

1958

State of Utah et al v. Brack Howard Noble and Ann C. Noble ; Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
- 8 1958

Supreme Court, Utah

Case No. 8884

STATE OF UTAH, by and through its
Road Commission, H. J. CORLEIS-
SEN, Chairman, LAYTON MAX-
FIELD and LORENZO J. BOTT,
members of the State Road Com-
mission,

Plaintiff and Appellant,

—vs.—

BRACK HOWARD NOBLE and ANN
C. NOBLE, his wife,
Defendants and Respondents.

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The defendants desire to supplement the Statement of Facts contained in the Brief of the Appellant.

Further summarizing the appraisal of each of the witnesses and the elements stated to have been considered by the witnesses in making their total appraisal, we present the following:

The Noble property as shown by defendant's exhibit two is situated on the East side of U.S. Highway 91, in the vicinity of Salt Lake County-Davis County boundary line, the tract consisted of 595 feet frontage along the Highway exclusive of right of way, and running easterly onto the mountain, a distance of 595 feet. The improvements located upon the tract consisted of a brick dwelling 34 feet by 34 feet, (R188), with sidewalks, retaining walls, and landscaping, a garage 20 feet by 82 feet (R189), a wash room and rest room in connection with the trailer spaces, 32 feet by 16 feet (R190), an office building and antique shop, and 32 trailer spaces improved with water and sewer facilities. The entire tract was overladen with sand and gravel deposits.

Mr. A. Z. Richards, Jr., a Civil Engineer testified that he surveyed and cross-sectioned the Noble property to determine the amount of sand and gravel that might be removed without disturbing the business property (R78). Mr. Richards had four test holes drilled on the property which were drilled by a special core drilling method, by which samples can be taken during the process of drilling to determine the exact material at any particular depth (R81); he also inspected the geology in the vicinity and had the benefit of an additional test hole on the property adjoining on the South (R103). Mr. Richards determined

that there were 355,222 tons of fine sand and 944,646 tons of a mixture of sand and gravel, making a total tonnage of 1,299,858 tons (R87).

The driller, Mr. Bass testified that he drilled the property by a core barrel method (R110) and drilled four holes in ten working days (R113). The witness identified the contents of 14 boxes which contained the samples of his drilling.

Mr. Howa testified that he is a Civil Engineer (R179), who has done considerable professional estimating in connection with construction of building, both for construction companies, school districts, the State of Utah, and other concerns (R181); that he made the appraisal in connection with the Noble property at the request of Mr. Edward M. Ashton, and did not know at the time whether he was appraising the property for the State or the owner (R185); that he made measurements and blueprints of all the improvements on the premises which required 3 days on the location by Mr. Howa and an assistant (R187); that in his opinion a fair replacement costs of the improvements was \$44,795.00 and a depreciated value of \$40,795.00; that in his opinion the Noble property had a fair market value of between \$270,000.00 and \$275,000.00 (R199).

Mr. Schoenfeld testified that he has been in the sand and gravel business since 1928, and for the past 10 years has been located in the North Salt Lake area, and is acquainted with the supply and demand for sand and gravel products in the general area as well and the market price of sand and gravel products as of July 22, 1955, (R205). Mr. Schoenfeld testified that he operated property adjoining the Noble property and was well acquainted with the Noble property (R205); that he has excavated to depths

up to 40 feet below the level of the highway and the material was all fine sand (R206), that the fine sand on the Noble property was all exposed in that the overburden had been cleaned off (R208). That the particular fine sand contained on the Noble property was limited in supply in the general Salt Lake area and was in demand for use by asphalt plants, and as brick sand, plaster sand, filling underground tanks and filling around sewer pipes (R209); that the supply of fine sand is also diminished now (R210); that the fine sand on the Noble property, having been cleaned off could be sold directly without processing, less a loading cost of 10¢ per ton (R212). That the major market for the sand and gravel on the Noble property would lie North of 9th South Salt Lake City, Utah, (R215), and being near the market the drayage is less since the hauling cost is about 10¢ per ton mile (R216); that the market value of the Noble property as of July 22, 1955, was \$275,000.00 (R223). Mr. Schoenfeld testified on cross examination that business was picking up every year in that the sale of sand increased from 20,000 tons in 1947 to over 100,000 tons in 1954 (R226).

Mr. Gaddis testified that he has been in the real estate and appraisal business for the past 49 years (R231); that he examined the Noble property after the improvements had been removed by the State, but had examined the reports of engineers as to the improvements on the property, and the quality and quantity of sand and gravel on the premises and had inspected the photographs (R233). That the witness made a careful study of the elements of value of the property (R234), and that the witness checked many gravel pits in Salt Lake County, Northwest, Southeast and in Bountiful District,

and obtained information from which he believed he could form a good judgment of value (R235). That in determining the value of the property, he considered what a buyer might pay for it, having in mind that any buyer would plan on making a profit on the sand and gravel (R235-236). That considering the frontage, the improvements, the sand and gravel and carefully analysing the values of each, the total property had a market value of \$291,000.00 (R240); that while he relied on the engineers reports as to the quality and quantity of the sand, the extent of the improvements, he used his own judgment as to values (R250-251).

