

1956

State of Utah v. Brack Howard Noble : Brief of Respondents

Utah Supreme Court

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Herbert B. Maw; Wendell B. Hammond; George K. Fadel; Attorneys for Respondents;

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Case No. 8544

DEC 13 1958

IN THE SUPREME COURT
of the
STATE OF UTAH

Clerk, Supreme Court, Utah

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

*Plaintiff,
Appellant,*

vs.

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.*

RESPONDENTS' BRIEF

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

Defendants,
Respondent.

Case No. 8544

RESPONDENTS' BRIEF

STATEMENT OF FACTS

The Respondents do not fully agree with the statement of facts set forth by the Appellants, and to avoid repetition, will set forth any differences in statement of facts and any

supplemental statement of facts by reference to the witness's testimony as patterned by the Appellant's brief.

Mr. Richards, the engineer, who had cross-sectioned the Defendants' property according to good engineering practice, and who had supervised the drilling operations, gave his estimates of the quantity and quality of the material both sand and gravel as set forth in appellant's brief. After Mr. Richards admitted that he did not know the exact composition of the materials under ground, Mr. Budge asked,

"This gravel business is pretty much like gold mining, you don't know what is there until you get there; is that correct?"

and Mr. Richards replied,

"That is right". (R. 212).

On redirect examination, Mr. Richards stated that he had examined the results of the drilling of 4 holes on Defendants' property and of a fifth hole placed on the south boundary of the Defendants' property, and also had examined adjoining properties on which there had been excavation, (R. 213 and 214); and the witness stated that his figures as given, were conservative, (R. 214). The witness had prepared Exhibit 2, which is a map of the Defendants' property showing the sand and gravel pits and showing that the plan of operation would be to excavate the property immediately East of the highway for a distance of 190 feet East, only to the level of the highway, in order to preserve the commercial character of that property, and then commencing 190 feet East of the highway the property could be excavated below the level of the highway by leaving a one and one-half to one slope to

hold the bank on the commercial property (R. 119); witness testified that from the drilling of test holes as designated by the witness, the witness was able to prepare the cross section showing the sand and gravel materials on the Defendants' property, and that exhibits 3 and 4 are cross sections prepared by the witness, (R. 117). The witness, Mr. Richards, testified that he is a partner in the firm of Caldwell, Richards and Sorensen, and during the course of the past 17 years has had many occasions to cross section land to determine quantities and qualities of material, and included among his clients are Interstate Brick Co. and many municipalities, (R. 113).

The second witness, one of the Defendants, Brack Howard Noble, before identifying the colored photos exhibits No. 28 through 41 to which the Appellants objected, identified Exhibits No. 21 through 27, which are 8 x 10 black and white photo prints showing the Defendants' home, trailer court, antique shop and surroundings, and these black and white prints were admitted without objection, (R. 147). Exhibits 21 through 27 which are the black and white prints are essentially the same scenes as exhibits 28 through 41, the colored photos. The witness stated that the colored photos represented a true picture except for the tinted trees, (R. 148) and a purplish tint on some objects in the photo. Jury were given both the black and white prints and the colored prints to compare in light of the objection of Appellant's counsel that the colored photos did not represent a true picture. Mr. Noble testified that he had a lease on the tract of land running 200 feet East of his tract from North Salt Lake giving him the right to excavate sand and gravel upon the tract next adjoining his tract on the east, (R. 159). The witness testified that he conducted a trailer court business

and antique business along the frontage of the highway for a depth of about 190 feet East of the highway, (R. 152), and that the property east of 190 feet from the highway was used for sand and gravel business, (R. 153), and the witness made a detailed explanation of each of his uses of the properties namely antique business, trailer court business, and sand and gravel business, as well as the location of his dwelling. The witness stated that in his opinion, his property, taking in to consideration the three business uses to which it was being put and for which it was reasonably adapted was at least \$300,000.00 (R. 163 and 164). Upon cross examination, the witness was shown Appellant's exhibits No. 44 through 50 which are 5 x 7 black and white photo prints, and the witness acknowledged that the pictures were representative of his property about July 22, 1955, (R. 184). Mr. Noble testified that of the \$300,000.00 value he placed upon the property, the sand and gravel would be worth about \$200,000.00 (R. 168); that the home was worth about \$15,000.00 (R. 178); the antique building was worth about \$3,000.00 (R. 179); that the laundry room, etc., for the trailer courts was worth about \$8,000.00 (R. 180); that the sewer system was worth between \$4,000.00 and \$5,000.00; the lighting system was worth \$2,000.00 (R. 180); and that the frontage property for a depth of 190 feet East of the highway was worth \$75.00 or \$80.00 a front foot (R.190). The witness stated that he had only had his sand pit open for 2 years and that the market was rapidly growing (R. 194 and 195).

Don R. Bass, the driller for Boyle Bros. Drilling Co., (R. 196), testified that he drilled four holes at places designated by the engineer. That the holes were drilled by use of a core barrel, (R. 197), which permits the taking of sam-

ples as the drilling progresses, and the samples so selected are not contaminated by outside material or material from other depths, (R. 198); the witness then identified exhibits No. 6 through 16 which were eleven cardboard boxes containing samples of material from each of the four test holes and each box was divided into compartments containing material from stated depths in each hole, (R. 199 to R. 201); upon cross examination, the witness testified that he had drilled many gravel properties and that all of his drilling was for the purpose of obtaining samples for examination and that four test holes drilled upon the Defendant's property were sufficient for finding out what is on the property, (R. 203); that some of the holes drilled were about 40 feet below the level of the highway, and at no time did the witness encounter water or large boulders, (R. 207). That subsequent drilling on adjoining property 200 feet south of the Defendant's property, and approximately south of hole No. 1 of exhibit No. 2 he found the same material as on the Defendant's property, and he inspected recent excavation made in connection with the road building which shows that the same material exists throughout the vicinity of holes No. 1, 2 and 3.

