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State of Utah v. Brack Howard Noble : Brief of State of Utah in Opposition to Petition for Rehearing

Utah Supreme Court

E. R. Callister; Walter L. Budge; Attorneys for Plaintiff and Appellant;

In the
Supreme Court of the State of Utah

STATE OF UTAH by and through its ROAD COMMISSION; H. J. CORLEISSEN, Chairman, LAYTON MAXFIELD and LORENZO J. BOTT, members of the State Road Commission, *Plaintiff and Appellant,*

vs.

BRACK HOWARD NOBLE and ANN C. NOBLE, his wife; ELMO ENGLAND; E. J. HUBER; and PACIFIC NATIONAL LIFE ASSURANCE COMPANY, a corporation, *Defendants and Respondent.*

Case No. 8544

BRIEF OF STATE OF UTAH IN OPPOSITION TO PETITION FOR REHEARING

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ARROW PRESS, SALT LAKE

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STATEMENT IN OPPOSITION TO PETITION FOR REHEARING

We contended here before and we contend here again that it was error in the Court below to permit the defendants' expert witnesses to arrive at the "market value" of

the land taken by multiplying the yards of material by a given price and adding the obtained sum to the claimed values of other component parts of the estate. We are at a complete loss to comprehend the statement of your petitioners when they say that, "* * * no such supposed error[s] was advanced by the plaintiff * * * in the record on appeal * * * or covered by the points argued on appeal * * *." We have strongly contended throughout that it was *not* proper to multiply the number of tons of estimated material by a given price per unit and to add the amount obtained thereby to other claimed items of damage to arrive at market value. This is exactly what petitioners' expert witnesses did do—and did admit doing.

> "* * * the evidence of defendants' experts shows with abundant clearness that they arrived at their determination of the value of the lands in question by multiplying the estimate * * * as to the tons of sand and gravel in place by the estimated value per ton." (Opinion of the Court.)

Your petitioners cannot successfully contend otherwise.

STATEMENT OF POINT

POINT I.

THE LANDOWNER IN DEALING WITH A PARCEL OF LAND ON WHICH THERE IS MINERAL MAY NOT ESTABLISH FAIR MARKET VALUE BY EXPERT TESTIMONY BY WHICH THE EXPERT MULTIPLIES THE GROSS MATERIAL PRESENT BY THE MARKET VALUE PER UNIT.

ARGUMENT

POINT I.

THE LANDOWNER IN DEALING WITH A PARCEL OF LAND ON WHICH THERE IS MINERAL MAY NOT ESTABLISH FAIR MARKET VALUE BY EXPERT TESTIMONY BY WHICH THE EXPERT MULTIPLIES THE GROSS MATERIAL PRESENT BY THE MARKET VALUE PER UNIT.

Petitioners return to this Court with complete renewed reliance upon the case of *National Brick Co.* v. *United States,* 76 U. S. App. D. C. 329, 131 Fed. 2d 30; the case is reproduced in toto in their brief. We submit that the law, logic and reasoning in the decision of this Honorable Court heretofore rendered in this cause is susceptible to a more certain defense against assault than the holding of the case, supra, upon which petitioners seek this rehearing. In fairness we think that petitioners should have called to the Court's attention the more recent authority, *United States* v. *Land in Dry Bed of Rosamond Lake, Cal., et al.,* (July 1956) 143 Fed. Supp. 314. This case discusses the *National Brick Co.* case as well as numerous others which have concerned themselves with the issues here. We think that these more recent holdings clearly sustain our contention that this Court has ruled correctly; the petition for rehearing should be denied.

United States v. *Land in Dry Bed of Rosamond Lake, Cal., et al.,* supra, was an action concerning lands lying in a dry lake bed which were taken by the government through

eminent domain. The issue was fair market value. The condemnee contending that the land's best use was for mining sites for the production of rotary clay used in oil drilling. Said the Court:

> "* * * The question now arises on trial, as to what testimony the experts for the landowners may give.
>
> "(a) Quantity and Quality of rock, mineral or timber in place and the per ton or unit value thereof cannot be multiplied out to give market value; nor may it be valued separate from the land. '* * * The separate valuation of timber or rock attached to land, or valuations arrived at by a process of multiplying the number of cubic feet or yards by a given price per unit, are not approved bases for evaluation. *United States* [*ex rel. Tennessee Valley Authority*] v. *Indian Creek Marble Co.*, D. C., 40 F. Supp. 811. * * *' *United States* v. *13.40 Acres*, D. C. Cal. 1944, 56 F. Supp. 535, at page 538. From the facts of that case, the experts for the landowner did exactly the thing shown in the quote, namely multiplied the yards by a given price and arrived at a valuation. The court properly granted a motion for a new trial. * * *
>
> "* * * In *National Brick Co.* v. *United States*, 1942, 76 U. S. App. D. C. 329, 131 F. 2d 30, the land in question contained a sand bank containing 300,000 cubic yards of pure sand. The court prevented the landowners' expert from giving testimony concerning the value per ton of the sand from the bank, as to whether he had bought sand of the same quality and what he had paid for it, and as to the value of the land with the sand. The court limited the testimony to the fair market value of the property for land as real estate. The judgment was reversed and remanded for a new trial. The circuit court said, 131 F. 2d at page 31:

> "'* * * 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. * * *'

"The court in its concluding paragraph, said, 131 F. 2d at page 32:

> "'* * * 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. * * *'

"This final statement we think to be a correct statement of law and the resulting decision correct. We cannot agree with the earlier portion of the opinion if it purports to say that the *fair market value* of the sand in place could be presented to the jury, separate and apart from the valuation of the land itself.

