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Utah Supreme Court

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BRIEF

KET NO. 10072 A

SUPREME COURT
OF THE
STATE OF UTAH

BOARD OF EDUCATION OF SALT LAKE CITY, a public corporation,
Plaintiff and Respondent,

vs.

BOTHWELL AND SWANER COMPANY, a corporation, and FLOYD B. BOTHWELL, trustee, et al.,
Defendants and Appellants.

Case No. 10072

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

DISPOSITION OF CASE BY LOWER COURT 2

RELIEF SOUGHT 2

STATEMENT OF FACTS 3

ARGUMENT 9

POINT I. THE TRIAL COURT ERRED PREJUDICIALLY IN PROHIBITING APPELLANTS' EVALUATION WITNESS, NIELSEN, FROM RENDERING AN OPINION ON THE MARKET VALUE OF THE CONDEMNED PREMISES 9, 10

(a) By the applicable standard, the witness was well qualified to testify on market value 10

(b) Contention that the Court's ruling did not prevent the witness, Nielsen, from rendering an opinion (based on other grounds) is erroneous 15

POINT II. THE TRIAL COURT ERRED PREJUDICIALLY IN DENYING ADMISSION IN EVIDENCE OF SALES OF COMPARABLE PROPERTY PROFFERED BY THE APPELLANTS .. 17

(a) It could not be said that sales occurring two years after the date of value were, as a matter of law, so remote as to have no probative value 20

POINT III. BY THE REFUSAL OF THE TRIAL COURT TO ADMIT THE TESTIMONY AND EVIDENCE OFFERED BY THE LANDOWNERS, APPELLANTS WERE DENIED A FAIR TRIAL 23

(a) The sole evaluation testimony admitted was that of the landowner, himself 23

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Machine-generated OCR, may contain errors.

Page

POINT IV. THE COURT ERRED PREJUDICIALLY IN DENYING TO APPELLANTS INTEREST AT THE STATUTORY RATE OF 8% PER ANNUM FROM THE DATE OF JUDGMENT ON THE VERDICT UNTIL THE DATE OF DEPOSIT MADE BY THE RESPONDENT 25

POINT V. THE BOARD OF EDUCATION FAILED TO ESTABLISH EXISTENCE OF THE PUBLIC NECESSITY FOR THE APPELLANTS' PROPERTY, OR THAT THE PROPOSED USE WAS ONE PUBLIC IN NATURE 29

CONCLUSION 31

AUTHORITIES CITED

29 C. J. S. 1380, Eminent Domain, Sec. 333a 28

Nichols on Eminent Domain, Vol. 5, p. 439, Sec. 21.31 (3rd ed.) 20

Nichols on Eminent Domain, Vol. 5, p. 452, Sec. 21.31 (2) 20

Wigmore on Evidence, Vol. 3, p. 44, Sec. 714 (3rd ed.) 13

CASES CITED

Board of Regents of University of Arizona v. Cannon, 86 Ariz. 176, 342 P. 2d 207 (1959) 11, 13

City of Chicago v. Vaccarro, 408 Ill. 587, 97 N. E. 2d 766 20

Curry v. Bacharach, 271 Pa. 364, 117 Atl. 435 (1921) 30

Dept. of Public Works v. Divit, 182 N. E. 2d 749 (Ill. 1962) 12

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS—Continued

Page

Dormann v. State of New York, 4 A. D. 2d 979, 167 N. Y. S. 2d 760 19

Douglas County v. Myers, 201 Or. 59, 268 P. 2d 625 14

Garr v. Cranney, 25 Utah 193, 70 Pac. 853 14

Graham v. Ogden Union Ry. & Depot Co., 79 Utah 1, 6 P. 2d 465 14

Hance v. State Roads Comm. of Md., 221 Md. 164 156 A. 2d 644 19

Holcombe v. City of Houston, 351 S. W. 2d 69 (Tex. Civ. App. 1961) 21

Housing Authority of City of Little Rock v. Sparks, 234 Ark. 868, 355 S. W. 2d 166 (1962) 21, 23

Mai v. Garden City, 177 Kan. 179, 277 P. 2d 636 12

McFarlane v. Winters, 114 Utah 149, 211 P. 2d 981 (1949) 27

Montana, State of v. Peterson, 328 P. 2d 617 (Mont. 1958) 12

Norman v. Utah Hotel Co., 60 Utah 52, 206 Pac. 556 (1922) 14

Oregon Short Line R. Co. v. Jones, 29 Utah 147, 80 Pac. 732 25

Salt Lake & U. R. Co. v. Schramm, et al., 56 Utah 53, 189 Pac. 90 (1920) 25

Shelby County v. Baker, 110 So. 2d 896 (Ala. 1959) 11

Shurtleff v. Salt Lake City, 96 Utah 21, 82 P. 2d 561 24

Southern Pacific Co. v. Arthur, 10 U. 2d 306, 352 P. 2d 693 (1960) 16, 18

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS—Continued

Page

State Road Comm. v. Danielson, et al., 122 Utah 220, 247 P. 2d 900 (1952) 26, 27

State Road Comm. v. Denver & Rio Grande W. R. Co., 8 U. 2d 236, 332 P. 2d 926 (1958) 30

State Road Comm. v. Hansen, 14 U. 2d 305, 383 P. 2d 917 (1963) 16

State Road Comm. v. Peterson, 12 U. 2d 317, 366 P. 2d 76 19

Tanner v. Provo Bench Canal & Irr. Co., 40 Utah 105, 121 Pac. 584 24

Taylor v. State Roads Comm., 224 Md. 92, 167 A. 2d 127 (1961) 21

Thompson v. State of Texas, 319 S. W. 2d 368 (Tex. 1958) 23

Turner v. State Roads Comm. of Md., 213 Md. 428, 132 A. 2d 455 (1957) 14, 15, 17

U. S. v. 63.04 Acres of Land, 245 F. 2d 140 (2 C. A., 1957) 19

Utah, State of v. Peek, 1 U. 2d 263, 265 P. 2d 630 (1953) 12, 18, 23, 26

Utah, State of v. Peterson, 12 U. 2d 317, 366 P. 2d 76 (1961) 18

Utah, State of v. Tedesco, 4 U. 2d 248, 291 P. 2d 1028 (1956) 12, 18

Utah, State of v. Woolley, et ux., 15 U. 2d ......, 390 P. 2d 860 (1964) 18

Webb v. Olin Mathieson Chemical Corp., 9 U. 2d 275, 342 P. 2d 1094 (1959) 11, 14

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Machine-generated OCR, may contain errors.