Mr. Schoenfeld testified that he had been running sand and gravel pit operations since 1934 in North Salt Lake, and during this period has had an occasion to open and develop three pits, and that he recently had an operation which joined the Defendants' property on the north side, (R. 217); the witness was well acquainted with the Defendants' property and that the Defendants' property was about the same as the witness' property, (R. 218); that the type of material on the witness' property commencing at the highway and extending East to where the abrupt hill begins is all straight

sand with no gravel in it at all for a depth of at least 20 to 25 feet below the level of the highway, which was as far as he had gone; the witness identified material contained in exhibit No. 10 which he stated was what he called muck sand, and which material was no different from the material on the witness' own property, (R. 219). The sand material below did not need any further processing, but the material on the hill which was sand and gravel could be used as fill material without processing, but could be used for concrete if processed, (R. 220); the fine sand which he called muck sand was in largest demand for asphalt plants, but could also be used as plaster sand or brick sand as well as for fill material around special tanks, and sewer jobs, (R. 220); that the witness sold the fine sand for 75¢ per yard at the plant site, after loading at a cost of about 10¢ per yard, (R. 221); that the muck sand was worth 25¢ a ton in place, and the other material would be worth 10¢ a ton in place, (R. 222); the witness stated that the location of the Noble Property with respect to highway projects and other use in the vicinity made the Noble property valuable by the saving in haulage since hauling costs were from five to ten cents per ton-mile. The other sources of supply were East Bountiful, which required about 7 miles more hauling and the point of the mountain in South Salt Lake County which was even farther from the market, (R. 225). By reason of the limited supply and the heavier market for fine sand, the witness believed that within 3 years there will be no source of supply from the north of fine sand, and the next closest source would be the point of the mountain, (R. 226); that the fine sand delivered at 90¢ per ton would cost 35¢ for loading and hauling, leaving a gross profit of 55¢ per ton (R. 227). Upon cross examination, the witness stated that the Defendants' property was the closest point to the asphalt plants where

most of the muck sand goes, (R. 235); that there is a great demand for the other fill material for building on the west side of Salt Lake, all of which must be filled before it can be built on, (R. 236). Upon redirect examination, (R. 236), the witness stated that he would be willing to pay Mr. Noble 25¢ a ton for the muck sand in place even though he is leasing land at 10¢ per ton for the reason that the property he is leasing at 10¢ a ton requires earth removal, cleaning and processing, whereas the muck sand on the Noble property is ready for loading. The witness stated that under a prior lease, he had muck sand in a place similar to the Noble muck sand for which he was paying 10¢ per ton, but he had entered this lease in 1947, and at the time he entered the lease he still had to do the surface stripping (R. 237).

Mr. Joseph P. Howa, the Civil Engineer, testified that he prepared blue prints of the improvements on the Defendants' property showing the buildings, retaining walls and other improvements (R. 246). He testified as to the sizes of the various improvements and the details of their construction (R. 247-248); and as to replacement costs of the various improvements, and arrived at a total replacement value of \$44,795.00. He was of the opinion that the total depreciation was \$4,000.00 which would make a present value of improvements of \$40,795.00, (R.252-253).

Mr. Gaddis testified that he had been engaged in real estate and investment business for 46 years, (R. 270); that he appraised the Defendants' property after the improvements had been removed. He appraised the frontage property for a depth of 190 feet at 75 dollars per foot. There being 595 feet frontage he valued that portion of the property at \$44,625.00, (R. 272); then in response to the hypothetical questions placed, Mr. Gaddis gave the answers as set forth

in the appellant's brief; on cross examination the witness stated that while he was not a sand and gravel businessman, he depended upon experts to support his opinion as to value, (R. 279).

Mr. Sherman Rideout testified in behalf of the Defendant, (R.280), and stated that he had been in the real estate business for 27 years; that he appraised the Defendants' property about a week before the trial date, but the values at the time of appraisal were about the same as of June 22, 1955, (R. 281); that the witness appraised the frontage property for a depth of about 200 feet which he considered a good depth for business property at \$75.00 per front foot, making a total of \$44,625.00, (R. 282); that as an appraiser, he must at sometimes base his appraisals upon the professional opinions of others; that assuming the quantity and quality of sand and gravel stated by the engineer, Mr. Richards, and the value of this material in place as stated by Mr. Schoenfeld and considering the replacement value of the property less depreciation as stated by the engineer Mr. Howa, (R. 283), and having seen pictures of the property offered in evidence, Exhibits 21 to 41 inclusive, (R. 284) and having seen the property from the street practically every month during the past four or five years, and being generally acquainted with the businesses carried on on the property, the fair market value of the property was \$270,000.00, (R. 286-287); the witness was asked to base his opinion upon the idea that a fair market value of the property is what a willing buyer who had the means to do so and who wasn't under pressure, would pay to a willing seller who desired to sell his property, and wasn't under pressure to sell it, (R. 285).

Douglas F. Larsen, the Materials Engineer for the Utah State Road Commission testified that there was drilled under his supervision 4 holes, (R. 322 and 341); one of the holes was drilled with an 18 inch auger which is only capable of going to a depth of 20 feet, (R. 340); the material obtained by the drilling was tested for fineness and all of it would pass through a $\frac{3}{4}$ inch sieve, 99.8 per cent would pass a $\frac{3}{8}$ inch sieve, (R. 322); the witness testified that materials passing a No. 40 sieve or smaller would be considered fine sand, (R. 337); and that 94.3 per cent of the material tested passed the No. 40 sieve, (R. 323).

The witness, Mr. Knowlton, called by the State as an expert in sand and gravel classified muck sand as being as fine as fine dirt, and that blending sand would be somewhat larger in its grains, (R.343); then upon cross examination, (R. 357), the witness stated that they acquire their muck sand from a process as a waste material, and they do not have any bed of muck sand, so that the material the witness calls muck sand was just the washout waste from the cleaning of other sands and gravels; that this material which he called muck sand, he sells for 30¢ a ton loaded on the trucks; that:

“Q. Is that muck sand you sell for 30 cents a ton anything like the sand on Noble's property?

A. Well, it is not identical with it by a long ways; there is some blending sand on Noble's property.

Q. Have you inspected the sand on the property immediately north of the noble property that was leased by Schoenfeld?

A. In a general way. I never made a minute exam-

ination of it.

Q. Do you know whether there is any difference between the sand on the property of Schoenfeld and the Noble's property?

A. I won't attempt to make an accurate comparative classification.

Q. Well, have you ever examined them to determine whether there is any similarity or difference?

A. Yes, I have. That is, certain layers I have.

Q. Now Mr. Schoenfeld testified that the material on his sand area, that he called muck sand, was the same as the material found on Mr. Noble's property.

Would you disagree with him?

