

1957

# State of Utah v. Brack Howard Noble : Petition for Rehearing

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

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## IN THE SUPREME COURT

of the  
STATE OF UTAHFILED  
FEB 13 1957

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.*

## PETITION FOR REHEARING

HERBERT B. MAW  
WENDELL B. HAMMOND  
GEORGE K. FADEL

*Attorneys for Respondents*

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# IN THE SUPREME COURT of the STATE OF UTAH

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STATE OF UTAH by and through its  
ROAD COMMISSION; 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.

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.*

Case No. 8544

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PETITION FOR REHEARING

## PETITION FOR REHEARING

To the Honorable Supreme Court of the State of Utah:

The above case was reversed by your Honorable body upon the ground of absence of evidence to support the verdict for two general reasons:

1. That the expert witnesses who testified for defendants fixed the value of the property by finding the product of the total tons of sand and gravel times the price per ton; and

2. That compensation for the property was fixed upon the basis of the equivalent of the total profits which would be realized from future operations of the property, instead of upon its actual present value in place.

We respectfully submit that the above propositions are not factually correct as shown by the record. We further submit that no such supposed errors were advanced by the plaintiff either in the record on appeal, or covered by the points argued on appeal, or presented to the trial court for its determination by motion for a new trial prior to appeal, and were, therefore, not properly before this Court for its determination on appeal.

The following points are respectfully submitted in support of a rehearing:

### STATEMENT OF POINTS

#### POINT I

THAT THE TRIAL COURT'S INSTRUCTIONS TO THE JURY WERE CORRECT STATEMENTS OF THE LAW IN THE POINTS AT ISSUE.

## POINT II

THE OPINION ASSUMES THAT THE VALUE FIXED BY THE WITNESSES UPON THE GRAVEL AREA INCLUDED A PROFIT: WHEREAS THE EVIDENCE OF THE VALUE OF THE SAND AND GRAVEL WAS BASED UPON WORTH IN PLACE AND NOT UPON RESALE VALUE OF THE REMOVED GRAVEL. THE METHOD OF VALUATION USED BY THE WITNESSES IS SUPPORTED BY OPINION OF THE UNITED STATES COURT OF APPEALS IN THREE DIFFERENT CIRCUITS.

## POINT III

THE JURY'S VERDICT CAN BE CONSTRUED AS AWARDING ONLY ABOUT ONE-THIRD THE VALUE OF SAND AND GRAVEL PLACED BY THE WITNESSES; THEREBY LEAVING OVER ONE HUNDRED EIGHTEEN THOUSAND (\$118,000.00) DOLLARS "PROFIT" FOR A PURCHASER.

## POINT IV

THE OPINION FAILS TO GIVE PROPER CONSIDERATION TO THE FINDINGS OF THE JURY.

## POINT V

RESPONDENT'S CASE IS SIMILAR TO AND SUPPORTED BY FAMOUS NEW YORK CASE, CITED BY ORGEL BEFORE FINAL DECISION UPON FINAL APPEAL.

## POINT VI

CASES CITED IN THE OPINION OF THE COURT ARE DISTINGUISHABLE FROM FACTS OF THE INSTANT CASE.

## POINT VII

THE APPELLANT HAVING FAILED TO OBJECT TO EVIDENCE OR INSTRUCTIONS PERTAINING TO THE SAND & GRAVEL AT TRIAL, THE APPELLATE COURT SHOULD NOT CONSIDER OBJECTIONS RAISED FOR FIRST TIME UPON APPEAL.



## POINT VIII

RESPONDENTS RESPECTFULLY REQUEST INFORMATION UPON INQUIRIES.

## POINT IX

THE TRIAL COURT DENIED A MOTION FOR NEW TRIAL AND ENTERED JUDGMENT UPON THE VERDICT.

## ARGUMENT

### POINT I

THAT THE TRIAL COURT'S INSTRUCTIONS TO THE JURY WERE CORRECT STATEMENTS OF THE LAW IN THE POINTS AT ISSUE.

The trial court directed the jury as follows:

*Instruction No. 7.* "You 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. 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 stated, 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. 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 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."

THE EVIDENCE ADDUCED ON BEHALF OF THE DEFENDANTS CONFORMED WITH THE COURT'S INSTRUCTIONS.

1. It fixed the use and value of the property for business purposes, as of the date of occupancy by the State.
2. It fixed the value of the buildings in place as of said date.

3. It fixed the amount of sand and gravel in the gravel pit of said property and the value of the same in place as of the date of occupancy.

THE EVIDENCE OF THE DEFENDANTS DID NOT PRESUPPOSE THAT THE PURCHASER WOULD "REQUIRE MANY YEARS IN DISPOSING OF THE SAND AND GRAVEL TO RECOVER BACK THE FULL ESTIMATED PURCHASE PRICE IF IT WERE RECOVERABLE AT ALL" AS YOUR HONORABLE BODY DECLARED.

## POINT II

THE OPINION ASSUMES THAT THE VALUE FIXED BY THE WITNESSES UPON THE GRAVEL AREA INCLUDED A PROFIT: WHEREAS THE EVIDENCE OF THE VALUE OF THE SAND AND GRAVEL WAS BASED UPON WORTH IN PLACE AND NOT UPON RESALE VALUE OF THE REMOVED GRAVEL. THE METHOD OF VALUATION USED BY THE WITNESSES IS SUPPORTED BY OPINION OF THE UNITED STATES COURT OF APPEALS IN THREE DIFFERENT CIRCUITS.

