carolina. (See *Judson v. South Carolina State Highway Department*, 236 South Carolina 424, 114 S.E. 2d 591, 1960.) In that case, the appellant owned a tract

of land, a part of which had been condemned by the State Highway Department for interstate right-of-way purposes. Following a trial before a jury, the landowner appealed, charging inter alia that the trial court had committed error in refusing to allow in evidence that the highway was being financed by the use of funds from the United States Government. The Supreme Court granted a new trial, but on other grounds, reasoning as to the issue of federal funds that :

“ \* \* \* It would have been improper to allow any evidence that the federal government was furnishing the money in connection with this highway project. The sole question, if any, was what compensation the appellant was entitled to for the taking of his property for highway purposes. Sources of funds for the payment of the amount of the verdict in this case was not in issue in this trial.”

As for Utah, this court has stated that the public source of funds in a condemnation proceeding is not admissible as evidence :

“ \* \* \* The fact that the federal government is participating in the cost \* \* \* has no bearing on determination of the legal issues involved, and would not be admissible in evidence.”

(See *State v. Salt Lake City Board of Education*, 13 U. 2d 56, 368 P. 2d 468 (1962).) Of course, a new trial is proper when counsel for the adverse party brings in or attempts to bring in irrelevant evidence upon collateral matters for the purpose of attempting to prejudice the jury. (See 39 Am. Jur. “New Trial” 65.)

### POINT III.

THE COURT ERRED PREJUDICIALLY IN ALLOWING THE LANDOWNERS TO BRING BEFORE THE JURY, DIRECTLY AND BY INNUENDO, THE DEFENDANTS' ALLEGED NEGOTIATIONS WITH VARIOUS OIL COMPANIES.

It is not competent for a landowner to show to what use he intended to put property, and the probable future use of the property. (*State v. Tedesco*, 4 U. 2d 248, 291 P. 2d 1028; *Redondo Beach School District, L. A. County v. Flodine*, 314 P. 2d 581 (Cal. 1957); *Redwood City Elementary School Dist. v. Gregory*, 272 P. 2d 78 (Cal. 1954); 4 *Nichols on Eminent Domain*, 12.314.) Such evidence does not tend to show market value and it utterly disregards the fact that other land might well be purchased at prices determined by cold and unimaginative bargaining and by the laws of supply and demand. (See 5 *Nichols on Eminent Domain* 18.11(2).) In addition, negotiations, unexecuted agreements, offers to purchase, and the like, are inadmissible as evidence of value in a condemnation proceeding. (1 *Orgel on Valuation Under the Law of Eminent Domain*, 2d Ed. Sec. 148.) The reasons are apparent. They are not binding on the offeror or offeree and are of no persuasive effect insofar as determining market value is concerned. That value is to be determined at least in part by actual arms-length consummated market transactions. (5 *Nichols on Eminent Domain*, 21.1.)

The trial court had previously and quite properly

determined that an existent partially-executed lease agreement form mentioning Standard Oil Company, the defendants, and a portion of the subject property was not admissible at trial. However, early in the trial proceeding in referring to his activities, defendant Frank Woolley stated that: "Oh, I endeavored to check with various oil companies." (Tr-14) The state moved to strike that statement but the court allowed it to stand as something that might bolster the owner's testimony as to value. Of course, the only strength it could lend that testimony is the weight the jury might give to the mention of the oil companies themselves, which in itself is irrelevant and inadmissible. Counsel for defendants then asked Woolley if he had had the area surveyed for the purpose of locating a piece of property which he intended to use as a service station. (Tr-16) The state made the same objection, and the court said he would be allowed to answer as to whether a survey was made. (Tr-17) This is similarly irrelevant and draws a step further toward the lease form itself. Later, counsel for the defendants asked directly if the landowner had negotiated a lease with Standard Oil, to which the owner responded in the affirmative. (Tr-51) The state objected on the ground that there had been a ruling on the question. The court ordered the answer stricken but the defendants continued to proceed in the same irrelevant direction. (Tr-51)

As a result, the defendants managed to bring before the jury a speculative enterprise for which, in their opinion or in the opinion of their experts, the land might be used. They based their estimate of value upon that

speculation, and bolstered it with the above negotiations over the objections of the State. The state was placed in the position of apparently attempting to suppress significant information.