A. I think Mr. Schoenfeld is a better authority on that than I am, Sir."

Mr. Knowlton further testified that the property of Utah Sand and Gravel is located about a mile and a half south-erly from the Noble property and on the East side of Highway 91 (R. 350); that the witness' company excavated along the East side of Highway 91 to a depth of 40 feet below the level of the Highway, (R. 352); that the witness had been buying materials from Foss Lewis pit in Bountiful, which is about 8 miles away for 10 cents per ton, but this purchase was made under a 2 year contract which had since expired, (R. 353); the witness stated that the hauling price is about 5¢ per ton-mile, and that the location of gravel property with respect to the market is an important item in connection

with determining its value, (R. 359); and that most of the asphalt producers are located near North Salt Lake at the present time; that the Noble property is strategically located with respect to the industrial area of the city, (R. 360); the witness testified that he had negotiated with Mr. Noble for the purchase of some material and that the price at which it was offered was 20¢ per yard, (R. 353), and in declining to purchase, no objection was made as to the price, but in a letter, the witness wrote Mr. Noble in part as follows:

“After giving further consideration to this matter, and also the fact that we understand the State Road Commission is intending soon to obtain right of way for the highway development in that neighborhood, which will involve this property, we have decided that it would not be in our best interest to consider the purchase of any of this material from you at this time.”

The witness stated that he had recently negotiated with the State of Utah for certain blending sands on property to be acquired by the State just north of the Noble property, (R. 355), and that he was particularly interested in the blending sand.

Mr. Kiepe, the appraiser for the State, testified that the property had a multiple use, and that ultimately its highest and best use would be to preserve it for commercial development or industrial development which might properly expand along U. S. Highway 91, (R. 376); that the portion of the property which would have best use for business would be that frontage along the highway for a depth of 200 feet, (R. 382); that the witness made an estimate of replacement costs of the improvements to consider in connection with

his estimate of value, (R. 370) and (R. 385); the witness' opinion as to how much sand and gravel could be economically removed from the property was 286,668 cubic yards, (R. 386), which was considerably less than the 1,299,868 tons which the engineer calculated, (R. 387); that he did not consider it economically feasible to excavate below the grade line of the highway, (R. 387), East of the 200 foot depth; that the witness made an inquiry as to the value of sand and gravel and his opinion after inquiry was that the average price of all the material including sand and gravel was 10¢ per cubic yard in place, (R. 389); and on this basis, the present worth of the sand and gravel is \$14,540.00; that when the buildings were removed an additional \$3,150.00 could be recovered from sand and gravel, (R. 391); that the frontage property would be worth \$92.00 per front foot in ten years from now, and would sell for \$45,500.00, but the present worth is \$21,075.60 calculated by determining that the present worth of \$45,500.00 ten years from now is \$21,075.60, (R. 391); in summarizing, Mr. Kiepe determined the total value of the property as follows: (R. 392-393):

a. Sand and gravel and overburden	\$14,540.00
b. Sand and gravel where buildings are located	3,150.00
c. Value of the land	21,075.00
d. Rental income for 10 years at \$2,700.00 per year; present cash value	18,117.00
Total	<u>\$56,882.00</u>

The witness concluded that the fair market value was \$56,900.00 according to his calculations, (R. 393) (Exhibit 54). Upon cross examination the witness stated that he did not appraise the home separately, but that he estimated the

replacement cost of the residence at \$15,300.00 and a depreciation of \$3,060.00, leaving a present replacement cost less depreciation of \$12,240.00 for the residence, (R. 404); that the witness obtained information on the business conducted on the premises for the years of 1952 and 1953, but did not get the figures for 1954 and 1955, (R. 404); that the witness determined the yardage of sand and gravel by using a U. S. Geological survey map (Exhibit 55) and by use of the contour lines thereon, (R. 406); that on the map (Exhibit 55) the Noble property is indicated by about one half an inch, (R. 408); that though the witness said in order to appraise according to the rules of his organization, he had to do everything himself, in this instance he relied upon the map and accepted information from every source he could possibly glean as an appraiser, (R. 410); that the witness did not cross section the property himself and did no drilling, (R. 410); that the witness knew what type of material was on the Noble property "just by what is open", and that he inspected cuts on the Noble and adjoining properties, (R. 415). As to the price of the sand and gravel, the witness obtained all of his information from other people, (R. 418); that the witness based his opinion mainly on leases and contracts that were made prior to 1954 or during 1954, (R. 419); that the witness knew that the great building program was to begin after 1955, (R. 420); that the witness realizes that hauling makes a tremendous difference in the price of sand and gravel and that where hauling costs 5¢ a ton mile, this becomes an important item, (R. 424); that with respect to the lateral support since the adjoining properties had a primary use for sand and gravel, the logical way for development of the property and particularly the property to the East would be to develop it from the Noble property, (R. 431 and 432). The witness stated that he was familiar with

other properties along the highway and the vicinity of the Noble property, (R. 459); that he was acquainted with the property of Mayor Stewart, which adjoined the Noble property immediately on the North, (R. 460); that Mayor Stewart's property was subject to a lease in favor of Mr. Schoenfeld for 9½ years; and that there was an additional term to run on the lease of 5 years; (R. 461). The witness identified a deed from Mayor Stewart to the State Road Commission for 8.45 acres which showed a consideration of \$80,000.00, (R. 462); that the State, in addition to paying Mayor Stewart \$80,000.00 for the land, would still have to pay Mr. Schoenfeld for the 5 year lease, which Mr. Schoenfeld had on the sand and gravel, (R. 464) and much of the material had already been removed from the property. The deed from Mayor Stewart to the State Road Commission showing consideration of \$80,000.00 was offered and admitted in evidence as Exhibit 56 without objection, (R. 468).

Mr. Solomon, the second appraiser called by the State, identified Exhibits 43 through 50 which are black and white prints of pictures taken by him, (R. 475); the witness estimated the quantities of sand and gravel as of July 1955, as follows:

- | | |
|---------------|--------------------------------|
| a. Overburden | 41,127 cubic yards |
| b. Muck sand | 388,671 cubic yards, (R. 478). |

The witness testified that he first established the highest and best use for the property in which the highest and best use for the frontage property to a depth of 200 feet is for preservation for business use, and the balance of the property east of the 200 foot set back had the highest and best use for the extraction of deposits, (R. 479); that from the witness'

investigation, his opinion was that muck sand was worth 10¢ per cubic yard in place, and overburden was worth 4¢ per cubic yard in place, and these figures were determined by checking with operators who were buying and selling such products, (R. 481); the witness placed a value on the frontage property at \$50.00 per foot to a depth of 200 feet, (R. 486); he placed a value of \$1,250.00 on the right of way 50 feet in width on the north of the Noble property, (R. 487); the witness computed the cost of replacement of the improvements of Mr. Noble and allowed depreciation, (R. 488), making the depreciated value of the improvements \$21,827.00, (R. 489); the witness summarized his values of the property as follows: (R. 483-489),

a. Frontage	\$29,750.00 (but at R.489—\$28,750)
b. Right of Way	1,250.00
c. Improvements	21,827.00
d. Gravel area	<u>19,518.00</u>
	\$72,345.00

The witness concluded that his opinion was that the market value of the property as of July 22, 1955, was \$72,000.00, (R. 494). The witness further stated that he did not think the payment of \$80,000.00 by the State Road Commission to Mayor Stewart was an excessive price, (R. 495).

