

1956

# State of Utah v. Brack Howard Noble : Brief of Appellant

Utah Supreme Court

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E. R. Callister; W. L. Budge; Robert B. Porter; K. Roger Bean; Attorneys for Appellants;

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In the  
**Supreme Court of the State of Utah**

STATE OF UTAH by and through its  
ROAD COMMISSION; H. J. COB-  
LEISSEN, Chairman, LAYTON  
MAXFIELD and LORENZO J.  
BOTT, members of the State Road  
Commission,

**FILED**  
JAN 11 1957  
Plaintiffs, Supreme Court, Utah  
Appellant,

vs.

Case No.  
8544

BRACK HOWARD NOBLE and ANN  
C. NOBLE, his wife; ELMO ENG-  
LAND; E. J. HUBER; and PACIF-  
IC NATIONAL LIFE ASSURANCE  
COMPANY, a corporation,

Defendants,  
Respondent.

**APPELLANT'S BRIEF**

E. R. CALLISTER,  
Attorney General,  
W. L. BUDGE,  
Assistant Attorney General,  
ROBERT B. PORTER,  
Assistant Attorney General,  
K. ROGER BEAN,  
Assistant Attorney General,  
*Attorneys for Appellant.*

ARROW PRESS, SALT LAKE

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In the  
**Supreme Court of the State of Utah**

STATE OF UTAH by and through its  
ROAD COMMISSION; H. J. COR-  
LEISSEN, Chairman, L A Y T O N  
M A X F I E L D and LORENZO J.  
BOTT, members of the State Road  
Commission,

*Plaintiff,  
Appellant,*

vs.

Case No.  
8544

BRACK HOWARD NOBLE and ANN  
C. NOBLE, his wife; ELMO ENG-  
LAND; E. J. HUBER; and PACIF-  
IC NATIONAL LIFE ASSURANCE  
COMPANY, a corporation,

*Defendants,  
Respondent.*

**APPELLANT'S BRIEF**

**STATEMENT OF FACTS**

This is an appeal from a jury verdict and judgment entered thereon awarding the defendants Noble the sum of \$150,000.00 together with interest, exclusive of costs and to the date of judgment, in the further sum of \$7,321.05. The verdict stems from a condemnation proceeding com-

menced by the State of Utah through its Road Commission for the taking of approximately eight and a fraction acres of land for highway purposes situate in Salt Lake and Davis Counties, Utah. Trial was had in the Third Judicial District Court in and for Salt Lake County, commencing on the 3rd day of April, 1956, the Honorable Joseph G. Jeppson, Judge, presiding. The State Road Commission had secured an Order of Immediate Occupancy on the 22nd of July, 1955, and at the time of the trial the improvements on the land had been removed and actual construction of the road bed was in progress; this made it impossible for the jury upon a view of the premises to observe the property in its original condition at the time of the taking. The importance of this fact will be made clear to this Court later in this brief.

By stipulation and motion to dismiss the defendants Elmo England and E. J. Huber were eliminated from the cause (R. 97, 98, 99); the Pacific Mutual Life Assurance Company filed its answer (R. 19) and amended answer (R. 35) asserting its note and mortgage as against the defendants Noble. The Pre-trial Order (R. 32, 33) limited the issues to the question of damages. The State's Motion for New Trial (R. 76) was denied (R. 78). Notice of appeal from the judgment and the whole thereof was, by your appellant, timely filed (R. 93).

At the trial the State first placed into evidence its Exhibit 1, a map of the land to be condemned (R. 108-112); thereafter the defendants Noble undertook the burden of proving the quantum of damages for the taking. This, we think the record shows, the defendants failed to do.

First witness for the defendants, Albert Z. Richards, (R. 112) stated that he was a civil engineer with a B. S. Degree, 1939, from the University of Utah; that he had been hired by the defendants in November of 1955 to cross section the area of the property condemned and to determine the quantity and quality of the materials to be found thereon (R. 114); that he employed a driller and supervised the drilling operations. The witness concluded that there were one million two hundred ninety nine thousand and eight hundred fifty eight tons of material (1,299,858) in the tract of which 355,222 tons was "muck" sand and 944,646 tons a mixture of sand and gravel (R. 123). On cross examination the witness testified that he could estimate within 10% [after the drilling of but four test holes] how much material in cubic yards there was beneath the surface of the eight-acre tract (R. 134); but the witness also was of the opinion that gravel mining was pretty much like gold mining and that one does not know what is there until he gets there (R. 212).