An attempt by counsel to bring before the jury matters not properly for the consideration of the jury in disregard of the court's ruling that a certain line of evidence is inadmissible, is grounds for a new trial. Counsel, in objecting, is placed in the position of suppressing significant evidence and attempting to deceive the jury into rendering an unjust verdict. (39 Am. Jur. 65 and Collected Cases.)

#### POINT IV.

THE TESTIMONY OF THE RESPONDENTS' CASE WAS INHERENTLY IMPROBABLE, AND THE EVIDENCE PRESENTED WAS INSUFFICIENT TO JUSTIFY A VERDICT OF \$20,000.

An unqualified witness should not be permitted to render an opinion, and it is not to be presumed that a witness is competent to give an opinion. (*5 Nichols on Eminent Domain* 18.4(1).)

More particularly, a witness who states his opinion of market value must be familiar with market value in the neighborhood of the taking. (*5 Nichols on Eminent Domain* 18.2(2).)

The first evaluation witness used by the respondents,



John Aaron, evidenced his lack of qualifications under voir dire. He had done no selling in Utah, no appraising in Utah, and no fee appraising whatsoever. He hadn't lived in Utah for 23 years past. (Tr-57-58) Factors affecting Wyoming and Utah property value, such as tax levels, the general condition of the economy, level of income, and ability to pay, all could easily be decidedly variant. Mr. Aron was clearly not acquainted with market conditions in Utah, and as a result, is not an expert as to Utah market value.

An opinion based upon knowledge acquired long before the date as of which property is to be evaluated, is subject to exclusion. (5 *Nichols on Eminent Domain*, 18.4(2).)

The respondents' second evaluation witness, James Tozer, does not meet that test of expertness insofar as the subject property is concerned. He made his appraisal and formed his opinion some years before this land was taken and was even unaware that the property directly upon the state line itself was no longer part of this property, and no longer usable for private commercial purposes. (Tr-64 and 67) His opinion was based upon knowledge acquired long before the date as of which the property was to be evaluated, and that property was to be valued for the purposes of this suit as of the date of taking. (*State Road Commission v. Valentine*, 10 U. 2d 132, 349 P. 2d 321 (1960).) As a result, his testimony could not be persuasive as a matter of law in that it was not based on a timely examination of the property. Con-

cededly, there is considerable discretion in the trial court as to the exclusion of expert testimony, but certainly the quality of this testimony is not impressive, and probably merited exclusion.

The only other evidence presented by the defendants was the testimony of the defendant, Frank S. Woolley, himself. Quoting from the general law on the subject as set out in *5 Nichols on Eminent Domain*, 18.4(3):

It is generally understood that the opinion of the owner of the land is so far afflicted by bias that it amounts to little more than a definite statement of the maximum figure of his contention."

The \$10,000 figure added to his testimony is even more luridly exposed as weightless in that he himself says he wasn't qualified to render it. (Tr-22) That \$10,000 figure is the only figure placed on the land classed as agricultural by the defendants, and is so inherently unbelievable that the \$20,000 award must certainly have been based on the value of the small parcel characterized by the defendants as service station property. Twenty thousand dollars is outside the bounds of a reasonable award for that type of land taken. It is especially incredible in that it was based on the testimony of three men, one of whom had no familiarity with the property at the time of taking, another who had no familiarity with the Utah market, and the third a defendant in the lawsuit.

Even the theory advanced by the defendants was spurious. There exists many miles of this highway frontage from which a prospective buyer could choose (Tr-77);

therefore, there was no particular premium for this property, which was cut off from the border at the time of taking, and was not a developed border area. (Tr-81)

We submit that the theory and testimony of the respondents is incredible and a new trial can be granted where disputed testimony is incredible, impossible, or improbable. (39 Am. Jur. "New Trial.")

### CONCLUSION

The judgment of the lower court, by reason of error committed during the trial of the case, and the inherent improbability of respondent's testimony, should be reversed, insofar as the jury verdict of \$20,000 is concerned, and should be remanded to such court for new trial on the issue of just compensation.

Respectfully submitted,

A. PRATT KESLER  
Attorney General

NORMAN S. JOHNSON  
Assistant Attorney General

ROBERT S. CAMPBELL, JR.  
Special Assistant Attorney  
General

*Attorneys for Appellant*