TABLE OF CONTENTS—Continued

Page

Weber Basin Water Conservancy Dist. v. Nelson, 11 U. 2d 253, 358 P. 2d 81 ... 14

Weber Basin W. C. Dist. v. Ward, 10 U. 2d 29, 347 P. 2d 862 (1959) ... 18, 20, 23

Wineger, et al. v. Aires, 371 Pa. 242, 89 A. 2d 521 (1952) ... 30

STATUTES CITED

15-1-4, Utah Code Annotated 1953 ... 27

78-34-1 & 4, Utah Code Annotated 1953 ... 30

78-34-5, Utah Code Annotated 1953 ... 30

78-34-10 (1), Utah Code Annotated 1953 ... 24

CONSTITUTION

Art. 1, Sec. 22, Utah Constitution ... 24

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

BOARD OF EDUCATION OF SALT LAKE CITY, a public corporation, *Plaintiff and Respondent,* vs. BOTHWELL AND SWANER COMPANY, a corporation, and FLOYD B. BOTHWELL, trustee, et al., *Defendants and Appellants.*	Case No. 10072

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This case was originated by the Respondent in 1960 by the filing of a complaint in the District Court of Salt Lake County to expropriate, by condemnation, lands of the Appellants. Issues relating to the proposed use being pub-

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lic in nature, the public necessity of the acquisition, the power of the Respondent to condemn the property of the Appellants and just compensation to be exacted for the expropriation were raised and submitted to trial. This appeal is prosecuted to review the several judgments made and entered by the trial court in the cause.

DISPOSITION OF CASE BY LOWER COURT

Upon pre-trial hearing, the lower court entered its Judgment of Right to Condemn in favor of Respondent (R. 51). Thereafter, upon trial of the issues of compensation and damages, the trial court entered its judgment against the Respondent and in favor of Appellants in the amount of $185,000.00; said judgment failed to provide for or carry interest either before or after judgment. The Motion of Appellants for a new trial on questions of the right to condemn and compensation was, by the lower court, denied on the 16th day of January, 1964. After several ancillary hearings and upon motion of Respondent, the lower court entered its Judgment of Condemnation on the 3rd day of March, 1964, adjudicating the public use, the authority therefor, and vesting in Respondent the absolute title in and to the condemned premises of Appellants.

RELIEF SOUGHT

It is submitted by this appeal that the judgment of the District Court entered on the verdict of the jury be reversed and the case remanded for new trial on the issues of value and compensation.

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Additionally, it is contended that the judgment of condemnation of March, 1964, be reversed and the case be remanded to the lower court with instructions to dismiss the Respondent's complaint and the stated cause of action.

In the event the reliefs requested above are denied, Appellants further seek judgment declaring their entitlement of interest payable by the Respondent at the Statutory rate from the date of entry of the judgment on the verdict to the date of the deposit of monies made by Respondent.

STATEMENT OF FACTS

The property of Appellants, as to which condemnation is sought, is described in the complaint of the Board of Education filed in April, 1960 (R. 2-3). A large tract, well known to inhabitants of Salt Lake City, the condemned premises is situated between Eighth South and Ninth South Streets in the City, the westerly property line thereof fronting upon Thirteenth East Street. The entire tract, prior to the taking, comprised some 157,383 square feet, of which the whole thereof was condemned (Tr. 26-29). For convenience at trial, the portion of the property abutting upon 13th East was referred to as Parcels A and B (Tr. 26-28), and the southeasterly segment, abutting upon Sunnyside Avenue on the north and 9th South Street on the south was denominated Parcel C (Tr. 28-29). As of the date of service of summons, Parcels A and B, comprising 74,356 sq. ft. more or less, were subject to R-5 use zone of Salt Lake City, while tract C, encompassing 83,027 sq. ft. was zoned R-2 (Tr. 26-29, 52-54, 73).

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The Appellants by their answer, denied the existence of a public use, raised the further questions of public necessity and lack of authority in law for the contemplated use and prayed for a dismissal on the merits, or as an alternate, if such questions were resolved in favor of the Board, that just compensation be thereupon adjudged (R. 8-9, 16-17, and 49-50).

Relative to the preliminary issues, interrogatories were served upon and answered by the Board (R. 18-23); the response indicated the proposed use to be in furtherance of general "school needs", that the Board "had not made final plans" for the use of Appellants' property, but that an immediate need existed for the parking of 400 to 600 automobiles (R. 20-21). Appellants' motion for summary judgment, founded upon the answers produced in discovery, was denied upon pre-trial hearing (R. 51-52), and the Petition for interlocutory appeal lodged by Appellants to review such ruling was by this Court denied on December 7, 1962 (See Sup. Ct. Dock. 9777). Upon further pre-trial hearings, the power of the Board to condemn the lands of Appellants was determined in the Respondent's favor (R. 56-57, 75-76) and the cause was thereupon set for trial by jury on the issues of value and compensation (R. 76-78), damages having been deemed to have accrued as of June 28, 1960 (R. 78).

On November 18, 1963, a jury of eight was selected and the trial affecting the issues of value began by the presentation of Appellants' case in chief (Tr. 1-2, 24). It was the theory of the landowners' case that under applicable zoning regulations, the highest and best use of the

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condemned portion zoned R-5, was multi-story apartments with a potential capacity of 315 apartment units (Tr. 49, 54), the segment under R-2 zoning serving the collateral needs of auto parking (Tr. 55, 90). Further, that although the largeness in size and plottage of the entire tract made it highly desirable and unique among land similarly zoned within the City, market value was to be primarily gauged by an examination and analysis of the sale of other properties (Tr. 66, 67, 104, 112).