Mr. Rideout testified that he has been in the real estate and appraising business in Salt Lake City for the past 28 years (R253); that he first appraised the Noble property in the early part of 1956, although he was on the property many times prior thereto between 1950 and 1955 (R254); that in arriving at the overall value of the Noble property, he took into consideration the quantity and quality of the gravel, the value of the sand and gravel, the value of the buildings and improvements, and the value of the frontage (R256). That he appraised the fair market value of the Noble property at between \$260,000.00 and \$270,000.00 and would be very happy to have it listed and advertise it for sale at that price (R258). That since the first trial of this cause Mr. Rideout made further study and investigation and inquiry to get all the information he could (R259) and that his appraisal was a result of his own investigation and study (R261).

Mr. Solomon testified for the State that the highest and best use of the Noble property as of July 22, 1955, would be to use the frontage for a depth of 200 feet for business purposes, leaving the existing improvements, and

to use the property East thereof for the mining of sand and gravel (R272); that he talked with men who had drilled test holes on the property and read their reports (R272). That in determining the value of the sand and gravel he made inquiries from numerous sources and had the "facilities of experts who were acquainted with this particular property and the advantage of obtaining their opinion as to the market values" (R276); that as to the type of material he relied on information supplied him by other persons (R284). *Mr. Solomon said that he made no cross sections, and that his information as to the amount of sand and gravel was based upon his observation just by looking at the side of the mountain* (R288). His appraised value of the Noble property was \$72,000.00 (R278).

Mr. Kiepe testified for the State that the Noble property had a changing use in that the immediate, highest and best use would be for the development of sand and gravel deposit, but ultimately the property would best be used for commercial use in view of the fact that it was on a very busy highway where commercial development would ultimately grow (R333); that the frontage should be maintained level for a distance back 200 feet from the front boundary (R333); that the balance of the property should be excavated to the maximum depth after allowing for the proper land support (R334). That his approach to value was the income approach in which it would be purchased upon a basis of future income (R334-335); that in his opinion a fair price for the property was \$57,825.00 (R335). Upon cross examination Mr. Kiepe testified that he placed a value of \$28,000.00 upon the improvements, \$35.00 per front foot on the frontage, and determined that there could be removed 216,700 yards of material (R336); that

in determining the quantity of sand and gravel he used exhibit 55, which was a map prepared by the United States Department of Interior (R337), *and that the Noble property is represented on the map by about one-half inch* (R337).

By way of summary the appraisal of the witnesses and some of the elements considered by them in arriving at their appraisals are set forth in the following chart.

WITNESS	NOBLE	HOWA	SCHOENFELD	GADDIS	RIDEOUT	SOLOMON	KIEPE
Total Market Value	\$300,000 (R165)	\$270,000- \$275,000 (R199)	\$275,000 (R223)	\$291,000 (R240)	\$260,000- \$270,000 (R258)	\$72,000 (R278)	\$57,825 (R335)
Frontage 595 feet	\$100.00 per foot (R323)			\$75 per ft. \$44,625 (R247)	\$75 per ft. \$44,625 (R258)	\$50 per ft. \$31,000 (R305)	\$35.00 per foot (R336)
Sand Gravel	* 355,222 * 944,646 E 1,299,868 (R87)	tons tons tons				*192,835 yds * 41,127 yds *233,962 yds (R292)	216,700 yds. (R336)
Price Sand	In place 25c yard delivered \$1.10 ton (R147- 154)		75c ton loaded at pit at cost of 10c ton (R212)	50c ton bank run (R251)			
Price Gravel	In place 15c ton delivered \$1.00 ton (R154)		75c ton loaded and processed at pit (R213)	\$1.10 de- livered (R251)			
Improve- ments	\$40,000 (R323)	Replacement costs \$44,795 (R199) Depreciated \$40,795 (R200)		\$30,724 (R240)		\$21,827 (R298)	\$28,000 (R336)

ARGUMENT

POINT I

THE VERDICT OF THE JURY IS FULLY SUPPORTED BY COMPETENT EVIDENCE AND SHOULD BE AFFIRMED.

The Appellant, relying on its own interpretation of the former opinion of this Court, State vs. Noble 6 Utah 2d 40, 305 P2d 495, contends there was no evidence to support the verdict of the jury and erroneously concludes that the appraisals of the witnesses were arrived at by multiplying quantity of material beneath the surface by the price of such materials. The appellant has failed to distinguish between two propositions, one of which is proper, and the other improper:

(a) One *may consider* quantity, quality and value of sand and gravel to determine the market value, for each is an element that aids in determining the market value.

(b) One *may not arrive* at a value of the land by multiplying the quantity of ^{sand} and gravel by the price per ton.