STATEMENT OF POINTS

The Respondents statement of points are in the main the converse of the statement of points of the Appellant, and are set forth as follows:

POINT I

THE RESPONDENT SHOWED BY PREPONDERANCE

OF THE EVIDENCE THAT THE VALUE OF THE PROPERTY TAKEN WAS AT LEAST \$150,000.00 IN SUPPORT OF THE VERDICT OF THE JURY AND THE JUDGMENT ENTERED THEREON.

POINT II

THERE WAS NO ERROR IN ALLOWING EXPERTS TO TESTIFY AS TO THE MARKET VALUE OF THE PROPERTY WHERE THE OPINION OF THE EXPERT WAS BASED PARTLY ON HIS OWN OBSERVATION AND PARTLY UPON INFORMATION SUPPLIED BY OTHERS, NOR WAS IT ERROR TO RECEIVE THE OPINION OF A WITNESS AS TO THE VALUE OF THE WHOLE PROPERTY BASED IN PART UPON HYPOTHETICAL QUESTIONS.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE COLORED PHOTOS IN EVIDENCE.

POINT IV

IT WAS NOT ERROR TO PERMIT THE JURY TO CONSIDER THE DEFENDANTS EXHIBIT NO. 56 UPON CROSS EXAMINATION OF THE PLAINTIFF'S WITNESS AS TO FAIR MARKET VALUE.

POINT V

THERE WAS NO ERROR IN REFUSING TO STRIKE THE TESTIMONY OF THE WITNESS HOWA AS TO THE MARKET VALUE OF SAND AND GRAVEL.

POINT VI

THE JURY WAS FULLY INSTRUCTED UPON THE LAW APPLICABLE TO THE CASE AND NONE OF WHICH INSTRUCTIONS WERE OBJECTED TO BY THE APPELLANTS.

ARGUMENT

POINT I

THE RESPONDENTS AGREE WITH THE APPELLANTS CONTENTION THAT THE BURDEN OF SHOWING DAMAGES RESTS UPON THE LAND OWNER, AND THE JURY WERE SO ADVISED BY INSTRUCTIONS OF THE COURT, (R. 45):

INSTRUCTION NO. 6

“You are instructed that the burden of proving value, and the burden of proving damages, are burdens which the law puts upon the defendants. These burdens of proof are successfully carried by defendants only if you find that they have established the truth of their contentions by a preponderance of the evidence.

A “preponderance of the evidence” is defined as that amount of evidence which is more convincing as to its truth, or which convinces the mind of the jury that a proposition is more probably true than not true.

Therefore, if you believe that on a particular value the evidence is evenly balanced, then that value has not been proved, and you cannot award on that basis. The amount of

the market value that you find, must be supported by a preponderance of the evidence.”

The Utah Statute relative to compensation and damages and the assessment thereof as applied to a situation where the entire property is taken is as follows:

“78-34-10. Compensation and damages — How assessed. — The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

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

All of the witnesses testifying as to the value of the whole of the property arrived at their estimates by considering three general components of value of the Respondent's property:

- a. Value of the 595 feet of frontage along the highway for a depth of about 190 to 200 feet.
- b. Value of the sand and gravel and overburden.
- c. Value of the improvements.

All of the Respondent's witnesses used the computations made by Mr. Richards, the engineer, in determining the amount of sand and gravel, which figures were:

- a. Fine sand, 355,222 tons.

b. Sand and gravel mixture,	944,646 tons.
Total sand and gravel	<u>1,299,868 tons.</u>

Mr. Keipe, by his own observation determined that there were 286,668 cubic yards of sand and gravel, (R. 386). At this point it should be mentioned that some witnesses use yardage as measurement, and others use tonnage. Mr. Schoenfeld, the sand and gravel operator, testified that one cubic yard of material weights from 2,200 to 3,000 lbs., and the rule-of-thumb is that 1 yard of material is about $1\frac{1}{2}$ tons, (R. 234). So that Mr. Kiepe's estimate of 286,668 cubic yards is about 430,002 tons. Mr. Solomon estimated the overburden at 41,127 cubic yards (61,790 tons) and muck sand of 388,671 cubic yards (583,006 tons), (R. 478), making about 644,796 tons in all.

As to the value of the sand and gravel material, Mr. Schoenfeld testified that the fine sand was worth 25¢ per ton in place, and the remaining material would be worth 10¢ per ton in place, (R. 222); Mr. Howa stated the value was a minimum of 15¢ per yard for the entire run of material, (R. 268); Mr. Noble testified that the sand was worth 25¢ per ton in place, and the sand and gravel 15¢ per ton in place, (R. 171); Mr. Knowlton, the sand and gravel man called by the State testified, that he had bought blending sand from Foss Lewis in Bountiful, which is about 8 miles away for 10¢ per ton under and old 2 year contract, (R. 353), and that the hauling price is about 5¢ per ton-mile, and that location of sand and gravel property with respect to the market is an important item in connection with determining its value, (R. 359); Mr. Knowlton classified muck sand as being that material which is washed off from the washing of his other sand and gravel materials, but even this washed off muck

sand was sold by him for 30¢ a ton loaded on the trucks, (R. 356); Mr. Knowlton admitted that he had negotiated with Mr. Noble for the purchase of some material at the offered price of 20¢ per yard, (R. 353), and at no time did Mr. Knowlton make known to Mr. Noble that the reasons for discontinuing negotiations was a matter of price, (R. 367), and the only reason given was as set forth in exhibits 52 and 53 which is in part quoted in the Statement of Facts (supra). Mr. Kiepe placed a market value of 10¢ per cubic yard for all of the material in place, (R. 389); Mr. Solomon testified that the muck sand was worth 10¢ per cubic yard in place, (R. 481).