Second witness for the defense was Brack Howard Noble, one of the owners of the property being condemned (R. 136). The witness testified as to when he acquired the property; as to the improvements thereon; as to the businesses he conducted thereon, i. e., sand and gravel, trailer court and the selling of antiques (R. 138). Over plaintiff's objection (R. 147) defendants' Exhibit No. 28, colored photo, was admitted in evidence (R. 151). Defendants' Exhibits 29 to 41 inclusive, colored photos (R. 164), were offered and admitted over plaintiff's objection (R. 165). The witness was permitted to testify, (a) as to his income



from the property—1947 to 1951, \$5,000.00 per year; (R. 155); 1952, \$9,702.00; 1953, \$14,221.85; 1954, \$16,436.00; 1955, \$20,056.55 (R. 156); (b) as to its value, \$300,000.00; (R. 163) and (c) that as long as he lived he could net \$20,000.00 per year therefrom (R. 163). On cross examination the witness stated that the value of the sand and gravel would be approximately \$200,000.00 (R. 168); he had some difficulty in explaining how he arrived at that figure (R. 169-171); the witness also had some trouble in accounting for the remaining \$100,000.00 in terms of valuation of the properties exclusive of the sand and gravel (R. 178-181). The witness admitted that the colors portrayed by the photos [Defendants' Exhibits 28 through 41] did not represent the true colors of the landscape (R. 185-187). The witness estimated that it would take him 15 years to dispose of the muck sand on the premises (R. 195), and admitted that in order to do so he would have to do better than he had done to date (R. 195).

Don R. Bass, next witness for the defendants (R. 195), testified that he was a driller for Boyle Brothers Drilling Company of Salt Lake City, Utah (R. 196); that he conducted the drilling of four test holes on the defendants' property and made explanation as to depth and kind of materials found (R. 195-201).

Fourth witness for the defendants was M. L. Schoenfeld. The witness was a sand and gravel operator. He testified as to the nature of the sand and gravel materials, their uses, the demand for, the price of, and as to the existing supply (R. 217-239). The witness stated that there was a severe shortage of muck sand (R. 225), however, on cross

examination, this witness said he had not sold over 30,000 tons of sand in 1955 nor over 50,000 tons in 1954 (R. 231); the witness admitted that if 100,000 tons of sand and gravel per year *could* be sold off the Noble property, it would take 13 years to exhaust the supply (R. 232, 236). The witness stated that the value of the muck sand on the Noble property was 25c per ton in place (R. 222); that he would pay 25c for it (R. 228), at the same time admitting that under his lease agreement he was purchasing it for 10c per ton (R. 228); that under his former lease he had paid 10c per ton (R. 237). *He did not say what quantity of sand he would be willing to purchase, if any, from the defendants at 25c per ton.*

Fifth witness for the defendants was a Mr. Joseph P. Howa (R. 240). This witness was qualified as an expert; he was a "civil engineer" (R. 240), a "construction estimator" (R. 240); he was a "chief estimator" (R. 241); it had been his "responsibility to appraise structures already completed" and for six years "he had been building a reputation with architects in Salt Lake City" (R. 241); at the present moment he was *appraising* the Mayflower Apartments in Salt Lake City (R. 242). He had "estimated" the new Veterans Hospital in Salt Lake City (R. 242), he had "estimated" the Statler Hotel in Los Angeles (R. 242), he had *appraised* the Dixie Club on the Salt Lake-Davis County line (R. 242). At the present time, he was "Chief Managing Officer of the Inland Construction Company" (R. 261). On cross examination, he *was not an appraiser* (R. 258), he did not "evaluate property" (R. 262), he said appraisers used the "Dow Service" and the "Boggs System" in arriving

at the value of real property (R. 262). He could not explain the "Dow Service" method, because, "I do not appraise property" (R. 262). He did not know what text books appraisers used and he had never heard about "*McMichaels*" (R. 262, 3); he was working in conjunction with Mr. Edward M. Ashton (R. 263). The witness did not know what the *fair market value* of the home on the Noble property was, he did not know what a *willing purchaser* would pay for that home (R. 264); he had never claimed to be a "sand and gravel man" and he had *never claimed* to be an "appraiser of real property" (R. 265). These last denials were elicited from the witness on *re-direct* examination *after* the defense had qualified this witness as an *expert appraiser*. In this witness's opinion, the *value* of the Noble property was "between 250 and 275 thousand dollars" (R. 256), and the sand and gravel in place was worth \$175,000.00 (R. 261). *This witness did not testify at any place in the record as to what a willing purchaser, able to buy but not required to buy, would pay for the defendants' property, any or all of it!* (R. 240-269).

Thereafter, the defendants called two Salt Lake City realtors, Mr. Thomas E. Gaddis and Mr. Sherman D. Rideout, who were duly qualified as experts in the realty business.

Mr. Gaddis never did examine the house and buildings on the property and he did not go on the property prior to one week preceding the trial; he did not know anything about the property as of July, 1955 (R. 271). Over plaintiff's objection, the witness was permitted to testify as to the value of the property at the time of the taking, July

1955 (R. 271); of which he knew nothing. The witness declared:

“(1) That he was acquainted with what Mr. Richards told him as to the number of yards of sand, gravel and muck sand there was on the property (R. 273).

“(2) That he was acquainted with the figure [value] that Mr. Schoenfeld had set on the sand and gravel (R. 273).

“(3) That he had seen Mr. Howa’s blueprints and was acquainted with the *replacement values* of the buildings and improvements *as set by Mr. Howa* (R. 273).

“(4) That he had seen the pictures of the property which were in evidence” (R. 273, 4).