We respectfully cite to the court the case of *National Brick Co. v. United States*, 76 U.S. App. D.C. 329, 131 F. 2d 30 which was quoted in part in respondent's brief, but is set forth here in its entirety:

131 Federal Reporter, 2nd Series  
NATIONAL BRICK CO vs. UNITED STATES  
No. 8047

United States Court of Appeals for the  
District of Columbia  
Argued Oct. 5, 1942  
Decided Oct. 26, 1942

1. Eminent Domain 202-(4), 252(5)

In proceeding to condemn said land owned by brick company, rejection of testimony of company's manager and one engaged in business of

buying and selling sand as to value of land for sand contained therein was harmful error requiring reversal of judgment on jury's award of lesser amount, especially in view of judge's statement limiting appraisal to value of land as real estate, though subsequent witness testified as to value of land as sand bank.

2. Eminent Domain 134

In proceeding to condemn land, special value thereof due to its adaptability for use in particular business is an element which owner is entitled to have considered in determining amount to be paid in just compensation thereof.

3. Eminent Domain 202(4)

In proceeding to condemn said land owned by brick company, testimony as to quantity and quality of sand and its value in its natural condition in bank at time of taking was admissible to enable jury to apply correct standard of value of land with regard to best use thereof.

4. Eminent Domain 202(4)

In proceeding to condemn sand land owned by company using sand in manufacturing bricks or selling it to contractors for making of building mortar, inquiry should have been whether property was valuable in open market for sale of sand or use thereof in making bricks, and jury should have been informed by competent witnesses engaged in sand business as to quantity and quality of sand, uses to which it might be put, existence of market therefor, and value of land with sand on such market in its then condition.

Appeal from the District Court of the United States for the District of Columbia.

Proceeding by the United States to condemn land owned by the National Brick Company. From a judgment on a jury's award of compensation, the landowner appeals.

Reversed and remanded for new trial.

Messrs. Edwin C. Dutton and Richard E. Wellford, both of Washington, D.C. for appellant.

Mr. John P. Hearne, of the Bar of the state of California, pro hac vice, by special leave of Court with whom Norman M. Littell, Assistant Attorney General and Messrs. Vernon L. Wilkinson and Alexander H. Bell, Jr., all of Washington, D.C. were on brief, for appellee. Messrs. Charles R. Denny, Jr., and Dwight H. Doty, both of Washington, D.C. entered appearances for the Appellee.

Before GRONER, Chief Justice, and MILLER and VINSON, Associate Justices.

GRONER, C. J.

This is an appeal by a landowner in a condemnation proceeding instituted by the United States to acquire lands for the road development program of the National Capital Parks, Parkway and Playground System. The property involved consists of two and a half acres of a thirty-one acre tract of land adjoining the Baltimore & Ohio Railroad right of way in the District of Columbia. Appellant acquired the tract about thirty years ago and constructed on a part of it a plant for making brick. The plant has been in operation continuously, and during the entire thirty years brick and sand have been sold to builders in the District of Columbia and vicinity. Of the acreage of the entire tract about one-fifth is denominated "sand land," and the particular two and a half acres taken by the United States is a solid sand

bank sloping from a height of forty to ninety feet above the level of the adjoining railroad tracks. The bank contains approximately 300,000 cubic yards of sand, weighing approximately 450,000 tons. Appellant valued the land taken at \$67,500. The jury awarded \$9,000.

(1) The record does not include the pleadings and the evidence is condensed to a degree that makes it difficult to determine precisely what occurred at the trial, but enough appears, we think, to show that error was committed by the Court in the rejection of material evidence.

At the trial Mr Dalley, a part owner of the property and manager of the Brick Company testified that the most valuable use to which the two and one-half acres proposed to be taken could be put was the manufacture of brick and the sale of sand to contractors for making building mortar, that the property adjacent to it had been so used during the past thirty years, and that the sale of sand was on a per ton basis, appellant either making delivery at building operations in the District of Columbia, or permitting the purchaser to remove the same from the bank into his own trucks.

He testified "that the value of the land for the sand contained therein was \$67,500, which testimony, on motion of the United States, was stricken out, because he has estimated the value by the value of the sand per ton."

Another witness, William Obrey Steel, who is engaged in the District of Columbia in the business of selling sand and operating a sand pit, was asked to testify to the value of the sand per ton "in the bank just as it is now." On objection by the United States, the Court refused to allow the

witness to answer. Again, he was asked "Have you bought sand of the same quality as the sand contained in this two and a half acres?" He answered that he had. He was then asked what he had paid for it. An objection to this question was sustained, whereupon a colloquy among counsel and the Court ensued, during the course of which the judge remarked to counsel for the landowner: "You are entitled to get the fair market value of your property for land as real estate. That is what you are entitled to. You are trying to get most everything but that."

The same witness was thereupon asked whether, in view of his experience with "sand land" and in the purchase of sand, he was in a position to state what the fair market value of this particular land was at the present time. This question too, the Court refused to allow to be answered, stating to counsel: "He (the witness) is not the owner. The owner can testify to this opinion of its value, but he isn't a real estate man. You know that just as well as I do."

It is quite true that a subsequent witness was permitted to answer most of these questions and to testify that the property as a sand bank was worth \$25,000 or \$30,000 an acre. But in spite of this, we think sufficient harm had been done by the rejection of proper evidence of value, coupled with the Judge's statement limiting the appraisal to the value as real estate, to leave the jury bewildered as to the proper elements to be taken into consideration in ascertaining the fair market value of the property.

Obviously, the Court was originally of opinion that the presence on the property of the sand bank forty to ninety feet high, containing 300,000

cubic yards of pure sand was of no consequence in determining the value of the property taken, and that the added value by reason of the presence of the sand should not be considered. On this theory most of the evidence of the additional value of the sand in the bank as it was and of the additional value of the property by reason of presence of the sand was rejected.

(2) 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 of land is entitled to have considered in determining the amount to be paid in just compensation

So much as this was said by the Supreme Court in *Mitchell v. United States*, 267 U.S. 341, 45 S. Ct. 293, 69 L. Ed. 644. 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 property than to be told the sand as it lay, or, without this knowledge, how the jury could have reached a judgment based on anything more than guess or speculation.