Called as an evaluation witness for Appellants was Grant E. Nielsen. His qualifications to render an opinion on value were shown to be as follows:

a. A senior member of the American Society of Appraisers and President of the Utah Chapter (Tr. 42, 44);

b. A realtor and broker in Salt Lake City since 1954 (Tr. 44);

c. A former general contractor and construction technician (Tr. 43);

d. A former staff appraiser for the Utah State Tax Commission (Tr. 44);

e. Had testified as an expert witness in the courts of Utah (Tr. 44);

f. Had appraised all types of use properties (Tr. 44);

g. Had been retained as a fee appraiser for such established clients as State Road Commission, Kennecott Copper Company, numerous school boards, utility companies and others (Tr. 45-46).

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The witness, without objection rendered his opinion as to highest and best use of the condemned property (Tr. 49).

After identifying the topic tract and establishing his familiarity with it, he was asked his opinion of market value on the target date (Tr. 66). At that juncture, counsel for the Board was permitted, over objection (Tr. 70), an unlimited "voir doir" examination directed to the basis of the witness' opinion (Tr. 66-71, 121-146) part of the questioning being conducted without the presence of the jury. Adduced at this examination, was the following testimony:

a. That the appraiser had considered numerous sales of other property, among them being three transactions, which in his opinion, were comparable to the considered land zoned R-5 (Tr. 66, 69, 105-106, 110, 115, 119);

b. Sale No. 1 involved property at Fourth Avenue and B Street in Salt Lake City, took place in 1961, and was subject to R-5 zoning (Tr. 108-110);

c. Sale No. 2 concerned land at South Temple and K Street in the City, was consummated in 1962, and was zoned R-5 (115-117);

d. Sale No. 3 embraced property at 50 South Ninth East in the City, sale was made in 1962 and was subject to the same zone, R-5 (118-119);

e. That in the appraiser's opinion, there had not been a substantial change in market prices for R-5 prop-

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erty between the date of evaluation, June 28, 1960, and 1961 or 1962, the dates of the sales elicited (Tr. 111, 116, 135);

f. The witness found no sales in 1960, which in his opinion, were comparable to the condemned tract (Tr. 137, 139);

g. On cross-examination and without the presence of the jury, the witness acknowledged that other sales of R-5 property had been transacted in 1960 within the City, but that they were not sufficiently comparable, in his opinion, to be used (Tr. 127-133);

h. That each sale examined was compared with the subject property for location, zoning, plottage, and time of sale and weight given to it accordingly (Tr. 144);

i. That the value of unimproved real estate is determined by the market data or sales approach (Tr. 104).

After hearing such evidence, the trial judge found such testimony to be "wholly speculative", that only those sales "more favorable" and "more helpful" to the landowner were used by the witness to determine value and the judge thereupon refused to allow the opinion of Mr. Nielsen to go to the jury (See Tr. 146-147).

Appellants then proceeded to call two additional witnesses to testify on value (Tr. 163, 183), but upon objection of the Board, the testimony of each was rejected by the trial court as not having been founded upon proper

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basis and the same excluded was from the jury (Tr. 181, 190, 191). If received, the opinions of the witnesses proffered, respectively, were $542,160.00 and $596,000.00 (Tr. 175, 187). The landowners thereupon rested their case in chief without any evaluation testimony being placed before the trier of fact (Tr. 193).

Subsequent to the Board calling its first expert witness, Appellants requested and were granted permission to reopen their case in chief to permit the testimony of one of the landowners, Roy Bothwell (Tr. 200). After a hearing conducted without the presence of the jury, the witness testified that the condemned property was not "worth less than $525,000.00; absolute minimum, as to value" (Tr. 216). Upon objection of counsel for the Board, the witness was prohibited from explaining the basis of his conclusion (Tr. 217). The evidence of Mr. Bothwell was received as that of the landowner and not as a qualified and informed opinion on market value (Tr. 204-208, 217).

The Board called two evaluation witnesses (Tr. 193, 202). A number of R-5 and R-6 sales were adduced in support of their opinions, the date of such transactions ranging from 16 months prior to the key date of evaluation (Tr. 255) to four months succeeding (Tr. 309); only one sale was in the latter class. Over objection of Appellants' counsel (Tr. 274), one of the Board's witnesses was permitted to render his opinion as to the market value of the property zoned R-2 without having preliminarily produced any foundation therefor (Tr. 264-265). The Court received evidence from the Board's last witness that sales of R-2 land transacted in January and July, 1958, as relevant and

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comparable to the subject tract on the key date, June 28, 1960 (Tr. 354). The value conclusions of the Respondent's witnesses were $155,500.00 and $179,000.00, respectively (Tr. 265, 312.) The verdict of the jury, returned into open court on the 22nd day of November, 1963, was $185,000.00 (R. 134), and the judgment of the trial court thereon was entered the same day.

On the 10th day of December, 1963, the Board filed with the Clerk of the District Court a notice depositing with said official the sum of $185,138.80 (judgment and costs) (R. 138-139). Appellants objected to such deposit and the amount thereof on the ground that the payment tendered did not include interest on the judgment from the date of its entry, November 23, 1963, to the date of deposit at the statutory rate of 8% per annum. Upon hearing, the objection was overruled and interest denied (R. 143). Notwithstanding such order, the Board on January 2, 1964, filed an additional notice depositing "under protest" the sum of $1,662.35, representative of interest at 8% from the date of judgment to the date of the additional deposit (R. 140-141). The Appellants have not made application to the lower court to withdraw or receive said moneys or any part thereof.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED PREJUDICIALLY IN PROHIBITING APPELLANTS' EVALUATION WITNESS, NIELSEN, FROM RENDER-

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ING AN OPINION ON THE MARKET VALUE OF THE CONDEMNED PREMISES.