Then, the witness was asked what was intended to be a hypothetical question as to total value of the entire property, to which plaintiff made timely objection (R. 275). Thereafter the record reads as follows:

“Q. Now, Mr. Gaddis, the question that I ask you is as to whether or not—what you consider to be a fair market value of that property, based upon the idea that it would be the amount that a willing seller would be willing—who wasn’t under pressure—would be willing to sell it to a willing buyer, who was desirous of purchasing the whole property and wasn’t under pressure to do so and had the means to do so; what would you estimate would be the value of that property—the fair market value of that property—based upon that assumption?

“THE COURT: That is as of July 22, ’55?

“Q. As of July 22, ’55.

“A. The ground, I place \$44,625; the building, I didn’t see. I didn’t measure it, and, based entirely

on the *estimate* of your *estimator* here, he says it is worth \$40,999.

"THE COURT: Mr. Gaddis, you are not correctly quoting him; he didn't say that; he said it would cost so much to replace it.

"A. To replace it.

"THE COURT: *He didn't give any estimate as to market value.*

"MR. MAW: But he stated the depreciation.

"MR. BUDGE: That still isn't the market value.

"A. You are asking me to make an assumption—

"Q. That's right.

"A. —based on the value of the property, of the value of the improvements on—in July, last year—

"Q. Yes.

"A. —is that right?

"Q. That is correct.

"THE COURT: Now, the 'improvements' isn't quite it. He wants to know the market value of the entire piece of property; and I am not sure that you can take the value of the land, then the value of the improvements, and add them together. They may not be the same. Sometimes the combination makes it more or less.

"A. It is very vital to go into that point. If he assumes that the value of that property is \$40,000—I didn't see that property last week—but, if I can assume that the valuation is correct, I would add that to the value of the ground.

"Q. You may assume that.

"A. Can I assume that?

"Q. Yes.

"THE COURT: No, that isn't the value, according—

"MR. BUDGE: No.

"THE COURT: You must assume that the replacement value is so much, and that the buildings have depreciated in the amount of \$4,000, then your testimony would be based on the accuracy of that, together with your own judgment.

"A. *I can not form a judgment on the buildings that have been taken away, sir.*

"THE COURT: You have to bear in mind that replacement value is not market value, and replacement value, less depreciation, may or may not be market value.

"Q. May I ask you another question with respect to that?

"A. Yes, sir.

"Q. And make your calculations, assuming that the replacement value of those buildings was \$44,795, and that, in the opinion of the appraiser—the engineer—there is \$4,000 depreciation, then, considering your own experience with respect to such buildings and the information that—the impressions that you have *from the pictures that you have seen*—assuming that, what would be the value of the whole property?

"A. Of the whole property? When it comes to the gravel, can I assume—I am not a gravel man—I am not a gravel contractor—I am not a gravel anything; assuming that the information that I have, in talking to your engineer, assume that there are 355,222 tons of muck and sand, which he values at twenty-five cents an acre, and 964,646 tons of gravel at ten cents an acre—

"Q. Not an "acre"; do you mean a ton?

"A. Per ton, I mean—I beg your pardon—the total value of the sand and gravel would be \$183,269. Now, to sum up the ground value that I placed—

"THE COURT: *Just a moment, that value is what these witnesses said it was worth in place, but that doesn't say what you could sell the property for with that much in place.*

"A. That is true.

"THE COURT: Your problem is, what would it sell for under the conditions that Mr. Maw described, of a willing seller and willing buyer.

"A. *Assuming the figures are correct, I would say that the total value of the property—this is an assumption only—hypothetical question, as I understand it—*

"Q. Correct.

"A. —would be \$270,768" (R. 276, 277, 278).

(Emphasis added.)

Mr. Rideout then said that a fair market value of the property would be \$270,000.00 (R. 286, 287); a stupendous difference of seven hundred sixty-eight dollars (\$768.00) and no cents. The testimony of the witness Rideout (R. 280-288) was similar to that of the witness Gaddis and added nothing to the proof. The witness Rideout had no knowledge of the property nor its improvements as of July, 1955. By addition and multiplication, these witnesses arrived at a "value." At the conclusion of Mr. Rideout's testimony, the following took place:

"THE COURT: Mr. Rideout, you asked to be excused; you mean from the witness stand or courtroom?

"A. Both" (R. 288).

To this point in the record there is not one scintilla of evidence as to the "best and highest use" to which the property could be placed and not an iota of evidence as to what a willing purchaser, able to buy but not compelled to buy, would have paid for the Noble property on July 22, 1955, the date of the order of occupancy. The defendants rest.

The State called Sherman Burton, resident engineer on the project, who testified as to the materials to be found on the property; the cross section thereof; the number of cubic yards of sand and gravel that could reasonably be recovered and removed therefrom (R. 292-316).

Douglas F. Larsen, materials engineer for the Utah State Road Commission, was called for the State. The witness testified that it would be necessary to drill four or five test holes per acre, following good engineering practice, to determine the nature of the materials thereunder; he testified as to drilling operations conducted by the State on the property; as to the striking of a "point of refusal" at 40 feet (R. 320), and as to encountering underground waters (R. 320). The witness further testified as to the analysis of the materials recovered from the drilling (R. 316-323). On cross examination the witness testified:

"Q. Now, Mr. Larsen you testified this morning that you would have to drill four or five holes on an acre to determine accurately how much sand and gravel was in there; is that correct?