(3) Counsel for appellant was not seeking to prove the profit derived from the sale of the sand, or the value or price of the sand after it had been taken out of the bank. In questioning these witnesses he was seeking to show the value of the land with regard to the best use that could be made of it. This is the standard by which the jury was to make an award. In order that they might apply this standard it was necessary that they know the quantity and quality of the sand and its value at the time of taking in its natural



condition in the bank. Counsel's questions were confined to these issues. *Montana Ry. Co. v. Warren*, 137 U.S. 348, 11 S. Ct. 96, 34 L. Ed. 681. See, also, *Manning v. City of Lowell*, 173 Mass. 100, 53 N.E. 160; *Creighton v. Board of Com'rs*. 143 N.C. 171, 55 S.E. 511, 10 Ann. Cas. 218; *Savings & Trust Co. v. Pennsylvania R. Co.* 229 Pa. 484, 78 A. 131.

In the leading case of *Boom Co. v. Patterson*, 98 U.S. 403, 408, 25 L. Ed. 206, the Court held that the adaptability of lands located in the Mississippi River for a logging boom was a proper element in estimating their value. It was there said: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

What is already said receives additional emphasis from the fact that the Government's witnesses in this case were real estate men who testified in the main in relation to the value of the land for real estate development and who, when asked about the added value of the sand bank treated it as an encumbrance which would have to be removed for building operations rather than as an added value to the land.

James W. Campbell, the single witness of the Government who was in the sand business, con-

fined himself on the subject of value to the statement that he had a ten years' supply of sand on hand and for that reason he had not inquired as to other sources of sand supply or their value. But he and the other witnesses for the Government were permitted to state what in their opinion was the value of the land for real estate development purposes alone.

(4) We think the inquiry should have been whether the property was valuable in the open market for the sale of sand or for the use of sand in the making of bricks, and that in order to reach a fair conclusion in this respect the jury should have been informed by competent witnesses as to the quantity of the sand, the quality of the sand, the uses to which it might be put, whether there was a market for it, and the value of the land with the sand in that market in its then condition.

Reversed and remanded for a new trial in accordance with this opinion.

The testimony of Mr. Schoenfeld (R 217-239) as summarized in the Respondent's Brief at page 5 and 6 shows that in fixing the value of the sand and gravel at 25c and 10c per ton respectively, the witness considered the value of the sand and gravel as it lay in place; that the fine sand could be delivered for sale at 90c per ton after payment of costs of loading and hauling of 35c per ton leaving a gross profit of 55c per ton. In the interest of brevity, the attention of the court is respectfully invited to the citations in the Respondent's Brief, and the record for the testimony of Mr. Schoenfeld in connection with the value of the material together with the great demand and market for the material, especially by rea-

son of the proximity of the Noble property to the market for said products. The jury had the benefit of Mr. Schoenfeld's testimony both on direct and cross examination concerning costs and profit and were fully advised that the value established by Mr. Schoenfeld for the products in place included no profit.

The opinion indicates some concern with the statement of Mr. Noble that it may have taken him 15 years to sell the muck sand. We respectfully submit that a "willing buyer" would fair better selling the sand over a 15 year period, because of the greater advantage income tax wise, and in view of the nearness of this property to the growing market, when according to the testimony, the location of the Noble property with respect to the market and demand results in a saving immediately of from 35c to \$1.00 per ton hauling costs from the next nearest sources. The "willing buyer" is also apprised that there is only one crop of sand and gravel; that the largest operator in the area, Utah Sand & Gravel has already depleted its supply in that vicinity; that of all commodities which may be rendered obsolete, sand and gravel would seem to be one of the last minerals to fall from the market and that the passage of time in the face of a diminishing supply would serve to advance the value of the sand and gravel.

### POINT III

THE JURY'S VERDICT CAN BE CONSTRUED AS AWARDING ONLY ABOUT ONE-THIRD THE VALUE OF SAND AND GRAVEL PLACED BY THE WITNESSES; THEREBY LEAVING OVER ONE HUNDRED EIGHTEEN THOUSAND (\$118,000.00) DOLLARS "PROFIT" FOR A PUR-

## CHASER.

The jury had testimony of the Respondent's witness supporting the verdict as follows:

Frontage, 595 feet at each \$75.00.....	\$ 44,625.00
Improvements .....	40,999.00
	<hr/>
	85,624.00
Sand and Gravel area .....	183,269.10
	<hr/>
	\$268,893.10

The jury, by finding the whole tract to be worth \$150,000.00, in effect, may have assigned only \$64,376.00 to the sand and gravel computed as follows:

Total value .....	\$150,000.00
Frontage and improvements .....	85,624.00
Value of sand and gravel area .....	64,376.00

The value assigned to the gravel area by the jury was about one-third of that testified to by the Respondent's witnesses, which left a margin for a prospective buyer of \$118,893.10, based upon value *in place*. The value of the sand and gravel area if based upon retail or incidental sales after removal was much greater as testified by Mr. Schoenfeld.

## POINT IV

THE OPINION FAILS TO GIVE PROPER CONSIDERATION TO THE FINDINGS OF THE JURY.

The trial of this cause continued for a period of about 4½ days during which time the jury considered testimony as set forth in over 400 pages of record, and viewed the premises which then consisted mainly of the

debris of the removed buildings and the gravel area. The jury could find it quite significant that both the witnesses for the Appellant and Respondent used similar methods by which to arrive at a market value in that these witnesses from the business world would be pursuing the subject the same as the prospective purchaser, who, himself would know no other way of determining the value of the land. If, in fact, the witnesses did misconceive the method by which the value of the gravel area was to be determined, the jury, by its reduced verdict cannot, itself, be deemed to have arrived at its verdict other than in the proper manner.