In summary, the jury in determining the value of the sand and gravel had the following testimony:

Respondent's Witnesses:

Fine Sand	355,222 tons @ .25	\$ 88,805.50
Sand & Gravel	944,646 tons @ .10	94,464.60
	1,299,868 tons Total	<u>\$183,270.10</u>

Mr. Kiepe:

Sand & Gravel	286,668 yards @ .10	\$ 28,666.80
	(430,002 tons)	
	But present cash value	\$ 17,690.00

Mr. Solomon:

Fine Sand	388,671 yards @ .10	\$ 38,867.10
Overburden	41,127 yards @ .04	1,645.08
	(644,796 tons)	<u>\$ 40,316.08</u>
	But present cash value	\$ 19,518.00

Mr. Kiepe and Mr. Solomon apparently calculated the

amount of material by estimating the amount within a cone shaped excavation leaving lateral support on four sides and going to a depth of about the level of the highway, in disregard of the evidence that by agreement and custom the only lateral support necessary would be that which adjoins the east side of the 200 foot commercial property. Mr. Knowlton, the Appellant's witness, testified that his firm had excavated to a depth of about 40 feet below the level of Highway 91 in the vicinity of the highway, (R. 352). Mr. Knowlton never did testify as to the market value of the material in place, but did state that he had been paying 10¢ per ton for the material at Bountiful, and hauling at a distance of 7 miles greater at a cost of 5¢ per ton-mile, which in itself was 35¢ per ton for haulage alone in excess of the haul which would have been required had he purchased the material from the Noble property, (R. 353 and 359).

The frontage property of the defendants consisted of 595 feet along U. S. Highway 91, together with a 50 foot right-of-way adjoining thereto, but the latter right-of-way was not a part of the litigation herein. All of the experts agreed that a good depth for commercial or industrial property would be from 190 to 200 feet East of the highway. As to the values placed upon the frontage property, the opinions were as follows:

Mr. Gaddis,	\$75.00 per front foot	\$44,625.00
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Mr. Rideout,	\$75.00 per front foot	\$44,625.00
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Mr. Keipe stated the property would be worth \$92.00 per front foot in 10 years from now making it \$54,740, but that the present worth is \$21,075.60. (R. 391).

Mr. Solomon, \$50.00 per front foot \$29,750.00

(R. 486), but (R. 489), he shows the total for the land is \$28,750.00 instead of \$29,750.00, (R. 489).

The improvements including the residence on the property had been blue printed in great detail by Mr. Howa, a Civil Engineer, who determined the replacement costs at a total of \$44,795.00, and that the depreciation on these improvements was \$4,000.00, making a replacement value less depreciation of \$40,795.00. Mr. Gaddis and Mr. Rideout in answer to the hypothetical questions placed to them, stated that from their general observation of the property during prior years, and from viewing pictures, and from considering the testimony of Mr. Howa that the replacement value was \$44,795.00 less \$4,000.00 depreciation; that the witnesses considered these matters in forming their opinion of the value of the whole property.

Mr. Kiepe testified that he had made an estimate of the cost of replacement of the improvements to check another method which he uses for valuation, (R. 370 and 385); that he estimated the replacement cost of the residence at \$15,300.00 and the depreciation of \$3,060.00 leaving a present replacement cost less depreciation of \$12,240.00 for the residence, (R. 404); however, rather than place a value on the improvements as such, the witness under his method of appraisal determined a rental income for 10 years of the property at \$2,700.00 per year which would have a present value of \$18,117.00. Mr. Solomon explained in detail his method of appraising the value of the improvements, and his procedure was to estimate the replacement costs and allow a reasonable depreciation, (R. 489 to 492). Mr. Solomon gave the deprec-

iated replacement costs of the improvements as follows:

	REPLACEMENT COST	DEPRECIATED REPLACEMENT VALUE
Home (R. 491)	\$15,400.00	\$10,797.00
Antique Repair Shop (R. 492)		1,878.00
Laundry Room (R. 492)		1,920.00
Antique Building (R. 492)		3,532.00
Trailer Court, sewage & power (R. 492)		3,200.00
Total		<u>\$21,267.00</u>

The foregoing total appears to be \$21,267.00, but Mr. Solomon had stated a total of \$21, 827.00, (R. 492). It is apparent that Mr. Solomon used the figure of \$21,827.00 for the improvements in coming up with his overall total of \$72,345.00, (supra 15). Mr. Solomon endeavored to explain the difference between fair market value and replacement cost, and did in fact distinguish between the two, but in this instance it is obvious that he himself considered the depreciated replacement cost as the market value.

The court instructed the jury as to evidence of replacement value as follows:

“You have heard evidence of “replacement value”. Replacement value is what new buildings would cost on today’s prices of the same type of materials, or it may be what second-hand buildings of the same type would cost, if they could be placed on the property. The defendants are not entitled to replacement values as such.

Depreciation was given to you as the measure of the extent of the wear and tear on the buildings. De-

preciation is not necessarily the difference between replacement cost and market value. You may, however, consider replacement costs and the depreciation figure as elements to be considered in determining what a willing buyer would have paid for the entire property, it being sold by a willing seller."

The detailed discussion concerning replacement costs and its relation to fair market value in the examination and cross examination of several of the witnesses would seem to have fully informed the jury that replacement costs can be considered in determining value, but are not necessarily conclusive thereof, and the fact that Mr. Solomon, the Appellant's witness, apparently relied entirely upon the depreciated replacement cost method, the jury could well have considered the values placed by Mr. Howa as being more exact because of his more detailed examination and determination of costs.

In summary the jury had the following to consider in connection with determining the fair market value of the property.

Respondents' witnesses:

Frontage: 595 feet	@ \$75.00	\$ 44,625.00
Improvements:		40,999.00
Sand & Gravel:		183,269.10
		<hr/>
		\$268,925.10

Mr. Noble testified that his opinion of the market value of the property was \$300,000.00.

Appellant's witnesses:

Mr. Kiepe:

a. Sand and gravel and overburden	\$14,540.00
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b.	Sand and gravel where buildings are located	3,150.00
c.	Value of the land	21,075.00
d.	Rental income for 10 years at \$2,700.00 per year	18,117.00
		<hr/> \$56,882.00

Mr. Solomon:

a.	Frontage	\$28,750.00
b.	Right of Way	1,250.00
c.	Improvements	21,827.00
d.	Gravel area	19,518.00
		<hr/> \$71,345.00

From the evidence presented, the jury could well have found the fair market value of the Defendants' property to be in excess of \$268,000.00, but in its determination it considered the value of the property at \$150,000.00 which seems to be fully and amply supported by the evidence.