(a) *By the applicable standard, the witness was well qualified to testify on market value.*

At the trial on damages, Grant E. Nielsen, realtor and appraiser of Salt Lake City, was called as the Appellants' principal evaluation witness. Upon being sworn, the examination of the witness was at once directed to the general qualifications of the witness (Tr. 42-48). In addition to an explanation of his education, training and experience in the real estate community, Nielsen testified that he was familiar with the condemned tract, that he had personally inspected and viewed it, that he had been requested to appraise the premises and that he had, in fact, formed an opinion of its market value as of June 28, 1960.

Thereafter, Nielsen was asked his opinion as to the highest and best use of the considered property; he responded, without objection by the Board, that the best use was a "high-rise" multiple apartment site. Upon confirming this conclusion, the witness was asked for his opinion on market value. Thereupon, counsel for the Board, over objection, was allowed, under the pretense of voir doir, to conduct a searching cross-examination of the substantive basis for the expert's value opinion, specifically his analysis of comparable sales. The net effect of this untimely and unfortunate interrogation was the trial court's declaration that the witness was not qualified to render an opinion:

> "It appears from his own testimony that his opinion, based upon comparables in 1962, would be

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> wholly speculative; would not be helpful to the jury in determining comparable values. For that reason, I am going to decline to permit the testimony to go to the jury, unless he further qualifies on this theory of comparable values." (Tr. 146.)

Based on an erroneous hypothesis, Nielsen was excluded from testifying on market value. For the trial court to have so ruled was clear and unqualified error. The function of the trial judge in receiving or rejecting the opinion of a witness on market value is to adjudge, preliminarily, the competency of the witness by his training, his educational achievements, his specialized knowledge of the field or domain under inquiry, and his practical experience in the real estate and appraisal business. *Board of Regents of University of Arizona* v. *Cannon,* 86 Ariz. 176, 342 P. 2d 207 (1959); *Shelby County* v. *Baker,* 110 So. 2d 896 (Ala. 1959). It is not his province to act as an arbiter of fact, or to weigh the merits of the opinion testimony on a finely balanced scale; that assignment rests solely with the jury. *Webb* v. *Olin Mathieson Chemical Corp.,* 9 U. 2d 275, 342 P. 2d 1094 (1959). Therein, it was said:

> "* * * When the subject under consideration involves some aspects of science, art, trade, or learning about which the general knowledge of laymen is not sufficient to interpret and apply evidence accurately in the finding of facts and drawing conclusions, *one who has acquired special knowledge of the subject through study, or experience may be permitted to testify as an expert and give his opinions in regard to it.* * * *
>
> "* * * So long as there is reasonable basis shown to justify the trial court's permitting the

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> witnesses to testify as experts, the testimony is allowed to come in as competent evidence. The qualifications of the witnesses then become one of the factors for the jury to consider in determining the weight to be given it." (Emphasis added.)

Indeed, the presentation, by the witness, of his analysis of sales of other property, or the manifestation of the reasons generally underlying his opinion, is not a condition precedent to the admissibility of an opinion. Such is the plain meaning of this Court's holding in *State of Utah* v. *Tedesco,* 4 U. 2d 248, 291 P. 2d 1028 (1956). For that matter, it was not until the decision in *State of Utah* v. *Peek,* 1 U. 2d 263, 265 P. 2d 630 (1953), that sales of comparable property were properly considered the subject of inquiry at all, on direct examination; prior thereto, it had been contended that questions relating to collateral sales were reserved for cross-examination. In rejecting Nielsen's testimony, the lower court disregarded the clear effect of *Tedesco.*

The witness, Nielsen, on voir doir examination, stated that he had examined, was familiar with, and had analyzed a number of sales of other property, that he had utilized and considered three (3) transactions in particular, in arriving at his opinion; as to the latter sales, the nature and dates of each were declared. Even had the witness failed to adduce one sale, his opinion, based upon general qualifications, should have been initially received for whatever weight the trier of fact might accord to it. *Mai* v. *Garden* City, 177 Kan. 179, 277 P. 2d 636; *Dept. of Public Works* v. *Divit,* 182 N. E. 2d 749 (Ill. 1962); *State of Montana* v. *Peterson,* 328 P. 2d 617 (Mont. 1958). The rule is set out

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in *Board of Regents of University of Arizona* v. *Cannon*, 86 Ariz. 176, 342 P. 2d 207 (1959):

> "* * * It is true that there are other elements which may be used to determine market value, *including a knowledge of the sales prices of other property similar in character and locality, but we know of no rule which requires the use of this element exclusively.* If the witness testifying as to market value bases his opinion upon a recognized method of determining it which is of such a nature that it is not a matter of common knowledge, but results from special experience of training of the witness, his opinion in the matter may be regarded as expert. *Upon cross-examination* he may be questioned as to the extent of his knowledge of other elements, and *lack of such knowledge would be a matter for the jury to consider in weighing the value of the testimony.* * * *" (Emphasis ours.)

Wigmore states the general maxim thusly:

> "A sufficient qualification is usually declared to exist where the witness is a resident, landowner, or farmer, in the neighborhood." 3 Wigmore on Evidence 44, Sec. 714 (3rd ed.).

Nielsen brought to the trial an abundance of personal qualifications. President of the Utah Chapter of the American Society of Appraisers, former appraiser for the State Tax Commission, a realtor and broker in Salt Lake City for many years with an established appraisal clientel, Nielsen had qualified as an expert on market value in other suits of like nature. Once having elicited his training, education, experience and knowledge of the subject property, all objections to his opinion on value went to the weight

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rather than to its admissibility. *Norman* v. *Utah Hotel Co.*, 60 Utah 52, 206 Pac. 556 (1922).