The finding of the jury that the whole of the Noble property was worth \$150,000.00 is consistent with the proposition that the jury only consider quality, quantity, and price of the sand in arriving at the value of the land with the sand in it. There is no indication that the jury multiplied quantity of sand by price per ton in arriving at its verdict.

This court has on many occasions expressed itself on the regard to be given to the verdict of the trier of fact:

In the case of *Wilson vs. Ulroid*, 1 Utah Second, 362, 267 P 2d 759, the court held:

(5) "The question of damages in such instance seems best addressed to the discretion of a jury; they have homes, spouses and children of their own, are experienced in the practical affairs of daily life, and have different points of view; and they are afforded the benefit of seeing and

hearing the parties and their witnesses. Because of their advantaged position courts are extremely reluctant to interfere with their verdicts. This is necessarily so in order that the right of trial by jury assured under our law<sup>9</sup> be preserved. If courts were prone to set aside jury verdicts and substitute their own judgments therefor whenever they disagreed with the jury, the right would be abrogated and the jury system would be but a pretense. The concept of trial by jury necessarily presupposes that there is a wide area within which the pendulum of the jury's deliberations may swing without interference from the court. And so long as they remain within the boundaries of what reasonable minds could believe their findings should remain inviolate.

(7) "The validity of the verdict in the instant case is reinforced by the fact that the trial judge has given his approval by refusing to vacate or modify it. As we stated in *Geary v. Cain*,<sup>11</sup> ' . . . in case of doubt, the deliberate action of the trial court should prevail. Otherwise this court will sooner or later find itself usurping the functions of both the jury and the trial court, . . . '

*Nasner v. Burton et al*, 2 Utah 2d 236, 272 P. 2d 163 held "This being a law case and Plaintiff having prevailed, he is entitled to the benefit of the evidence in the light most favorable to him, together with every inference and intendment fairly and reasonably arising therefrom."

*John C. Cutler Association v. DeJay Stores*, 3 Utah 2d 107 279 P. 2d 700, the court held: "The defendant, DeJay, having prevailed is entitled to have us view the evidence and every fair inference and intendment arising therefrom in the light most favorable to it. And if when

so regarded, there is any substantial evidence, or, as sometimes stated, any reasonable basis in the evidence to support the finding made by the trial court, it will not be disturbed."

Bowden v. Denver and Rio Grande Western Railroad Co. 3 Utah 2d 444, 286 P. 2d 240:

"There is a most important difference between this case and the Butz case hereinabove discussed. In the latter, the trial court had deprived the plaintiff of a trial by jury and resolved all of the issues of fact against him as a matter of law, whereas in this case the matter was submitted to a jury and the facts were found against the plaintiff. We reaffirm our commitment that 'The right of jury trial . . . is . . . a right so fundamental and sacred to the citizen . . . (that it) should be jealously guarded by the courts.'" But once having been granted such right and a verdict rendered, it should not be regarded lightly nor overturned without good and sufficient reason; nor should a judgment be disturbed merely because of error. Only when there is error both substantial and prejudicial, and when there is a reasonable likelihood that the result would have been different without it, should error be regarded as sufficient to upset a judgment or grant a new trial."

Taylor v. Weber County, 4 Utah 2d 328, 293 P. 2d. 925:

"This being a law action and the jury having found the issues in favor of the defendant, they are entitled to have us consider all the evidence, and every inference and intendment fairly arising therefrom in the light most favorable to the defendant.

“The evidence as revealed by the record is conflicting, but was found under the courts instructions to be clear and satisfactory in the defendants favor. The jury saw and heard all of the witnesses, viewed the premises, and examined the exhibits. Since the evidence amply sustains the verdict, we are not disposed to overturn it unless it was rendered under instruction, constituting prejudicial error.”

Has the respondent been accorded the benefit of the evidence and every fair inference and intendment arising therefrom in the light most favorable to the respondent? In addition to the evidence summarized in the briefs, and in this petition, we respectfully urge the court's consideration of the following excerpts from the testimony which indicate that the jury was not acting under any misconception of fact or law in arriving at its verdict.

MR. NOBLE: (R. 170)

Q. I still do not get an answer to my question, Mr. Noble. I want to know how you got the \$200,000.00 figure value on your gravel.

A. Well, in the first place, I could take it out myself and get a lot more out of it than that.

Q. I am not interested in that.

A. I could sell all my gravel I could get, considerably more than that—worth considerably more than that. (169).

Q. How long would it take you to sell that at 24,000 tons a year?

A. Well, I don't know, I would have to figure a little bit.

Q. It would take quite a while, wouldn't you?

A. I don't know. I would have to sell it that way.



Q. How fast could you sell it?

A. I do not know, that depends on the market. I wouldn't have to be in any hurry if I owned the land.

Mr. Schoenfeld, after testifying that the fine sand was worth 25c per ton in place and the gravel worth 10c per ton in place (R. 222), and that the proximity of the Noble property to the Salt Lake market results in a savings of from 25c to 30c a ton hauling costs if the material had to be hauled from Bountiful, the next nearest source, (R. 225) and that he retails the sand at 90c per ton at Salt Lake City, (R. 226), then under cross examination gave answers to questions as follows:

BY MR. BUDGE:

Q. Mr. Schoenfeld, let's get this figured now. We are starting out with a figure of 90 cents, you say 25 to haul it, that leaves 65 cents. You say it costs 10 cents to load it, that leaves 55 cents. Now I am interested in how much does the material cost; what do you pay for the material?