"A. I said I think at least four or five.



"Q. Do you think it would be possible to determine the amount of sand and gravel in an acre, even with four or five holes?

"A. I think so, with a reasonable amount of accuracy.

"Q. *Actually, you would have to take it all out to determine exactly what was there, would you not?*

"A. If you were going to determine it that way, yes.

"Q. *The matter of determining the amount of sand and gravel is highly speculative, isn't that so?*

"A. Yes" (R. 324).

The State called Ezra C. Knowlton as its next witness. Mr. Knowlton was the Executive Vice President of the Utah Sand and Gravel Company, the largest such operation in the Salt Lake Valley (R. 343). The witness explained the difference between so called "muck sand" and "blending sand;" (R. 342) ; as to his company's sale of "muck sand" (R. 344). That:

"A. We have never sold as much as 5000 yards a year—I had better say, 5000 tons a year. We sell in tons.

"Q. Never more than 5000 tons a year from your plant?

"A. That's right—muck sand.

"Q. Now have you had occasion to examine the so-called Noble properties north of your plant there?

"A. Yes, I visited that property a few times.

"Q. Have you been on the property and noticed the nature of the deposit of the sand?

"A. Just in general.

"Q. Is that muck sand or is it blending sand?

"A. Mainly on the bottom, in my judgment, the lower levels are more nearly muck sand type. The higher levels, based upon my observations, are more of the blending sand type.

"Q. There is no big demand for this muck sand in the Salt Lake Valley?

"A. There have been no requests made of us for any large quantity of muck sand.

"Q. Do you anticipate there will be any need for large quantities of that sand?

"A. Not of that particular type, I don't" (R. 344).

The witness testified as to the price of land comparable to that of the Noble property:

"Q. Have you had an opportunity to purchase any land that is comparable, that is in the same vicinity of this Noble property?

"A. Once, in one case we had an offer made to us of land in that general neighborhood.

"Q. What was that offer?

"A. That was \$1000 per acre.

"Q. Did you accept the offer?

"A. No, sir.

"Q. Why not?

"A. We did not consider it valuable enough for our uses to justify making the purchase" (R. 346).

And, as to the manner in which a gravel pit should be developed in order to preserve abutting properties (R. 346, 347); as to the feasibility of excavating to a depth of 40 feet on the Noble properties (R. 348). The Court did not

permit the witness to testify as to preservation of the property to put it to its highest and best possible use. From the record:

“Q. What I mean, if he were to excavate to 40 feet, what value, if any, would the land have?

“A. Assuming that the land could be excavated 40 feet, in my judgment it would have no value for any other use. It would just be a hole in the ground, unless it were backfilled.

“Q. Now if it were to be backfilled, what would that cost, in relation to the value you might get out of removing that material?

“MR. MAW: I object to that on the ground, your Honor, that we are placing no value whatsoever on the hole in the ground, and are not proposing that it shall be filled. Our whole value is the sand and gravel in it, and we have not presented any evidence that we are asking for one penny for the land after the sand and gravel has been removed.

“MR. BUDGE: If the Court please, the State's theory is this, that when you appraise land—and we have asked our appraisers to do it according to the Rule Book and according to their training and education—when you appraise land you appraise its highest and best possible uses, and in that respect we want to know how much it would cost to re-fill this hole, because we think the land has a potentially higher and better use than a hole in the earth.

“THE COURT: If they do not claim it you have no reason to go into it.

“MR. BUDGE: We think the highest and best use is not to dig that hole there.

“MR. MAW: You are proving it has no value at all, apparently, to fill the hole, and we will agree with you. We are not going to fill the hole.

“THE COURT: The objection is sustained” (R. 348, 349).

On cross examination the witness said his firm was paying 10c per ton for blending sand as of July 22, 1955 (R. 352). The witness's company had on hand a supply of 100,000 tons of muck sand (R. 357); the company was selling blending sand for .04c a cubic yard in place (R. 358). On re-direct examination the witness testified that from his company's past experience the 100,000 yards of muck sand on hand was sufficient for a 20 year supply (R. 361). The witness's company declined Noble's offer to sell them sand at 20c a yard (R. 368).

The State then called Werner Kiepe to the stand and qualified the witness as an expert appraiser (R. 368, 369). The witness stated that he had been employed by the State Road Commission to appraise the Noble property to determine its fair market value (R. 369, 370) as of July 22, 1955 (R. 373); the witness gave his opinion as to the highest and best use of the property (R. 376, 378, 379); the witness testified as to the present value of \$1.00 which could not be “captured” for 15 years, that it would be 38c (R. 380, 381); the witness explained to the jury the mode and manner of his appraisal of the Noble property (R. 381-393) and stated his opinion as to the fair market value which a person willing to sell, but not required to sell, would sell to a person willing to buy, but not required to buy, as of the 22nd day of July, 1955 (R. 393). It was the witness's opinion that the fair market value of the whole of the properties was \$56,900 (R. 393).