It is elementary that the determination of whether a witness is competent to record his opinion on land value rests to a large extent, with the discretion of the trial court. *Weber Basin Water Conservancy Dist.* v. *Nelson,* 11 U. 2d 253, 358 P. 2d 81; *Graham* v. *Ogden Union Ry. & Depot Co.*, 79 Utah 1, 6 P. 2d 465. But a more important principle is that the decision of the trial judge will not stand on appeal if it is patent that prejudicial error was committed or his discretion was abused. *Garr* v. *Cranney,* 25 Utah 193, 70 Pac. 853; *Webb* v. *Olin Mathieson Chemical Corp.*, supra; *Douglas County* v. *Myers*, 201 Or. 59, 268 P. 2d 625.

Turner v. *State Roads Comm. of Md.*, 213 Md. 428, 132 A. 2d 455 (1957) is a case in point. Coates was called to testify in behalf of the landowners. He was an experienced realtor and broker of 20 years. On direct examination, the witness elicited four (4) sales of property which, in his opinion, were comparable to the property which the Roads Commission had condemned. The trial court ruled that the testimony was vague and general and refused to permit the appraiser to testify as to market value. The Maryland Court reversed the ruling of the trial judge and granted a new trial. In so doing, it declared:

> "This Court has long held that while the admissibility of expert opinion evidence is largely within the discretion of the trial court, it is always subject to the review of the appellate court. * * * (citing authorities.)
>
> "We have concluded after a careful examination of the evidence that the trial court should not

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> have excluded the opinion evidence of Mr. Coates. * * * The evidence therefore shows not one sale, but at least four sales with the year of sale and sale price per acre. * * * *We feel that both property owners were possibly harmed by being denied the right to present Mr. Coates' testimony to the jury and that the exclusion of this evidence constitutes reversible error."* (Emphasis added.)

In the case at bar, Nielsen testified of three (3) sales which in his opinion were probative. The facts herein substantially parallel those in *Turner* v. *State Roads Comm.* and, it is submitted, warrant and require the same treatment as therein given, namely, a new trial.

(b) *Contention that the Court's ruling did not prevent the witness, Nielsen, from rendering an opinion (based on other grounds) is erroneous.*

It has been said that the ruling of the trial court barring Mr. Nielsen from imparting his opinion on market value to the jury did not foreclose an opinion based on general qualifications of the witness. At the hearing on Appellants' motion for new trial, the trial court remarked:

> "The court takes the view that market data comparability is a matter which the court must consider in advance of testimony going to the jury.
>
> "If it isn't helpful, the jury shouldn't hear it. If it is so one-sided that the court does not consider it a helpful standard, it is the duty of the court to exclude it, *but it wasn't the intention of the court to prohibit the witness from testifying from his*

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general knowledge, his general examination, his general opinion, as to values on the key date." (Trans. of Proceeding—December 23, 1963, p. 11.)

There are at least two reasons why this statement affords no panacea to the otherwise erroneous decision of the trial court in rejecting the opinion of Nielsen:

1. The comparative sale (or market data) approach to market value is the paramount, the key, and pragmatically the only test which can be utilized in determining the market value of the condemned property (unimproved and non-income bearing). This approach hinges upon the application of the "willing buyer—willing seller" test adopted by this Court. *Southern Pacific Co.* v. *Arthur,* 10 U. 2d 306, 352 P. 2d 693 (1960); *State Road Comm.* v. *Hansen,* 14 U. 2d 305, 383 P. 2d 917 (1963). Witness the statement appearing in the Appraisal Manual of the American Institute of Real Estate Appraisers:

> "The market data approach is essential in almost every appraisal of the value of real property. * * *
>
> "Why is market data good evidence of value? Because it represents the actions of users and investers. * * * The market data approach recognizes that the typical buyer will compare asking prices and work through to the best deal available. In the market data approach the appraiser is an observer of the buyer's actions." Appraisal of Real Estate, American Institute, pp. 68, 319 (3rd ed. 1960).

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2. If the lower court found that Nielsen's testimony, predicated upon a careful diagnosis of other sales, would not be "helpful" to the jury, how, it is queried, would an opinion founded on generalities be "helpful"? The question provides its own answer.

The position taken by the trial court herein was raised and answered in *Turner* v. *State Roads Comm. of Md.*, supra, discussed above. After commenting upon action of the trial court in refusing to allow the witness, Coates, to testify on market value, the Court said:

> "Appellee insists that the court did not decide the witness could not qualify and the appellants should have proceeded further to qualify the witness. *We do not agree. Counsel had drawn from the witness all information he had of comparable sales and the court reiterated his original opinion that Coates was not qualified. The excusal of the witness at this juncture cannot be considered as an abandonment to qualify him.*"

The error of the trial court in preventing Nielsen from testifying on market value was prejudicial and warrants a new trial on compensation.

POINT II.

THE TRIAL COURT ERRED PREJUDICIALLY IN DENYING ADMISSION IN EVIDENCE OF SALES OF COMPARABLE PROPERTY PROFFERED BY THE APPELLANTS.

The witness, Nielsen, testified that upon his investigation of sales in the area, there were three (3) transactions

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which he utilized and considered comparable. See Brief of Appellants, pp. 6, 7. In each instance, the sale was of property situated in Salt Lake City, subject to the same use zone as the condemned premises, and purchased for multiple-apartment construction. The dates of the transactions were 1961 for Sale No. 1 and 1962 for Sales No. 2 and No. 3. The trial court found the sales to be too far removed in point of time to be relevant, that the same were the product of a biased witness and refused to receive them as bearing upon market value as of June 28, 1960. This is the comment of the trial judge:

> "* * * Having taken only 1962 prices, and, without having considered anything in 1960, the court is of the view that he (Nielsen) considers the 1962 prices more favorable to the land-owner here who called him to testify."

Apart from the statement falling in the category of a commentary on the weight of the testimony and the credibility of the witness, the decision to reject the sales as remote in time was prejudicial error.