The Defendants are entitled to have the evidence, and all reasonable inferences therefrom, considered in the light most favorable to them. This court has repeatedly held that if there is any substantial evidence supporting the finding of the Trier of Fact it will not be disturbed on appeal. *Malstrom v. Consolidated Theatres Inc.*, 4 Utah 2nd 181, 290 Pacific 2nd 689; *Beck v. Jeppesen*, 1 Utah 2nd 127, 262 Pacific 2nd 760; and a great number of other cases decided by this court.

POINT II

THERE WAS NO ERROR IN ALLOWING EXPERTS TO TESTIFY AS TO THE MARKET VALUE OF THE PROPERTY WHERE THE OPINION OF THE EXPERT WAS BASED PARTLY ON HIS OWN OBSERVATION AND

PARTLY UPON INFORMATION SUPPLIED BY OTHERS, NOR WAS IT ERROR TO RECEIVE THE OPINION OF A WITNESS AS TO THE VALUE OF THE WHOLE PROPERTY BASED IN PART UPON HYPOTHETICAL QUESTIONS.

The procedure followed by the expert witnesses of the Defendants, was essentially the same procedure followed by the experts testifying for the Appellants as heretofore discussed, excepting that the experts for the Appellants undertook to determine for themselves certain technical data such as the quantity and quality of material, and by inquiry from others determined the price or value of such material. Mr. Gaddis and Mr. Rideout gave their own observation and in part upon a hypothetical question. The trial court properly instructed the jury in connection with the opinion of experts based upon hypothetical questions as follows:

INSTRUCTION NO. 24

“Some of the experts in testifying as to the value of all of the Noble property, based their opinions, in part, upon certain hypothetical questions; that is to say, their opinion was based upon the information and findings of others which the expert assumed to be correct. You are instructed that you give weight to the opinion of an expert based upon these assumptions, to the extent that the assumptions are supported by a preponderance of the evidence in this case.”

All of the experts acknowledged that the value of the whole property must be determined by consideration of its component parts. The Appellant's witness obtained their

information on those component parts with which they were not familiar by inquiry from persons outside of the courtroom, whereas the Respondent's experts based their opinions upon information of other experts which was given in open court under strict cross examination.

The Appellants cite *State v. Tedesco*, 4 Utah 2nd 248, as opposing the procedure used by the Respondents' expert witnesses. In that case, the objection was that the experts assigned the retail value to individual lots in a subdivision and multiplied the number of lots by the retail value without allowing for any costs; however, no such circumstance was present in the trial of the subject case since the values assigned to the various types of sand and gravel were values of the material in place, and the retail values of said materials were substantially greater as testified by Mr. Schoenfeld and Mr. Knowlton. Mr. Schoenfeld testified that he sold the fine sand for 75¢ per yard at the plant site after a loading cost of about 10¢ per yard, (R. 221).

The annotation on minerals in land as evidence of value in 156 ALR 1416 states that with remarkable unanimity the courts hold that in determining the compensation in eminent domain proceedings, the existence of valuable mineral deposits in the land taken, constitutes an element which may be taken into consideration if and insofar as it influences the market value of the land. The reason for the rule is that the measure of compensation in eminent domain proceedings is the market value of the land to be condemned as a whole with due consideration of **all the component parts** that make for its value. Then at page 1422 of said annotation, it states that if land containing minerals can be put to two uses, which are inconsistent, the owner is entitled to re-

cover for the more valuable use but not for both; but if the uses are not incompatible, both uses may be considered in fixing the market value. In the instant case there was no disagreement that the property was conducive to a commercial use as well as a sand and gravel business.

A well considered federal case dealing with the general problem of valuating property by considering the valuation of various part, is the case of *Cade V. United States*, 213 F. 2nd, 138, U. S. Court of Appeals, 4th Cir.

The landowner appealed from judgment of the district court contending the award was inadequate, and that the court erred in striking testimony of an expert who testified as to value of the whole of the land after giving valuation to the various parts, and that the court erred in excluding testimony as to value of a deposit of granite rock on land. In reversing the cause, the court held in part as follows:

(140) “. . . . the trial judge on motion of the government struck out his (expert witness) testimony on the ground that the overall value to which he had testified had been arrived at by adding together the values he had placed upon the various items.”

“This, we think, was error.”

“. . . . The witness testified to the value of the land as a whole after giving the valuation which he had placed upon the various parts. This is the way that any man of intelligence would have arrived at a valuation of the property for ordinary business purposes, and we know of no reason why a witness testifying under oath as to his opinions should not arrive at a valuation in the same way. . . .”

“In *United States vs. Wise*, 4 Cir., 131 F. 2d 851 this court held admissible evidence as to reproduction cost of structural improvements on property condemned. . . .”

Quoting from *Clark v. United States*, 8 Cir. 155 F. 2d 157, 162 the court said: “We think it was prejudicial not to permit defendant’s witnesses to tell the jury what part of the value he placed on the timber land and what part on the rest of the land. In eminent domain proceedings the rule is that all facts which an ordinary prudent man would take into account before forming a judgment as to the market value of property he contemplates purchasing is relevant and material. . . .”

In holding error to exclude the testimony of value of the granite deposit, the court quoted from *National Brick Co. v. United States*, 76 U. S. App. D. C., 329, 131 F 2d 30, where the trial court had refused to admit testimony as to the value of sand on the land:

“This opinion of the Court was, of course, wrong, for no rule is better established than that the special value of land due to its adaptability for use in a particular business is an element which the owner is entitled to have considered in determining the amount to be paid in just compensation. So much was said by the Supreme Court in *Mitchell v. United States*, 267 U. S. 341. **And we know of no other evidence by which the jury could be properly guided in determining the value of the property than to be told the per ton value of the sand as it lay, or, without this knowledge, how the jury could ever have reached a judgment based on anything more than guess or speculation.**”

(Emphasis added)

A similar result was reached in the case of *Early v. South Carolina Public Service Authority*, S. C., 90 S. E. 2d 472, a case in which the appellant by diverting fresh water caused salt water to flood upon respondent's land. The respondent called several witnesses, some of whom testified to value of land before and after flooding with salt water and some of whom testified as to amount of land involved, to which the appellant objected. The court held: (480)

"There was before the jury evidence in the form of the plat and the testimony of Mr. McCrady as to the number of acres involved; and only a simple mathematical calculation was required to translate the testimony of these witnesses . . . into the terms of damage to the whole area involved. The fact that property taken should be valued as a whole for the purpose of assessing compensation for the taking "does not preclude the admission of testimony showing particular elements of value for consideration by the jury in arriving at the overall value which they are required to find as the basis of compensation."

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE COLORED PHOTOS IN EVIDENCE.