A. Which I stated there, I would pay 25 cents a ton.

Q. Are you leasing presently, Mr. Schoenfeld—are you leasing property presently?

A. Yes, I am.

Q. Are you paying 25 cents a ton, in place, for your material?

A. No, I am not.

Q. What are you paying?

A. 10 cents—I am paying 10 cents.

Q. But you would be willing to pay 25 cents, is that right?

A. For that muck sand, yes.

- Q. You are not paying 25 cents now, though, you are paying 10 cents?
- A. I haven't got any muck sand. It isn't cleaned off, if there was any. I am taking a virgin mountain, and have to do all of the exploring.
- Q. That's right, absolutely right, and you know under the terms of your lease, you pay so much a yard for the material removed; now have you agreed to pay 25 cents for muck sand, if there is any there, and you remove it; have you?
- A. I would on that—
- Q. I did not ask you that. I said under your present lease you are paying 10 cents.
- A. Paying 10 cents for sand and gravel.
- Q. Whether sand or gravel, you are going to get it for 10 cents?
- A. For ten cents.
- Q. That is what I want to know. I don't want any evasion here. I want this jury to know what the true facts are.
- So now we can take that 10 cents off the 55 cents; that leaves you 45 cents. That would be a profit—is that what you are telling us?
- A. That's right.
- Q. And you would not have any business overhead connected with it?
- A. All you would have is your bookkeeping.
- Q. A bookkeeper; that is something, isn't it? That would cost you something wouldn't it?
- A. Yes, that would cost something.
- Q. Is there any other expense?
- A. No.
- Q. You don't have to carry insurance?
- A. That's right, hiring it done.

- Q. All right, you don't have insurance. Do you have any equipment at all?
- A. You don't if you hired it done.
- Q. How do you get it loaded?
- A. You can get it loaded for 10 cents a ton, as I told you. They will load it for 10 cents a ton all over the country.
- Q. You don't take into consideration any equipment of any kind then, at all, and no other expenses than that.
- A. I can't see where there would be, no.
- Q. How about wages; wages would come out of your profits?
- A. Which would be a very good profit.
- Q. How much muck sand could you load all by yourself out of one of those pits and make 45 cents a ton on it?
- A. Well, we have tested that out, with a tractor, loading 200 tons, an hour.
- Q. I thought you did not have equipment now?
- A. I am stating this: I hired it done.
- Q. We are trying to find out where the 45 cents goes; how much is profit.
- A. We load 200 tons.
- Q. How many men do you have to load 200 tons an hour?
- A. One man.
- Q. One man, no loading machine; how do you get it up in the trucks?
- A. With that loading tractor, with that piece of equipment.
- Q. That costs something don't it; how much did that tractor cost?
- A. \$18,000.

Q. \$18,000; then somebody has got to be paid for that, don't they, out of the profit?

A. I can hire it loaded and let mine set, and get it unloaded for 10 cents. Therefore, the cost wouldn't be any more if I loaded it myself than if I hire it loaded.

Q. You wouldn't even have to go out there at all; you can stay home and get that?

A. That's right, I could.

Q. You would not even have to keep track of how much they took out?

A. No, the ticket machine would tell me.

Mr. Rideout (R. 285) to (R. 287) expressed his opinion that the market value of the property based upon the idea that 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. Mr. Rideout based his opinion in part upon the expert opinion of others. As to this method of arriving at an opinion, Whigmore has this to say. "There is no mysterious logical fatality in basing 'one expert opinion upon another.'; it is done every day and business and applied science." (3rd Ed. Supplement adds): "For that matter, in every day trials factual opinions or conclusions of both lay and expert witnesses are utilized in hypothetical questions." (1 Whigmore Evidence 2d Ed. Sec. 682, p. 1093).

Whigmore, 3d Ed. Vol. III, Sec. 720, after stating that knowledge of the thing to be valued is a requirement says

“As with other kinds of knowledge (Ante Sec. 672) so with knowledge of values, the place of this element may be supplied by hypothetical question. Thus, where a witness is competent to speak of house values, but has not seen the house in question, the specifications and other particulars may be placed before him hypothetically for an opinion, and then his knowledge of the value-standard may become available; or in some cases, his attention may be called to a thing assumed to be substantially similar to that in question and his judgment may be given on the hypothesis of similarity, this hypothetical basis is legitimately and frequently employed as a substitute for actual observation.”

Mr. Kiepe (R. 389)

- Q. And what were your findings—do you have an opinion as to the value of fine sand, muck sand and blending sand, or do you have an opinion as to the value of that?
- A. I have an opinion as to what the materials, which are within that area excavation would be worth.
- Q. You obtained that from, I suppose also, sales of comparable material in the area; that went into your consideration?
- A. Yes, the prices sand and gravel men are paying for materials in place.
- Q. What do you think is a fair market price for muck sand and mixing sand or blending sand, in place?
- A. The price I put on this material, was at the rate of ten cents a cubic yard.
- Q. Ten cents a cubic yard—what price did you put on the gravel, Mr. Kiepe?
- A. That is all of that.

Q. You say 10 cents?

A. Overburden, sand and gravel, all materials lying above the level of the highway, I have given an average price of ten cents.

Q. In place, ten cents?

A. Yes.

Mr. Solomon (R. 481):

Q. What do you find to be the fair market price for these materials as of that date, as you have determined?

A. From my investigation, in my opinion, that muck sand is worth 10 cents per cubic yard, in place, and overburden, 4 cents per cubic yard, in place.

Q. And did you check at various locations, and upon various instruments to figure those uses?

A. I checked with operators who were buying and selling such products, also with the market.

#### POINT V

RESPONDENT'S CASE IS SIMILAR TO AND SUPPORTED BY FAMOUS NEW YORK CASE, CITED BY ORGEL BEFORE FINAL DECISION UPON FINAL APPEAL.