By a chain of decisions, the law is well established in this jurisdiction that sales of comparable property are admissible as bearing upon market value, *State of Utah* v. *Peek,* 1 U. 2d 263, 265 P. 2d 630 (1953); *State of Utah* v. *Tedesco,* 4 U. 2d 248, 291 P. 2d 1028 (1956); *Southern Pacific Co.* v. *Arthur,* 10 U. 2d 306, 352 P. 2d 693 (1960); *Weber Basin W. C. Dist.* v. *Ward,* 10 U. 2d 29, 347 P. 2d 862 (1959); *State of Utah* v. *Peterson,* 12 U. 2d 317, 366 P. 2d 76 (1961); *State of Utah* v. *Woolley, et ux.,* 15 U. 2d ......, 390 P. 2d 860 (1964), and their use

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is now common practice in the trial of land condemnation suits.

Each of the sales proffered by the witness, Nielsen, was consummated subsequent to the date of value in the case. This should cause no alarm nor should that fact render them inadmissible. The preferred and majority rule supports the introduction of similar sales of property, made before or after the taking, which have a reasonable relationship to the status of the market at the date of assessment of value. *Hance* v. *State Roads Comm. of Md.*, 221 Md. 164, 156 A. 2d 644; *U. S.* v. 63.04 *Acres of Land,* 245 F. 2d 140 (2 C. A., 1957). In *Dormann* v. *State of New York,* 4 A. D. 2d 979, 167 N. Y. S. 2d 760, the admissibility of a sale made two years after the date of acquisition was approved and it was said by the New York Court:

> "It seems reasonably clear that the sale was made in good faith and in the ordinary course of business. We find no case precisely in point where testimony was received of a sale two years after an appropriation but sales made prior to an appropriation for an even longer period of time have been approved (Village of Lawrence v. Greenwood, 300 N. Y. 231, 90 N. E. 2d 53). The rule in Massachusetts is that testimony of after sales within a reasonable time is admissible and we see no good reason why the same rule should not apply in this state. (citing authorities.)"

This Court has not had occasion to pass upon the question, pointedly, although the sales under consideration in *State Road Comm.* v. *Peterson,* 12 U. 2d 317, 366 P. 2d 76, were transacted subsequent to the date of evaluation.

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(a) *It could not be said that sales occuring two years after the date of value were, as a matter of law, so remote as to have no probative value.*

There is no magic standard by which a comparable sale is determined. A host of factors, inclusive of size, shape, zoning, and proximity of time and location, are to be considered; the best that can be said is that comparability is dependent upon the conditions and circumstances of each situation. 5 Nichols on Eminent Domain 439, Sec. 21.31 (3rd ed.). The time of sale, as an element itself, is of moment in ascertaining whether the market conditions between the two dates have fluctuated or substantially changed. If such conditions have maintained a relative consistency, the proffered sale should be admitted. *Weber Basin W. C. Dist.* v. *Ward,* 10 U. 2d 29, 347 P. 2d 862; *City of Chicago* v. *Vaccarro,* 408 Ill. 587, 97 N. E. 2d 766. Placed in the negative:

> "Remoteness in point of time, however, will condemn the evidentiary value of a sale only where there has been such a change in conditions during the interval as to make the sale an unreliable test of value." 5 Nichols on Eminent Domain 452, Sec. 21.31 (2).

The witness for Appellants, Nielsen, testified that with respect to comparable Sales Nos. 1, 2, and 3, there had been no measurable shift of the market between the date of condemnation (1960) and that of the respective sales (1961 and 1962) (Tr. 112, 116, 135). Furthermore, Nielsen stated that his investigation did not disclose any sales during 1960 which, in his opinion, were similar to the

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condemned tract (Tr. 137-139); at this point in the trial, such testimony was undisputed as the Board had not yet gone forward with its case. The foundation for time of sale was therefore amply satisfied for the admission of each of the proffered sales brought forth by Mr. Nielsen.

In rejecting the sales, the trial court expressed apparent concern over the remoteness of time involved. That factor, standing alone, is of little consequence. Sales made five years or more have been received, *Taylor* v. *State Roads Comm.,* 224 Md. 92, 167 A. 2d 127 (1961); *Holcombe* v. *City of Houston,* 351 S. W. 2d 69 (Tex. Civ. App. 1961), and a trial court was held to have abused its discretion in rejecting sales made three years before the key date. *Housing Authority of City of Little Rock* v. *Sparks,* 234 Ark. 868, 355 S. W. 2d 166 (1962). Remoteness in time goes not to the admissibility of the proffered sale, but rather to its weight. Thus, in approving the use of a sale made six and one-half years from the date of value, this Court said:

> "While we recognize that if a prior sale is too remote in point of time, and changed conditions have intervened so that the trial court thinks the evidence has no probative value, he may sustain the objection, we do not regard the instant situation as falling within the classification. * * * *The more remote the time of the prior sale the less probative value it may have on the immediate situation, but that goes to the weight of the evidence and not its competency or its relevance."* (Emphasis ours.) *Weber Basin W. C. Dist.* v. *Ward,* 10 U. 2d 29, 347 P. 2d 862 (1959).

Any misgivings that the trial court may have had as to the sales proposed by Appellants went to their weight

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and value, not the admissibility thereof. That the trial court was in doubt about the accuracy of its ruling is evident from the transcript. After hearing all the evidence including that of the Board, the court, on its own motion, stated that it would permit Nielsen to testify on market value, utilizing the proposed 1961 sale (No. 1 herein) as a premise (Tr. 394, 395). After argument, the court reversed the prior pronouncement and held to its initial decision denying the admission of the opinion and sales of Mr. Nielsen and denied Appellants' motion to reopen their case in chief:

> "The court having reconsidered the ruling stated just prior to recess now believes that an opinion by Mr. Nielsen based upon *one* comparable would not be sound or justified or helpful to the jury." (Tr. 398.)

In so doing, the trial court, again, indulged in the weighing of evidence, the credibilty of the witness and the relative merits of Nielsen's opinion. Such constitutes prejudicial error.