The Appellants contend that it was error for the court to admit in evidence exhibits No. 28 through 41 which are enlargements of photographs taken in the colored film; however exhibits No. 21 through 27 are black and white photo prints of essentially the same scenes as the colored pictures and both the black and white prints and the colored photos were offered by the Respondents for

consideration of the jury at the same time. These exhibits were identified by Mr. Noble who under cross examination admitted that the photos were a true picture except for the tinted trees and some purplish tint on objects in the photo, (R. 148). The jury were also given exhibits No. 43 through 50, which were black and white prints of pictures taken by Mr. Solomon, (R. 475). The jury was given every opportunity to compare the colored photos with those black and white ones, and as stated by Mr. Gaddis, **the colored photos are no more or less a true representation than the black and white photos, but are representative.**

The main objection of the appellants to the colored photos seems to be that they are misleading, and on this point Whigmore on evidence, Vol. III, section 792, page 185 states:

“Occasionally a Court is found excluding a photograph as being misleading; but this is begging the very question which the jury have to decide; it would be as anomalous as if the judge were to order

a witness from the stand because he was believed by the judge to be lying.”

In view of the lengthy cross examination concerning the colored photos, and that the jury had an opportunity to compare the colored and black and white photos as well as to view the premises, it appears clear that the court did not abuse its discretion in allowing the colored photos to be admitted in evidence.

POINT IV

IT WAS NOT ERROR TO PERMIT THE JURY TO CON-

SIDER THE DEFENDANTS EXHIBIT NO. 56 UPON
CROSS EXAMINATION OF THE PLAINTIFF'S WIT-
NESS AS TO FAIR MARKET VALUE.

Mr. Kiepe was the Appellant's witness who was being cross examined by the Respondent. Mr. Kiepe stated that he had checked the sales of all land in the vicinity of the Noble property and he knew what they sold for, (R. 459); that he was well versed in prices which had been paid for properties along that highway. Mr. Kiepe was then asked if he knew what the Valentine property sold for, and then whether he appraised Mayor Stewart's property which was immediately North of the Noble property, and he replied that he had so appraised the Stewart property, (R. 460); that the sale by Mayor Stewart to the State Road Commission was a negotiated sale, (R. 463); that in paying Mr. Stewart \$80,000.00 for the tract which was subject to a lease with 6½ years remaining, (R. 465) the State paid too much for the Stewart land, (R. 466). **Then the deed from Mayor Stewart to the State Road Commission was marked as Exhibit 56, and was admitted in evidence without objection.** (R. 468); nor did the appellant object to any of the cross examination in this connection; furthermore on redirect examination of Mr. Kiepe, the Appellants undertook a detailed examination concerning the sale of the Stewart property to the State Road Commission, (R. 469). On direct examination by the Appellant of Mr. Solomon, (R. 494), Mr. Solomon stated that he appraised the Stewart property; that the witness appraised the Stewart Property for \$80,000.00, and that this was not an excessive price, (R. 495); that the Stewart property had 1325 feet or so frontage as compared with 595 feet of frontage on the Noble property, (R. 495). It is to be noted at this point that the Stewart property was

subject to a lease having about 6½ years remaining in favor of Mr. Schoenfeld who had the right to remove the sand and gravel therefrom, and the \$80,000.00 was only a payment for the fee subject to said lease.

The Appellant cites the case of Weber County et al. v. Ritchie, App. Br. 27 as authority that the court erred in permitting the jury to consider Exhibit No. 56. However, that case is distinguished from this one in two important particulars:

First, in that case the evidence was offered in direct examination by the land owner whereas in the instant case, the testimony was on cross examination of Mr. Kiepe by Respondent and direct examination of Mr. Solomon by the Appellant.

Secondly, in the Weber County case a more serious objection to the testimony of similar sales was that the particular sale which it was sought to introduce in evidence included not only sale price but damages as well.

This court in the case of State vs. Peek, 1 Utah 2nd, 263, 265 Pacific 2nd, 630, held that the price paid for similar lands is admissible in evidence both on direct examination and cross examination. While the Peek case does not pass directly upon the question as to whether or not evidence as to the price paid by condemner for similar property is admissible, yet the court's opinion would seem to indicate that upon cross examination of a witness as to his opinion of value of property as long as it tends to disclose the truth, the inquiry should be allowed and should never be curtailed or

California, in the case of the City of Los Angeles v. Cole, 170 Pacific 2nd, 928 while holding that the price paid by the condemner for other property is not a proper basis for determining market value, further commented (Page 933) as follows:

“(10) Nor does the record sustain appellants’ objection that these instructions were prejudicial because in their statement of the law they did not contain the additional rule announced in the Brizzolara case supra 100 Cal. at page 437, 34 P. at page 1084, that while evidence of the character specified is not admissible as evidence in chief, such evidence is admissible by way of cross-examination “for the purpose of testing the fairness or honesty of an opinion which the witness may have given upon his direct examination, in relation to the value of the property involved in the action.” As heretofore noted in the

present action such testimony was permitted on cross-examination of respondent’s witness, and in a separate instruction the court advised the jury as to the propriety of their taking such testimony into consideration for the aforesaid limited purpose—its impeaching effect. Reclamation District No. 730 v. Inglin, 31 Cal. App. 495, 500 160 P. 1098 and cases therein cited.”

In this case no objection having been made to the trial court concerning Exhibit 56; and Mr. Kiepe having been confronted with this matter on cross-examination with the full opportunity to explain his appraisal and opinion of the transaction; and the fact the the Appellants on direct examination of Mr. Solomon elicited from Mr. Solomon the testimony that the Stewart property was appraised by Mr. Solomon for \$80,000.00 and that he thought it was a fair price,

(R.495) there could have been no error committed in connection with the introduction of Exhibit 56.

POINT V

THERE WAS NO ERROR IN REFUSING TO STRIKE THE TESTIMONY OF THE WITNESS HOWA AS TO THE MARKET VALUE OF SAND AND GRAVEL.