The opinion quotes from Orgel on "Valuation Under Eminent Domain," 4th Addition, pages 541 to 547. It is to be noted that the entire quotation from Orgel is taken under the chapter titled "Business Profits" as Evidence of Value." Orgel and the opinion cite two New York cases, Orleans County Query Co. v. State, 172 App. Div. 863, 159 N.Y.S. 30 (1916), and *Sparkhill Realty Corp. v. State*, 268 N.Y. 192, 197, N.E. 192 (1935). The *Sparkhill Realty Corp. v. State* case was litigated over a period of

about 10 years and was finally concluded by an opinion rendered April 27, 1938 by the Supreme Court, Appellate Division, of New York, 4 N.Y.S. 2d 679, which opinion was affirmed by the Court of Appeals of New York, 279 N.Y. 656, 18 N.E. 2d 301. The property comprised about 164 acres of which 110 acres were upland containing deposits of Trap rock and the remaining 54 acres were marsh lands. The first award was for \$1,650,000.00; upon retrial there was an identical award. The third award, based upon a referee's report to the lower court was \$1,333,209.00, together with interest of \$630,830.00. The previous judgments had been reversed and remanded for new trial for the reason that the value was established by expert witnesses who based their opinions upon the anticipated profits to be derived from the operation of a quarry which had not yet been placed into operation. We quote now certain excerpts from the opinion of the Appellate Division of the Supreme Court in 1938, 4 N.Y.S. 2d 679:

“That judgment under review should not be disturbed unless it clearly appears that it included unlawful, or excluded lawful, elements of damage, or unless it is tainted with unmistakable legal error. . The value of property taken in condemnation proceedings is a question of fact (case cited). It is settled beyond question that respondents are entitled to recover the fair market value of their property based on the most advantageous use to which it could be put. In this case appellant occupies the status of a purchaser (cases cited). In order to arrive at an estimate of fair market value of the property in question, all those things which would be considered by a buyer and seller,

neither under compulsion, neither having an advantage over the other, must be taken into consideration by a witness competent to assemble, weigh and translate them into dollars and cents. All the facts and circumstances which a buyer and seller would consider in connection with the purchase and sale of a piece of property are relevant and material in arriving at a determination as to its market value. Exceptional circumstances exist in this case. The property which is the subject of this litigation -- a quarry and an uncompleted plant—is not the subject of barter and sale in any general market and obviously its value is not to be determined upon evidence relevant in cases involving residence, business or similar property. Fair value in this instance, neither being under duress, is the sum of money a willing purchaser of such a plant and quarry would pay, and a willing seller would accept. When the state deprives a citizen of his property for public use, he should have the right to prove every element that can fairly enter into the question of market value (cases cited) \* \* \* The respondents swore three expert witnesses on the question of value. To discuss the evidence in detail would extend our views beyond reasonable limits. We shall therefor, but briefly refer to the testimony. In response to a hypothetical question, one of these witnesses fixed the value of the respondent's property at the time of appropriation at \$1,946,528.70; another at \$1,996,529.00 and the third at between \$1,996,529.00 and \$2,496,529. Appellant criticizes this evidence and argues that it is based upon conjecture as to profits and that the data upon which the witnesses relied are speculative and conjectural and that consequently the responses of the witnesses are based upon an assumption of a fixed annual profit from the quarry operations. We cannot



acquiesce in this view. Not only did the witnesses deny that they took such an element into consideration, but the question propounded to them specifically excluded such an assumption. We agree with the referee that the hypothetical question was free from the objections condemned by the court of appeals in the former appeal. As said by him, it 'included no element of good will and no assumption that the operation of this property would produce certain profits during the period of many years.' Respondent's witnesses did take into consideration, and they were justified in so doing, the value of the trap rock and the profitable operation of the plant. Certainly a prospective purchaser and a seller would have in mind a possibility of profit to be derived from the operation of the plant. It was not an assumption of profitable operation, but an assumption of fixed profit over a period of years which the Court of Appeals rejected. Nowhere in the opinion of Judge Loughran is there any intimation that the court intended to exclude from consideration the possibility of profitable operation. The condemnation of the former judgment in the highest court was based not upon a profit but upon an invariable profit over 'decades to come' \* \* \*

"In eminent domain proceedings, one who is deprived of his property should be permitted to prove all factors which are relevant in fixing its value. There is no well considered case which holds that profits may never be considered as an as an element of value. Profits may be recognized as an important item, and are only excluded in cases where the evidence is too speculative. Each case necessarily involves different facts and must be considered by itself. Only a few general rules apply on the question of valuation in condemna-

tion proceedings, and even these may yield to exceptional circumstances (cases cited). The usable value of property for any suitable legitimate business is always relevant in fixing its market value (cases cited). But it is the potentialities of a given piece of property, both developed and undeveloped which constitute its chief element of value. The value of trap rock and the reasonable probabilities of the profit to be derived therefrom are elements which may be assumed a prospective purchaser would take into account in fixing the value which he would be willing to give for the property \* \* \*."

The court indicated that the fact that the owner purchased the property in 1909 for \$18,000.00, was unimpressive for the reason that "no plans had been perfected for turning this barren land into a trap rock quarry whereby its value might be greatly increased, in 1909 \* \* \*"

We respectfully submit that the final determination of the cause in the *Sparkill Realty Corp v. State* case could well change the views of Orgel and the Orleans case. However, in citing the *Sparkhill* case, we do not mean to concede that the element of the profit was considered in any respect in establishing the market value of the property, since, in fact, the element of profit was specifically excluded.

#### POINT VI

CASES CITED IN THE OPINION OF THE COURT ARE DISTINGUISHABLE FROM FACTS OF THE INSTANT CASE.

In the case of *Searle v. the Lackawanna & Blooms-*

burg Railroad Company, 33 Pennsylvania, page 57, cited in the opinion and quoted by Nichols on page 248, this is a case in 1857, wherein the railroad was condemning lands which ran across unopened and undeveloped coal mines, and the court indicated that these undeveloped coal lands were commonly sold by the acre. The following excerpts are significant:

“But so far as regards the unopened coal veins on the land, we may treat the case as one of wild lands . . .”