The Board of Education did not witness the difficulty experienced by Appellants in the presentation of its evaluation witnesses. Firstly, the trial court reversed its ruling that sales be introduced prior to the witness rendering his opinion; the matter of sales and their validity, it was said, was for cross-examination (Tr. 264, 265). Secondly, the Board introduced into evidence sales of property zoned R-2, which were transacted in January and July, 1958 (Tr. 354). If the trial court was concerned about the remoteness of time accompanying the sales offered by Ap-

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pellants, 1958 sales offered by Respondent should have caused equal anxiety.

Although the determination of comparability rests in the first instance, within the discretion of the trial court, *State of Utah* v. *Peek,* 1 U. 2d 263, 265 P. 2d 630 (1953), that discretion, if found to be erroneous or abused, will be overturned. In *Weber Basin W. C. Dist.* v. *Ward,* 10 U. 2d 29, 347 P. 2d 862 (1959), the trial court excluded a sale of the condemned tract made six and one-half years prior to the date of value. Such exclusion was found to be in error, and served as a ground for the cause being remanded for new trial. See also *Housing Authority of City of Little Rock* v. *Sparks,* 234 Ark. 868, 355 S. W. 2d 166 (1962) and *Thompson* v. *State of Texas,* 319 S. W. 2d 368 (Tex. 1958).

It is submitted that reasonable minds could not differ that the sales proposed and offered by Appellants were, in law, comparable, that the objections thereto went to their weight and not admissibility and that the trial court erred in refusing to receive the same.

POINT III.

BY THE REFUSAL OF THE TRIAL COURT TO ADMIT THE TESTIMONY AND EVIDENCE OFFERED BY THE LANDOWNERS, APPELLANTS WERE DENIED A FAIR TRIAL.

(a) *The sole evaluation testimony admitted was that of the landowner, himself.*

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The Appellants, as landowners in condemnation, are entitled to be compensated justly for the expropriation of their property by the Board of Education. Art. 1, Sec. 22, Utah Constitution; *Shurtleff* v. *Salt Lake City,* 96 Utah 21, 82 P. 2d 561; 78-34-10 (1) U. C. A. 1953. This requires a fair trial, free from prejudicial error.

The transcript of the testimony and evidence is undeniable that the error committed by the trial court, as outlined in Points I and II of this Brief, worked to the real prejudice of the Appellants. The aftermath of the lower court's rulings excluding the testimony and opinion of Nielsen, was that the landowners, who carry to the trial the burden of proof, *Tanner* v. *Provo Bench Canal & Irr. Co.,* 40 Utah 105, 121 Pac. 584, failed in their effort to place in evidence any testimony on market value. Not one scintilla of expert evidence reached the trier of fact in behalf of Appellants during the trial.

Only after the Board of Education had opened its main case were the Appellants permitted the opportunity of reopening their case for the limited purpose of calling one of the landowners, Roy Bothwell (Tr. 200). That testimony was received not as an opinion from one who had made an informed analysis of the market or as that of a qualified appraiser, but in the empty vacuum of a landowner, affected by bias and special interest. His lay statement that the "property wasn't worth less than $525,000.00; absolute minimum, as to value" was of no significance. Practically, the Appellants' case was void of evidence. In light of this, it is small wonder that the verdict of the jury was barely $6,000.00 above the evaluation testimony of the Board of

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Education, $179,000.00. The resulting prejudice requires that Appellants be accorded a new trial.

POINT IV.

THE COURT ERRED PREJUDICIALLY IN DENYING TO APPELLANTS INTEREST AT THE STATUTORY RATE OF 8% PER ANNUM FROM THE DATE OF JUDGMENT ON THE VERDICT UNTIL THE DATE OF DEPOSIT MADE BY THE RESPONDENT.

On November 22, 1963, judgment on the verdict of the jury was rendered in favor of Appellants and against the Board of Education for the sum of $185,000.00; said judgment failed to specify that interest was due and owing at 8% from the date of judgment until the same was paid or until a statutory deposit was made (R. 134). Appellants objected to the December 10, 1963 Deposit of Judgment, made by the Board on the ground that the same did not include interest from the date of judgment. Upon hearing, the trial court found that a judgment of condemnation is not of the same nature as ordinary money judgments, that interest was not owing, and thereupon overruled the objection (Proc. of Dec. 23, 1963, p. 30, R. 143). The lower court erred by the order.

Questions of entitlement of interest in condemnation suits have been before this Court. The cases of *Oregon Short Line R. Co.* v. *Jones,* 29 Utah 147, 80 Pac. 732 and *Salt Lake & U. R. Co.* v. *Schramm, et al.,* 56 Utah 53, 189 Pac. 90 (1920) have established the principle that interest at the normal rate of 6% per annum is not due upon the

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filing of a complaint in condemnation but is exacted prior to judgment, only in the event that the condemning agency possesses the property, pendente lite, under an order of occupation. Again, in *State of Utah* v. *Peek,* 1 U. 2d 263, 265 P. 2d 630, the Court declared that the condemnee is not entitled to the recovery of interest from the date of service of summons, there being no taking in law, even though the demised premises are vacant and nonproductive. *State Road Comm.* v. *Danielson, et al.,* 122 Utah 220, 247 P. 2d 900 (1952), provides that in those instances wherein the condemnor does obtain occupancy pendente lite, of the condemned tract, the lawful rate of interest is 6% from the date of the order of immediate occupancy to the "date of judgment". The singular issue (whether interest is owing upon the judgment in condemnation at 8% from the date of entry until paid or satisfied) raised by this appeal has not been directly before the Court.

The judgment on the verdict entered by the trial court on November 22, 1963, decreed a sum certain due the Appellants from the Board of Education. Its recitals were consistent with other money judgments at law ordinarily entered by a court of this State in an adversary proceeding. Like other judgments at law, it carries interest at 8% per annum from the date of entry. The statute relating to the payment of interest is the touchstone of the issue:

> "Interest on judgments. — Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; *other judgments shall bear interest at the rate of eight*

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per cent per annum." 15-1-4 U. C. A. 1953, as amended.