The Appellants quote in their brief only part of the testimony of Mr. Howa relative to his knowledge of the value of sand and gravel. Commencing at R. 258 and continuing to R. 268, the record shows that the Appellants cross examined Mr. Howa at length, and he testified that he was a building contractor as well as an engineer and estimator; that he had purchased about 5,000 yards of sand and gravel and concrete aggregate last year; that he determined the price of sand and gravel by calling firms such as Utah Sand & Gravel or Gibbons and Reed, (R. 267); that the witness realized that the construction of a plant for processing the sand and gravel would be necessary, and that the witness had built a sewage plant where the cost of washing sand for baffle was a part of his experience, and he took all of these matters into consideration in determining the value of the sand and gravel on the Noble property. Then when asked by Mr. Budge what he thought the material was worth in place, the witness stated that he would give for sand and gravel in place a minimum of 15¢ per yard, (R. 268). Mr. Howa had considerably more background in sand and gravel, than did the witnesses Mr. Solomon and Mr. Kiepe, who were presented by the Appellants as experts for the purpose of appraising sand and gravel property. Mr. Kiepe and Mr. Solomon both testified that they obtained their information upon the price of sand and gravel by

making inquiry from various operators, while Mr. Howa in addition to this procedure of inquiry had himself been experienced in purchasing and dealing with these products as a builder and engineer as well as estimator.

The Appellant cites *Mary Jane Stevens Co. v. First National Bank Bldg. Co.*, 89 U 456, 57 Pacific 2nd, 1099. This was a case where the plaintiff sought damages for the removal of what was a party wall situation, and the witness Richards was called as an expert on the difference between the value of the building before and after demolition of the partition wall. Comments 17 to 34 deal with this proposition and the Appellants quoted only a part of what was there said by the court. The court further held "The matter of determining the qualification of a witness to testify as to value rests largely in the discretion of the court. *City of Geneseo v. Schultz*, 257 Ill. 273, 100 N.E. 926. The discretion exercised will not be disturbed except for palpable error."

This court held in the case of *Salt Lake & Utah Railroad Co. v. Schramm et al.*, 56 Utah 53, 58, 189 Pac. 90, regarding opinion evidence as follows:

"In cases like the one under consideration the qualification of witnesses to express an opinion as to market value necessarily is a question to be largely determined by the trial judge. If it is shown that the witness is competent to express an opinion as to values, no matter what the source of the qualifying information may be, he should be permitted to testify. The sources of the witnesses' information may vary according to the peculiar means or opportunity the witness has of forming an opinion and judging the premises. We do not think any good reason can be assigned why a person who has occupied and used

the premises all her life, and has been interested and alert in making inquiry as to its value, may not be as well qualified to speak as the banker, lawyer, or real estate man, having more or less to do with the sales and transfers of real property. The means and extent of the knowledge of any witness may be gone into on cross-examination, and rebutted by the testimony of other competent witnesses, whose opinions may differ as to value. No rule can be formulated for determining the means by which a witness shall acquire the necessary knowledge to qualify him to speak that will apply in all cases. If, under all the circumstances, he was in a position to obtain knowledge and form a correct judgment as to values, whether or not by buying, selling, leasing, or using the property for purposes for which it is adaptable is immaterial, so long as the jury is given the benefit of the facts upon which the opinion of the witness is based. *Salt Lake Inv. Co. v. O. S. L. R. Co.*, 46 Utah, 203, 148 Pac. 439; *Montana Ry. Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. 96, 34 L. Ed. 681; 2 Lewis, *Eminent Domain* (3d Ed.) section 656."

This holding was also followed in the case of *Provo River Water Users Association v. Carlson* 103 U 93, 133 Pacific 2nd 777, at page 782, and the court further stated "The limited experiences of the witness might tend to depreciate the weight of their testimony, but it would not make them incompetent to testify if they were acquainted with land values."

POINT VI

THE JURY WAS FULLY INSTRUCTED UPON THE LAW APPLICABLE TO THE CASE AND NONE OF WHICH INSTRUCTIONS WERE OBJECTED TO BY THE APPELLANTS.

The jury was fully instructed by the court in the matter of determining the amount of compensation due the Defendants, (R. 41-59). By Instruction No. 3, the court instructed the jury that they are to determine the fair market value as of July 22, 1955, of the property taken by the State.

The following instructions or excerpts from instructions are quite pertinent:

INSTRUCTION NO. 7

“Your are not to consider what the property was worth to the defendants for speculation, or merely for possible uses, nor what they claim it was worth to them, nor can you consider what it may be worth to plaintiff for highway purposes, nor what the property would bring at a forced sale, you are not to consider the price the property would sell for under special or extraordinary circumstances, but only its fair market value on July 22, 1955, if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale.”

INSTRUCTION NO. 8

“It is your sworn duty to fix the just compensation due defendants in accordance with the evidence given in this case, being guided by the legal definition of that term, and by the rules of law which the Court will give you in these instructions. You are bound by your oaths to receive the law as it is laid down by the Court, even though it may not accord with your own view as to what the law is or should be.”

INSTRUCTION NO. 9

“You are instructed that defendants are entitled

to just compensation on account of the taking of their property. It is the duty of the jury to determine what amount of money will constitute just compensation, as that term is defined in these instructions.

In this case, "just compensation" is the fair market value of the property taken from defendants."

INSTRUCTION NO. 10

"As to the meaning of "Market Value", the market value of property taken for public use is the price estimated in terms of money which the property would bring if offered for sale in the open market with a reasonable time allowed in which to find a purchaser, buying with the knowledge of all the uses and purposes to which it was adapted and for which it was capable; or as otherwise state, it is the price the property will bring when offered for sale by one who desires, but is not required, to sell, and is sought by one who has the cash, and who desires, but is not required, to buy, after due consideration of all the elements reasonably affecting value."

INSTRUCTION NO. 11

"It would be unjust to the public that the State should be required to pay the defendants more than a fair market value for the loss they sustain by the appropriation of their property for the general good."

INSTRUCTION NO. 12

"The term "just compensation" means "just" not only to the party whose property is taken for public use, but also "just" to the public which is to

pay for it.”

INSTRUCTION NO. 20

“The defendants were entitled to sell the land and buildings on the theory that said land could be used for the best and most profitable purpose or purposes, for which it was adapted. They could have sold it on the theory that it was usable for several purposes, but you must consider or assume that the entire tract of land, including the frontage, trailer courts, antique store, and the sand and gravel deposits, would have sold to one man for whatever use or uses he could make of it.

You may not consider uncertain, remote or speculative, or imaginary uses, but only those elements which give the property a market value, or which reduce its market value. One way to do it would be to suppose a sale by a willing seller to a willing buyer, neither one being forced into the transaction, the buyer having the money to buy, and then determine what he would have paid for it in the light of all of the evidence in this case.”

INSTRUCTION NO. 23

“The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience has become an expert in any art, science occupation or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weight the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that

be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound."

CONCLUSIONS

From the foregoing review, we are of the opinion that the evidence fairly and reasonably adduced at trial would have supported and justified a verdict and judgment of nearly twice the amount entered, and the verdict and judgment below should be affirmed.

Respectfully submitted,

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