“In relation to the wild lands, such operations are no present injury, except in a purely imaginary sense. \* \* \*”

The case of *Reifer v. State Highway Commission*, 177 K. 683, 281 P. 2d 1080, is a case wherein the court cites Federal District Court cases in support of its decision. The Federal District Court case cited were the *United States v. Indian Creek Marble Co.*, 40 Federal Supplement 811 and *United States v. Five Acres of Land*, 50 Federal Supplement 69. The Indian Creek Marble case as heretofore noted was merely a memorandum by the District Judge in advising commissioners on methods of establishing valuation.

The Reiter case differs from the instant case in the following particulars:

a. In the Reiter case, the Highway Commission made timely objection to the testimony of the witnesses as to the value of the land based upon the sand and gravel, which objections were overruled by the trial court.

b. There was no evidence that the sand would ever be mined or marketed.

c. In the Reiter case, three of the witnesses arrived at the valuation based upon the quantity of sand under the land and the price received for the sand when it was sold. In the instant case, the witnesses for the respondents testified as to the value of the whole land taking into consideration the existence of the sand and gravel and the testimony as to the value of the sand and gravel as it lay in place; in the instant case the jury was apprised many times during trial that they were to find the value of the land and not necessarily the value of the sand; for example, during the testimony of Mr. Gaddis, Mr. Gaddis in explaining the basis of his appraisal began to indicate a value of the sand and gravel wherein the court interrupted as follows:

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 it would sell for under the conditions that Mr. Maw described of a willing seller and a willing buyer (R. 278).”

The opinion quotes from Nichols on Eminent Domain from page 245, and the first quotation ends with the phrase ‘value of the land.’ Nichols goes on to say right after that “If a piece of land contains valuable improvements, those improvements apart from the land

may not be considered. But certainly the character, nature, and extent of the improvements and the revenue derived therefrom are as essential to be considered in arriving at the value of the land as the land itself or the uses to which it may be put."

#### POINT VII

THE APPELLANT HAVING FAILED TO OBJECT TO EVIDENCE OR INSTRUCTIONS PERTAINING TO THE SAND & GRAVEL AT TRIAL, THE APPELLATE COURT SHOULD NOT CONSIDER OBJECTIONS RAISED FOR FIRST TIME UPON APPEAL.

At the time of trial, the appellant made no objection that the respondents were endeavoring to establish the value of the land by multiplying the quantity of sand by the price per ton. In fact, the appellant sanctioned the type of evidence offered by the respondent in that the appellant's witnesses themselves arrived at their opinion of the market value by determining the quantity of sand and its value in place. If there was any error in admitting the evidence or if the evidence was improper, the objection being made for the first time upon appeal should not be considered by the appellate court.

In the case of *Pettingill v. Perkins*, 2 Utah 2d 266, 272 P. 2d 185, this court held:

"In order that a party may take advantage of an error in instructions committed by the trial court, he must make a proper objection. 53 Am. Jur. P. 606. Generally, appellate courts will not review a ground of objection not urged in the trial court. 3. Am. Jur. 116, Appeal and Error, 381. The duty is incumbent upon counsel to give the

trial court the opportunity to correct the error before asking the appellate court to reverse a verdict and judgment thereon. Furthermore, it is well established that a party cannot assign as error the giving of his own requests. He cannot lead the court into error and then be heard to complain thereof. To permit such action would needlessly prolong litigation, so there might never be an end thereto. Having by his own pleadings, evidence, and instruction tried and rested the case upon the theory that the mother's negligence would bar the father, he is bound thereby, as the law of the case. He cannot now on appeal shift his theory and position."

#### POINT VIII

#### RESPONDENTS RESPECTFULLY REQUEST INFORMATION UPON INQUIRIES.

The respondent respectfully requests the court to advise respondents upon the following inquiries:

a. The opinion states that "the land must be valued as land with the sand and gravel given due consideration as a component part of the land and evidence of the amount, quality and value of the sand and gravel may be considered."

Would it be proper for the respondent to give evidence of the amount, quality and value of the sand; then without giving specific testimony of the market value of the land, allow the jury themselves to fix the market value of the land according to the instructions of the court.

b. Is there any necessity that witnesses testify as to the market value of the whole tract or is it sufficient

that evidence be presented which describes the tract, its uses, and the value of its component parts, then allow the jury to fix the overall value.

c. The expert appraisers arrived at their valuations by considering the value of the component parts, for example, Mr. Solomon, (R. 477 to R. 493) testified that he arrived at his appraisal by considering the valuation of the frontage property for a depth of 200 feet, by consideration of the value of the sand and gravel area, and by consideration of the improvements on the property. The improvements he examined were a laundry room, a water heater, a repair shop, a brick residence, an antique shop, meters, sewage disposals and trailer stalls; the home, he found, had a depreciated replacement value of \$10,797.00, the laundry room, \$1,920.00, the antique repair shop \$1878.00, the antique shop, \$3,532.00 and 32 aprons for use for trailer court, \$3,200.00, etc. He then used the aggregate of these values in determining his market value. Should there be any difference in arriving at the value of the land with improvements upon it by considering the value of the land and the value of the improvements in arriving at one value for both the land and improvements, than in determining the value of land containing valuable sand and gravel by arriving at the value of the land by considering the value of the land and the value of the minerals in it and then determining one value for the land with the improvements.

d. If the opinion of the expert were that the market value of the land were, in fact, the aggregate value of its component parts, and that this aggregate value were

\$270,000.00, but the reviewing court did not feel that this appraisal was supported by the evidence, then how much less than \$270,000.00 would the evidence support.

#### POINT IX

THE TRIAL COURT DENIED A MOTION FOR NEW TRIAL AND ENTERED JUDGMENT UPON THE VERDICT.