C. Francis Solomon, Jr. called by the State and duly qualified as an appraiser of realty testified:

(a) That he had been employed by the State Road Commission to appraise the Noble property (R. 475).

(b) That his appraisal was based upon the "highest and best use" of the condemned property (R. 479).

(c) That in his opinion the fair market value of the Noble property as of July 22, 1955 was \$72,000.00 (R. 494).

The witness fully explained the processes used in the development of the facts upon which his opinion was based (R. 479-494). There was no cross examination (R. 496). The State rests.

The defendants called in rebuttal Olive Zaharias who testified that she owned the property immediately to the south of the Noble property and that she had an agreement [through the attorney] with Mr. Noble whereby the parties were relieved of maintaining a lateral support between their properties (R. 496, 497, 498).

Brack Howard Noble recalled as a rebuttal witness proffered testimony and evidence as to a past sale of materials from the premises and as to his interest in an adjacent right of way (R. 498-506).

The State's witness, Douglas H. Larsen, was called by the defendants in rebuttal and was interrogated as to the prospective demand for sand and gravel for road construction (R. 506-512).

The cause was argued and submitted to the jury.

## STATEMENT OF POINTS

### POINT I.

THE DEFENDANT LANDOWNER FAILED TO  
SUSTAIN THE BURDEN OF PROOF AS TO

THE FAIR MARKET VALUE OF THE PROPERTY TAKEN AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY.

POINT II.

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POINT III.

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POINT IV.

IT WAS ERROR TO PERMIT THE JURY TO CONSIDER DEFENDANTS' EXHIBIT NO. 56 TO ESTABLISH FAIR MARKET VALUE.

POINT V.

THE COURT ERRED IN REFUSING TO STRIKE THE TESTIMONY OF THE WITNESS HOWA AS TO THE MARKET VALUE OF SAND AND GRAVEL.

## ARGUMENT

## POINT I.

THE DEFENDANT LANDOWNER FAILED TO SUSTAIN THE BURDEN OF PROOF AS TO THE FAIR MARKET VALUE OF THE PROPERTY TAKEN AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY.

The general rule is that the burden of showing the damages which the landowner will suffer rests on him. 29 C. J. S., Eminent Domain, Sec. 271. [See Note 82 and cases there cited; also 1956 Annual Pocket Part, citing *State v. Coop. Security Corp. of Church of Jesus Christ of Latter Day Saints, et al.*, . . . Utah . . . , 247 P. 2d 269.] In *Tanner v. Provo Bench Canal and Irrigation Company, et al.*, 40 U. 105, 118; 121 P. 584, *aff'd*. 239 U. S. 323, 60 L. Ed. 307, 36 S. Ct. 101, our Court said:

“\* \* \* Under the practice in force in this jurisdiction, the burden of establishing the *quantum* of damages was upon the appellants [Condemnee].  
\* \* \*”

There appears to be no later expression of the court on this proposition and the general rule is apparently the existing rule in this state: the burden of proof was upon the defendant Noble to prove the “quantum” of his damages. It was defendants’ contention that the value of his property taken was \$300,000.00; the opinions of his expert witnesses were, Gaddis, \$270,768.00; Rideout, \$270,000.00. We think the evidence adduced failed entirely to sustain any of these

amounts nor does it sustain the verdict of the jury for the sum of \$150,000.00.

The opinion testimony of the experts for the defendants was based on premises not established by the the evidence and such opinion testimony cannot, therefore, support the verdict. *Provo River Water User's Ass'n. v. Carlson*, ... U. ..., 133 P. 2d 777, 781. Witness for the defendant Mr. Joseph P. Howa, "Civil engineer" (R. 240), "Construction estimator" (R. 240), "Chief estimator", appraiser of "structures already completed," and *appraiser* of the Mayflower Apartments," (R. 241, 242) *who was not an appraiser* (R. 258), and who *did not* "evaluate property" (R. 262), and who *did not* know what the "fair market value" was, and *did not* "know what a willing purchaser would pay," (R. 264) testified as to the "replacement cost less depreciation" but, including "profit and overhead" (R. 263) of the improvements on the Noble property. This was not the "fair market value" upon which the expert witnesses for the defendant could assume what a "willing purchaser, able to buy but not required to buy, would pay to a willing seller, not required to sell, for the property."

"An opinion of market value must necessarily be intended to fix the value at which the property ought to give a fair return if sold to someone who is willing to purchase under ordinary selling conditions."

*Utah Assets Corp. v. Dooley Bros. Ass'n.*, 92 U. 577, 70 P. 2d 738, 741. "Fair [market] value" and "replacement value" are not necessarily the same as respects measure of damages. *Givens v. Gilmore Drug Co.*, 10 A. 2d 12, 337 Pa.



278. No assumption concerning the "replacement value" of the improvements on the defendants' lands could reasonably or at all support an opinion as to the "fair market value" of the property. The defendants' witnesses Gaddis and Rideout both based their opinion as to fair market value on the *replacement values* of the improvements to the realty; having been specifically asked to do so. Gaddis, (R. 275, 277); Rideout, (R. 283, 286).