"It is something totally different to permit an expert to inform a jury, that one *factor* considered was the amount of sand in place and its price per ton. This is the presentation of a factor which might well have been considered in the market place, and is not independent evidence of the fair market value of the sand. * * *

"'* * * In *Cade* v. *United States,* 4 Cir., 1954, 213 F. 2d 138, 141, the court found error

in the exclusion of testimony of experts who testified there was a deposit of granite rock on the ground which was reasonably worth $25,000. The court said: '* * * There was no reason why their testimony as to the value of the deposit of rock should not have been admitted for consideration by the jury in estimating the value of the land taken. * * *' The court also cited with approval *National Brick Co.* v. *United States,* supra.

"The fourth circuit had earlier permitted the separate value of timber to be stated, apart from the value of the land, including the timber thereon, *United States* v. *5139.5 Acres, etc.,* 4 Cir., 1952, 200 F. 2d 659, 661.

"We think the better rule is stated by the fifth, sixth and seventh circuits. *Georgia Kaolin Co.* v. *United States,* 5 Cir., 1954, 214 F. 2d 284, at page 286, states:

> " 'In eminent domain proceedings, the existence of valuable mineral deposits in the condemned land constitutes an element which may be taken into consideration if and in so far as it influences the market value of the land. The reason for this rule is said to be that the measure of compensation in such cases is the market value of the land to be condemned, taken as a whole and with due consideration of all the components that tend to make its market value. This rule has been applied to limestone, deposits, gold ore, fire clay, coal, stone, and sand and gravel, 156 A. L. R. 1416-1417; but there can be no recovery for both the value of the land and its mineral deposits as two separate items. *Atlanta Terra Cotta Co.* v. *Georgia Ry. & Electric Co.,* 132 Ga. 537, 64 S. E. 563; *United States* v. *620.00 Acres of Land, etc.,* D. C., 101 F. Supp. 686; Orgel on Valuation, under Emi-

nent Domain, page 544, rejecting the method of estimating the amount of stone in situ and multiplying this amount by a fixed price per unit; also citing *Searle* v. *Lackawanna and Bloomsburg Railroad Co.,* 33 Pa. 57. In rejecting the method of multiplying the estimated amount of clay by a fixed price per unit, the conclusion is largely based on its speculativeness. In discussing this point, the court below said that whether or not the deposits would be mined and the royalties paid would depend upon the condition of the market, the uncertainty of the future, the demand for the product, "and many other elements, on and on, in the future." '

"*United States* v. *Meyer,* 7 Cir., 1940, 113 F. 2d 387, at page 397, states:

" 'Likewise the value of timber growing upon the land was immaterial. The test is the value of the real estate as a whole and separate valuation of the timber would necessitate another valuation of the land thereof. All of the facts and circumstances bearing upon the condition and nature of the land as a whole and its possible use are proper as elements bearing upon value, but separate appraisements of the different elements constituting the whole are improper.' *Morton Butler Timber Co.* v. *United States,* 6 Cir., 1937, 91 F. 2d 884, 887-888.

"* * *

"* * * Conclusions.

"From the foregoing we would summarize the law as follows:

"(1) that a landowner in dealing with a parcel of land on which there is a mineral, timber or like substance may not introduce expert testimony by which the expert multiplies the gross material present by the market value per unit thereof and

thereby arrives at a figure which purports to be fair market value for the parcel; * * *

"* * * (3) that the landowner is entitled to have an expert or lay witness describe the commodity or substance on the land, the quantity thereof, the going price thereof as *factors* only, upon which the expert may in part base his value as to the *fair market value* of the parcel in question; that a landowner is not entitled to present testimony as to the fair market value of the mineral or timber or other substance apart from the value of the land. Insofar as *Clark, Cade* and *National Brick* cases, supra, may so hold or indicate to the contrary, we find ourselves in disagreement therewith; that if the holding of *National Brick,* supra, is restricted to the portion quoted in this memorandum, which portion is the concluding paragraph of the opinion, we are not in disagreement with *National Brick.* In other words, a clear distinction must be drawn between what is presented and considered as a *factor* underlying the expert's opinion as contrasted with opinion as to the fair market value of the substance, timber or mineral itself, apart from the land. * * *

"* * * As in all cases involving the opinion of the expert as to fair market value, the jury should be instructed that the factors considered by the expert are not in themselves direct evidence of the fair market value of the land condemned, but may be considered by the jury only for the purpose of determining what weight, if any, the jury accords to the testimony of the expert in his ultimate opinion as to the fair market value of the land in question as of the date of taking."

Finally, we think the statement in petitioners' brief in Point VII thereof, made as follows:

"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."

is manifestly unfair to the record. The objections made to the testimony of the experts Howa, (R. 256, 7, 8) Gaddis (R. 275), though they might have been more clearly and better made, went to the very fact that these witnesses were using a purely mathematical means of computation to arrive at a value.

We do not deny that the State's experts were permitted to express themselves also as to the quantity, quality and value per yard of the materials; and it appears from the testimony and the exhibits that the fair market value arrived at by these appraisers also amounted to a mathematical computation together with a process of addition of other values. Admitting then that in the trial of this cause a *clear distinction* was not drawn between what was presented as a *factor* underlying the experts' opinions as to fair market value and as to their *opinion of* the fair market value, we submit that such error can only be rectified through the process of a new trial.

CONCLUSION

Petition for rehearing should be denied.

Respectfully submitted,

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