The plaintiff moved for a new trial for the reason, among others, that the evidence was insufficient to support the verdict of the jury. The court, after argument upon the motion denied the motion and entered judgment upon the jury verdict. This court has repeatedly refused to grant a new trial where the district court has denied a motion for new trial.

The rule was stated in *James v. Robertson*, 39 Ut. 414, 117 Pac. 1068, which held in part as follows:

“While the district court, in the exercise of a sound legal discretion, without basing his ruling upon any specific error of law may, under certain circumstances, possess the authority to grant a new trial, yet we cannot do so, nor can we exercise the discretion which the district court might, and in some cases perhaps ought to have exercised. In cases like the one before us, where all other assignments fail, and the only available assignment is that the evidence does not justify the verdict of the jury, and where the trial court has refused to grant a new trial, all that we are authorized to do is to look into the evidence to ascertain whether there is any substantial evidence in support of every material element, which plaintiff is required to establish in order to recover. If there is such evidence, then, so far as we are con-



cerned, the verdict must stand, although in our judgment if we passed on the facts, the verdict upon the whole evidence should have been to the contrary. Nor can we, under the guise of reviewing an abuse of discretion by the trial court in refusing to grant a new trial upon the ground that the verdict is not supported by the evidence, pass upon the weight of the evidence. What the district judge might, or even should have done in this regard we may not do for him, simply because he refused to do it."

A review of the authorities on this point is contained in the opinion of this court in *Moser v. Z.C.M.I.*, 197 Pac. 2d, 136, wherein it was said:

"It is a matter now too well settled to admit of any serious dispute (and appellants do not contend otherwise) that the question of granting or denying a motion for new trial is a matter largely within the discretion of the trial court. *White v. Union Pacific Railroad Co.*, 8 Ut. 56, 29 P. 1030; *Van Dyke v. Ogden Savings Bank*, 48 Ut. 606, 161 P. 50; *Utah State National Bank v. Livingston*, 69 Ut. 284, 254 P. 781; *Thompson v. Brown Live Stock Co.*, 74 Ut. 1, 276 P. 651; *Jensen v. Logan City*, 89 Ut. 347, 57 P. 2d. 708. This rule applies whether the motion is based upon insufficiency of the evidence or upon newly discovered evidence. See cases above cited and *Valiotis v. Utah Apex Mining Co.*, 55 Ut. 151, 184 P. 802; *Greco v. Gentile*, 88 Ut. 255, 53 P. 2d 1155; and *Trimble v. Union Pacific Stages*, 105 Ut. 457, 142 P. 2d 674. This court cannot substitute its discretion for that of the trial court. *James v. Robertson*, 39 Ut. 414, 117 P. 1068, 2 N.C.C.A. 782. We do not ordinarily interfere with rulings of the trial court in either granting or denying a motion for

new trial, and unless abuse of, or failure to exercise discretion on the part of the trial judge is quite clearly shown, the ruling of the trial judge will be sustained. *Lehi Irrigation Co. v. Moyle, et al.*, 4 Ut. 327, 9 P. 867; *White v. Union Pacific Ry. Co.*, supra; *Utah State National Bank v. Livingston*, and *Trimble v. Union Pacific Stages*, supra. \*\*\*

“The rule in this jurisdiction, early laid down by this court, is that where a motion for new trial is based upon insufficiency of the evidence to support the verdict, the trial court will not be held to have abused its discretion in denying the motion unless there is not substantial evidence in the record to support the verdict. *United States v. Brown*, 6 Ut. 115, 21 P. 461; *James v. Robertson*, 39 Ut. 414, 117 P. 1068, 2 N.C.C.A. 782. Therefore, if reasonable minds could have found as the jury did in this case, from the evidence before it, then we cannot say that the trial court abused its discretion in denying plaintiff’s motion for new trial on the grounds of insufficiency of the evidence to support the verdict.”

In concluding the court said :

“And the jury having determined this question in plaintiff’s favor, and the trial court having denied defendants’ motion for new trial, this court cannot say that the trial court abused its discretion unless there was no substantial evidence to support the verdict, or in other words, that all reasonable minds must agree that it was plaintiff and not defendant Rogers, who transgressed the center line of the highway.”

Further, in *Uptown Appliance & Radio Co., Inc. v. Flint, et al.*, 249 Pac. 2d 826, this court said :

“Jury trials are a part of the fundamental tenets of our judicial system and where, as in this case a litigant has fully, completely, and without restraint been permitted to show his full grievance to a jury and they have conscientiously and without any showing of prejudice or other extraneous influences decided the matter there must be some basic and compelling reason so inherent in the evidence that the trial judge would be warranted in placing his judgment as to the result to be reached over and above that of the jury.

“‘A court, vacating a verdict and granting a new trial by merely setting up his opinion or judgment against the constitutional trial by jury.’ Jensen v. Denver & Rio Grande Railroad Company, 44 Ut. 100, 138 P. 1185, 1192.”

In the instant case, the plaintiff had every opportunity to place before the jury all evidence of value of the property and was permitted on cross examination to disclose in detail how the respondents' witnesses arrived at their evidence of value. The jury over a period of 4½ days had an opportunity to consider all elements which go to determining value and appear to have been fully advised as to the contentions of both the respondent and appellant on matters concerning value. The jury verdict of \$150,000, certainly is supported by evidence of value and there is no indication that the jury arrived at its verdict by any other than a proper formula, and it would seem that the respondent should at least be entitled to this inference.

## CONCLUSION

Respondents respectfully urge the court to reconsider its opinion in the light of giving the respondents the benefit of every intendment of the evidence; in eliminating from consideration matters raised for the first time on appeal; in giving due consideration to the findings of the jury and the trial court, and in eliminating from consideration of so much of Nichols and Orgel and other opinions which are based upon minority or superceded law.

Respectfully submitted,

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