## POINT II.

IT WAS ERROR FOR THE COURT TO ADMIT  
EXPERT OPINION EVIDENCE ON MARKET  
VALUE WHICH WAS BASED SOLELY ON  
VALUES OF THE COMPONENT PARTS OF  
THE WHOLE ESTATE.

Over plaintiff's objections the expert witnesses were permitted to testify as to the fair market value of defendants' property based upon individual estimates of the values of the separate parts thereof. Both Mr. Gaddis and Mr. Rideout, admittedly as to each, stated their opinion as to fair market value was based entirely upon:

"(a) Mr. Richards' testimony as to the quantity of the materials, sand and gravel.

"(b) Mr. Schoenfeld's valuation per cubic yard, or per ton, of sand and gravel.

"(c) Mr. Howa's replacement cost value of the improvements.

"(d) Their independent opinion as to the value per front foot of the property."

Thus, by assuming there were 355,222 tons of muck sand and 944,646 tons of sand and gravel (Richards) and that the muck sand had a value of 25c per ton in place and that the sand and gravel had a value of 10c per ton in place (R. 222) (Schoenfeld), or, 25c times 355,222 equals \$88,805.50 and 944,646 times 10c equals \$94,464.60, added together, \$183,270.10; (Gaddis \$183,269.00—R. 278) and by assuming that the “replacement” cost of the improvements would be \$44,795.00 (Gaddis R. 277) (Rideout R. 283) and, based upon the witnesses’ “own” opinions, 595 front feet at \$75.00 per front foot, (Gaddis R. 272) (Rideout R. 282) amounts to \$44,625.00, so:

\$183,270.10 for sand, gravel and muck sand:

44,795.00 for replacement cost of improvements:

44,625.00 for front footage value:

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then

\$272,690.10 would be the value of the land taken. Rounded out by Mr. Gaddis to \$270,768.00 and by Mr. Rideout to \$270,000.00 and “opined” by the “estimator” Mr. Howa to be between \$250,000.00 and \$275,000.00 dollars. The test as to “fair market value to the condemnee” as announced in *State v. Tedesco*, 4 U. 2d 248, 251; 291 P. 2d 1028, cannot be met in any such manner. That case holds, in part:

“A condemnee is not entitled to realize a profit on his property. It must go to the condemnor for its fair market value, as is, irrespective of any claimed value based on an aggregate of values

\* \* \*”

The true test is the market *value* of the land and not the market *price* of the sand and gravel that *might* be re-

moved. *National Brick Co. v. U. S.*, 131 F. 2d 30. It is said in 4 Nichols on Eminent Domain, 3rd Ed., Section 13.22 (2) at page 248, that:

*"In applying the valuation process to mineral deposits in place it has been held improper to determine the value thereof by using the product of the estimated amount of the deposit and a fixed price per unit. In the first place the estimate as to quantity has been considered too speculative and uncertain to merit consideration. In view of the contingencies and uncertainties of business in general, there can, in such case, be no certain estimate of the cost and potential profits. Undoubtedly, proof as to the quantity and quality of a mineral deposit is important as is also the cost of extracting it and processing it for the market. However, these are elements only to be considered with others in determining the value of the property. There is no limit to the value of a quarry or sand bank or clay bank, if an estimate can be made of the amount of stone, sand, or clay which can be taken, and a fixed price put upon it. Such computation ignores to some extent the loss and contingencies of the business. Consideration should, of course, be given to the nature of the property—that it is in a locality where there are valuable mineral deposits and that it has a value greater than farming lands—and evidence may be adduced as to the quality and quantity of the deposit. But the valuation must not be predicated upon such facts only. Such factors are proper when treated only as contributory factors to the ascertainment of market value rather than as the criterion thereof. \* \* \**" (Emphasis added.)

The *amount* of the sand and gravel in place and the present day price, or the prospective price for which it might in the

near or distant future be sold, is no criteria of the market value of the property.

### POINT III.

#### THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING IN EVIDENCE DEFENDANTS' EXHIBITS 28 THROUGH 41.

The exhibits here complained of appear to be "blown up", "colored" or "tinted" photographs. They were admitted in evidence over timely objections (R. 147, 148; 165).

As a general rule whenever it is relevant to describe a person, place, or thing, photographs or pictures are admissible for the purpose of explaining and applying the evidence and assisting the Court or jury in understanding the case. 32 C. J. S., Evidence, Sec. 709. The Court has stated that rule thusly:

"It is a well-settled rule that photographic views, when proved to be *correct* representation of person, objects, or localities which are subject matters of inquiry in an action or proceeding, are admissible in evidence to aid the court or jury to apply the facts proved to the particular case." (Emphasis added.) *Johnson v. Railroad*, 35 U. 285, 294, 100 Pac. 390; *State v. Woods*, 62 U. 397, 410, 220 Pac. 215.