The statute circumscribes all in personam judgments. *McFarlane* v. *Winters,* 114 Utah 149, 211 P. 2d 981 (1949). The single exception made to the "eight percent" rule is on judgments arising out of actions in contract. Under the time-honored principle of statutory construction, expressio unius est exclusio alterius, the legislative intent, by implication, prescribes that compensation judgments in condemnation bear interest at 8 percent until paid or until a statutory deposit is effected.

In *State Road Comm.* v. *Danielson, et al.,* 122 Utah 220, 247 P. 2d 900 (1952), it was contended that the statute above-quoted (then codified as 44-0-4) was applicable from the date of occupancy by the condemning agency. This Court rejected that argument, but in so doing, declared that the statute, now 15-1-4 U. C. A. 1953, was applicable from the time that damages in condemnation are determined. The Court, writing through Wolfe, C. J., said:

> "Admittedly, the amount of the damage sustained by the condemnee is not determined prior to the entering of the order but is left for later determination. *Until such time as damages are determined,* it is clear that there is no judgment which will bear interest within the meaning of Sec. 44-0-4."

The alter ego of this rule is that upon determination of damages and compensation and entry of judgment thereon, the statute is operative. In *Danielson,* the judgment of the trial court specified interest at 8% from occupancy by the State of Utah until paid (Supreme Court No. 7752). By

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its opinion, this Court found error only to the extent that interest was awarded "to the date of judgment". Interest at 8% from the entry of judgment until payment thereof was permitted to stand.

The rule set forth in *Danielson* is in harmony with the weight of authority. In 29 C. J. S. 1380, Eminent Domain Sec. 333a, it is written:

> "Generally interest on the award is allowed and judgments in condemnation proceedings have been held to be within the meaning of statutes providing for interest on judgments generally."

The significance of the trial court's ruling in this matter extends far beyond interests of the parties hereto. Counsel for Appellants are informed that the great bulk of condemning authorities in the State of Utah have interpreted the statutes and decisions of this Court as requiring the payment of interest at 8% on condemnation judgments and have, in fact, paid such interest for many years last past. If this Court determines that interest is not due and payable as herein contended and advanced, it is submitted that it should also declare whether such ruling has retroactive application to other causes wherein interest has been paid.

It is submitted that the trial court committed error in overruling Appellants' objection to the Deposit made by the Board of Education, and that the judgment of November 22, 1963, should carry interest at 8% until the Deposit of Judgment was made.

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POINT V.

THE BOARD OF EDUCATION FAILED TO ESTABLISH EXISTENCE OF THE PUBLIC NECESSITY FOR THE APPELLANTS' PROPERTY, OR THAT THE PROPOSED USE WAS ONE PUBLIC IN NATURE.

Through discovery processes, the Board made known the use it proposed to make of the Appellants' property—general school needs and parking area for automobiles (R. 20-22). Plans for actual use had not been finalized. At the pre-trial hearing in September, 1962, Appellants' counsel moved for summary judgment of dismissal on the ground that immediate need was not evidenced and that parking area was not an authorized public use. The pre-trial court denied the motion and Appellants, to review that Order, filed a petition for interlocutory appeal with this Court; the same was also denied. At a subsequent pre-trial proceeding in May, 1963, it was stipulated between the Board and Counsel for landowners that the issue of the power to condemn had been resolved in favor of the public agency (R. 75). The order of pre-trial entered upon the stipulation confirmed the power to condemn the lands of Appellants and provided that from the order, the right of appeal did not exist. Because present counsel did not represent the Appellants at that time, it is necessary to interpret the language adopted in said Order as to its content and meaning. With respect to that, present counsel for Appellants believe this was intended:

1. it was understood by Mr. McCulloch, then counsel, that the question of the Board's

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power to condemn had been determined adversely to Appellants at the September, 1962 hearing; and therefore,

2. no further issue would be raised as to that point in the lower court.

The waiver of Appellants' right of appeal is less troublesome. It is a general rule that although the right of appellate review may be waived by a litigant, that so fundamental is that right to the judicial system and due process of law, the waiver must be supported by adequate consideration. *Curry* v. *Bacharach,* 271 Pa. 364, 117 Atl. 435 (1921). The record does not reveal the existence of any such consideration.

The power of condemnation must be underwritten by satisfying statutory conditions. Specifically, the proposed use must be authorized by law and public in nature. 78-34-1 and 4, U. C. A. 1953; *State Road Comm.* v. *Denver & Rio Grande W. R. Co.,* 8 U. 2d 236, 332 P. 2d 926 (1958). The declared public improvement must be located in a manner compatible with the greatest public good and the least private injury. 78-34-5 U. C. A. 1953. Lastly, the need of the property condemned must be immediate. A default by the condemnor in meeting any of these requirements should result in the condemnation complaint being dismissed.

The Board of Education did not satisfy its burden of proof with respect to these issues. The case of *Wineger et al.* v. *Aires,* 371 Pa. 242, 89 A. 2d 521 (1952) is a ready response to a school board who enters the real estate mar-

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ket to condemn without evidencing a public need for educational facilities.

CONCLUSION

The trial court committed prejudicial error in refusing to permit the opinion testimony of Grant E. Nielsen, witness for Appellants, on market value and in rejecting the proffered sales of comparable properties elicited by the said witness. Appellants were prejudiced by said rulings and prevented from establishing their case on market value of the condemned premises. This Court should remand the case to the lower court for a new trial on the issues of compensation.

The lower court committed prejudicial error in holding that the Board of Education was entitled to condemn and expropriate the property of Appellants on the showing made.

The trial court erred in law in failing to prescribe that the judgment on the verdict carried interest at the statutory rate of 8% per annum. This court should rectify such ruling by requiring the payment of such interest from the date of judgment to the date that deposit of judgment was tendered.

Respectfully submitted,

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