With this rule appellant has no quarrel. The practice of admitting photographs in all proper cases should be encouraged. *Conn v. Oregon Electric Ry. Co.*, 300 P. 342, 346, 137 Ore. 75. In condemnation proceedings photographs should be admitted in support of testimony to establish value.

*State ex rel. McKelvey, Commissioner v. Styner, et al.*, (Ida.) 72 P. 2d 699. Not so when the photographs are *deceptive*; *McKee v. Chase*, 253 P. 2d 787, 792, 73 Ida. 491, or, if a photograph is *inaccurate, distorted or misleading*. *Cabonargi v. Jordan*, 100 N. E. 2d 496, 344 Ill. App. 276. Photographs,

“\* \* \* should be excluded where they would confuse or mislead rather than aid the jury, \* \* \* or unduly emphasize the claims or the evidence of one of the parties \* \* \*.”

32 C. J. S., Evidence, Sec. 709, p. 612.

[See, generally, American Digest System, Evidence, Key 359, (1) (3).] In *Metcalf v. Winchester* (Wyo.) 262 P. 2d 404, 412, that court said:

“\* \* \* The pertinent question was, did the photographs show *accurately* the condition of the ground \* \* \*.” (Emphasis from the opinion.)

For other recent cases generally in support of the argument presented here, see: *Leflin v. Howard*, 82 So. 2d 125; *Vugovich v. Chicago Transit Authority*, 126 N. E. 2d 731, 6 Ill. App. 2d 115; *American Rubber Corp. v. Jolley*, 72 So. 2d 102, 260 Ala. 600; *Godvig v. Lopez*, (Ore.) 202 P. 2d 935; *Lee v. Crittenden County*, 226 S. W. 2d 79; *Pozos v. Rivero*, 225 S. W. 2d 935; *Orr v. Columbus and Greenville R. R. Co.*, 48 So. 2d 630; photographs which are *true* representations are generally admitted in evidence, *Pilgeram v. Haas*, (Mont.) 167 P. 2d 339; *Bailey v. Greeley General Warehouse Co.*, 83 N. E. 2d 244; it is error to admit in evidence pictures which are *not a faithful reproduction*, *State v. Miller*, 43 Ore. 325, 74 Pac. 658.

Admitting or refusing to admit photographs in evidence is a matter of discretion with the trial court which will not be disturbed unless abused. The cases so holding are almost without number and the rule so well established that we feel no need to consume space in citing the authorities so holding. [See American Digest System, Appeal and Error, key 970 (2) and Evidence, key 359 (1).] Did the Court below then so abuse its discretion as to require that a new trial be granted in the case at bar? Appellant thinks so.

The exhibits complained of do not accurately portray or represent the premises as they looked and were when taken by condemnation; or in fact at anytime either prior or subsequent thereto. They are "posed" photos and so "colored" as to completely destroy the actual likeness or representation of what they purport to be the subject of. This Court has said:

"\* \* \* As a matter of course, before a photograph is admissible \* \* \* it must be made to appear that it is a true or correct picture or representation of the object photographed \* \* \*."

*Blake v. Harding*, 54 U. 158, 180 P. 172.

In the Blake case, the purpose of the exhibit was admittedly to aid the jury to better understand and appreciate the evidence relating to the value of property. The Court held the photograph should have been admitted for that purpose, subject *as a matter of course* to it being a *true* representation. *It would seem fundamental to a sense of justice that such should be the rule.*

At the time of trial and when the jury viewed the premises all improvements had been removed from the land.

The jurors were able to see only the bare mountainside and excavated roadway; therefore, the evidence as to the improvements could best be explained by the use of pictures in support of the testimony. Appellant's expert appraisers described the improvements and there were offered and admitted pictures in support thereof, we claim that proper. The complaint registered here goes only to the *obvious misrepresentation* as to appearances and values which these exhibits portray. The Court abused its discretion in admitting the colored photographs to the prejudice of plaintiff's cause.

#### POINT IV.

IT WAS ERROR TO PERMIT THE JURY TO  
CONSIDER DEFENDANTS' EXHIBIT NO. 56  
TO ESTABLISH FAIR MARKET VALUE.

Defendant placed into evidence a photostatic copy of a warranty deed (R. 468) as evidence of the purchase by the State Road Commission of 9.45 acres of land which was properly adjacent to defendant's holdings. This was a negotiated sale (R. 463), the purchase price \$80,000.00. *Proof of said sale was not competent evidence to establish fair market value.* This court has so held:

"Appellants offered in evidence the testimony of another landowner of the vicinity. They sought to prove the value of the Ritchie land taken by proving what this other owner had received from the County for his land for the same project. However, on voir dire it was disclosed that the sum of money this landowner received included damages to his remaining land. The court ruled out the testimony of this

witness upon the ground that it was not proper evidence of value. Under the authorities we think this was correct. Although the decisions divide upon the question of admissibility of amounts paid by the condemner for other lands, there is little disagreement that compromise settlements, including damages, are not admissible. The proposed testimony did not segregate the sale price from the damages. It is questionable whether the price, had it been segregated, would have been proper testimony under the definition of market value as applicable to condemnation proceedings. 18 Am. Jur. p. 996, Sec. 352 and cases cited thereunder. Generally see 118 A. L. R. 869, citing *Telluride Power Co. v. Bruneau*, 41 Utah 4, 125 P. 399, Ann. Cas. 1915A, 1251."

*Weber County, et al. v. Ritchie, et ux.*, 98 Utah 272, 96 P. 2d 744.

#### POINT V.

THE COURT ERRED IN REFUSING TO STRIKE THE TESTIMONY OF THE WITNESS HOWA AS TO THE MARKET VALUE OF SAND AND GRAVEL.

A qualified witness can testify as to the value of realty. Under the decisions of the courts, an unqualified witness cannot. 32 C. J. S., Evidence, Sec. 545, p. 299, 300. The defendants' witness "Howa" testified on cross-examination:

"BY MR. BUDGE:

"Q. That figure that you just gave us, 250 to 275 thousand dollars, Mr. Howa, you hesitated quite some time. Is this the first time that you have set a price on that property?

"A. No, sir.



"Q. Did you have a figure of 250 to 275 thousand dollars, when you came in this courtroom?

"A. No, sir, I had it before I came here—months before.

"Q. You have had this decision for several months; you knew that is what your answer would be to this question; is that right?

"A. No, sir, I arrived at that by experience in the field I am in.

"Q. That is not what I asked you now.

"A. *I basically am judging my price on what the material is worth out in that area.*

"Q. That is just fine. I am glad you are doing it that way, but what I ask you was, did you understand when you came into the Courtroom, when you were asked the total value of the property, it was going to be 250 to 275 thousand dollars; did you have that figure in mind when you came into the courtroom?

"A. I analyzed it, yes.

"Q. You knew that is what you were going to answer when you came in here?

"A. Yes.

"Q. That time you took then, you were not figuring it up in your head then, at that time?

"A. Yes.

"Q. Now which was it; did you know, or did you figure it up just now while you were sitting there?

"A. I approximated that price, as I said, by what I have purchased in sand and gravel from that area.

"Q. I asked you, if you, when you came in here to testify, under oath, you were prepared to swear

that in your opinion that land was worth from 250 to 275 thousand dollars. That is all I asked you. Were you prepared to swear to that when you walked into this courtroom?

"A. After hearing the testimony on the yardage of sand and gravel, I had the opinion what I just said.

"Q. Oh, you didn't know anything about the yardage until the time you came into this courtroom?

"A. Yes, I heard it—I heard the testimony.

"Q. You heard the testimony in court; you did not know anything about the yardage; you don't know anything about the yardage, do you?

"A. Yes, I have heard the total yardage before we came into court, from a paper Mr. Maw had given us on the yardage.

"Q. Oh, Mr. Maw showed you how many yards were out there?

"A. Yes.

"Q. But you are an expert, and appraiser, aren't you?

"A. No, sir.

"Q. You are not an appraiser?

"A. Not on sand and gravel.

"Q. Then I don't suppose if you are not an expert appraiser in sand and gravel, your testimony as to the value of that sand and gravel isn't any good at all to this jury, the court or me, and I will ask the court to have it stricken.

"MR. MAW: Just a minute. May I ask a question?

"THE COURT: The motion is denied. You can show the value by cross-examination, but it is too late to strike it." (Emphasis added. (R. 256, 7, 8).

The witness was admittedly not qualified to testify as to the value of the gravel deposit and the objection thereto of plaintiff should have been sustained. The witness could not form an opinion any better than that of the jury or men in general. This court has said:

“\* \* \* The witness is asked, not for his knowledge of transactions involving the property, but for his opinion, which involves a judgment which may be the result of a number of factors including knowledge of transactions. *The witness must not be a mere transmitter of information.* Any of us can do that. He must be able to give a judgment based on knowledge of values \* \* \*.” (Emphasis added.) *Mary Jane Stevens Co. v. First National Bank Building Co.*, 89 U. 456, 500; 57 P. 2d 1099.

We are not unmindful of the opinion of Mr. Justice Crockett, dissenting, in *Utah Coop Ass'n. v. White Distrib. and Supply Co.*, 2 U. 2d 391, 400; 275 P. 2d 687. However, this was not an issue for the *trial court's* determination of the “credibility” of the witness’s testimony—the question here is, did the court abuse its discretion in permitting an *unqualified witness* to express an opinion as to value to the jury? The answer can only be, yes.

## CONCLUSION

Since the evidence of the State established the fair market value for the Noble properties at their highest and best use, based upon the willing seller and the willing buyer doctrine, and, since the defendants failed to carry the burden of proof as to the quantum of damages, this cause

should be remanded to the court below with instructions to enter judgment for the defendants in the principal sum of \$72,000.00 plus interest thereon from the date of the taking, together with costs. Should defendants refuse to accept such sum the cause should be re-tried. We so conclude.

Respectfully submitted,

E. R. CALLISTER,  
Attorney General,

W. L. BUDGE,  
Assistant Attorney General,

ROBERT B. PORTER,  
Assistant Attorney General,

K. ROGER BEAN,  
Assistant Attorney General,

*Attorneys for Appellant.*