All of the witnesses took into consideration the quantity, quality and price of sand and gravel in arriving at the market value, but none of them arrived at a market value by multiplying the quantity of material by the price per ton. In each instance, of the witnesses who testified as to the price of sand and gravel per ton, had they determined the market value by multiplying tons of material times price per ton they would have arrived at a market value much higher than their appraised value. Mr. Noble's testimony as stated by the Appellant (App. br. 8) showed the expected profits on the sand and gravel alone would be \$590,991.60. The other witnesses all made allowance in

their appraisal for the profit which would be expected to be claimed and taken by the buyer (Gaddis R235-236) as revealed by the chart supra page 9.

We quote from *State vs. Noble*, Supra, Comment 4 as follows:

“(4) As will be observed from the cases hereafter considered, the defendants are not entitled to the value of the sand and gravel independently of the land of which it is part, nor considered as merchandise. 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.”

The opinion as quoted clearly states that evidence as to amount, quality, and value of the sand and gravel may be considered. As this evidence may be considered it must then follow, that the jury must be told the amount, quality, and value of the sand and gravel.

The trial court clearly instructed the jury that market value is not to be determined by multiplying number of tons by the estimated price and we quote the second paragraph of instruction number 11 as follows: (R21)

“In this connection you are further instructed that in determining fair market value you shall not consider how much the property will produce over a particular number of years nor shall you in arriving at fair market value multiply the number of tons of sand and gravel estimated in place by the price that might be obtained for it on the open market, nor shall you value the sand and gravel independently of the land of which it is a part. The land must be valued as land giving due consideration to the amount, quality and value of the sand and gravel in place, and as a component part thereof.”

The court further instructed the jury in instruction number 11-A as follows: (R22)

“You may not consider the separate items or parcels of defendants’ property and their separate valuations, and by a process of addition arrive at a total figure; but you must value the entire property condemned by the State as one parcel and its value is the amount it would bring in the open market from a buyer willing to buy and seller willing to sell, neither acting under compulsion.”

In his argument to the jury Mr. Budge for the State, read to the jury portions of instructions number 11 and 11-A (R360). He also read to them instruction number 12-A (R361), which instruction is as follows: (R24)

“You are instructed that in a condemnation proceeding such as this, a property owner is not entitled to realize a profit on his property. It must go to the condemner — the State in this case — for its fair market value, as is.”

It appears rather fully that both the witnesses and the jurors were admonished not to arrive at market value by multiplying tons of material times price per unit.

This Court in a decision rendered on August 5, 1958, in the case of Weber Basin Water Con. Dist. vs. Skeen et al, No. 8803 (only advanced sheets being available) found as follows:

“The jury had the benefit of opinions from three qualified experts as to the value of the land. Although these opinions varied considerably it is within the prerogative of the jury to believe whom it chooses and it chose to believe defendants’ experts rather than the plaintiff’s. On cross examination of

the two experts called by the plaintiff, some doubt was cast on the thoroughness of this inspection of the land, and this may well have affected the jury's consideration of their lower evaluation.

In the instant case the jury had the opinions of two qualified witnesses testifying for the State and four such witnesses for the defendant as to the value of the land in question. Their opinions as to value varied widely. So also was there wide variance in the thoroughness of the inspection of the premises by each of them. The jury heard all of the witnesses agree that the most beneficial use of the land would be to use the West 200 feet bordering the highway as business property and the remainder for the removal and sale of the sand and gravel thereon. It also heard the testimony of each as to the method he used in arriving at his valuation figure. These methods are as follows:

Mr. C. Francis Solomen testified that in his opinion the property was worth \$72,000.00. As a witness for the State he declared that he arrived at such figure through 1. visiting the property and inspecting all of the amenities pertaining thereto (R271), surveying comparable sales and offerings of land (R271), talking with men who had drilled test holes on the property (R272), making inquiries of other experts as to the value of sand and gravel and opinions as to the market value of the same (R276), and by 2. *looking* at the mountain side to determine the quantity of the sand and gravel (R288).

He stated definitely the basis for his determination of the quantity and quality of the sand and gravel as follows: (R288).

Q. So the information that you have given us as to the amount of gravel and sand that is in that property is based upon four holes in two spots, and in both holes the content was muck sand?

A. Was muck sand.

Q. And your observation just by looking at the side of the mountain, is that correct?

A. Yes.

The jury was thus justified in doubting the thoroughness of the examination of the property by Mr. Soloman.

Mr. Werner Kiepe, the other expert testifying for the State placed a value of \$57,825.00 on the property. He testified that in computing the number of tons of sand and gravel obtainable from the property he depended upon the contour lines on a topographic map covering the area. The map is marked Exhibit "Dp55" and the land in question covered one half of a square inch on the map.

It is apparent that the jury did not believe that it would be possible for any person to determine the amount of sand and gravel on the premises from such a map or by a method such as Mr. Kiepe used in appraising the Noble property.

In contrast to the methods followed by the States' appraisors in appraising the property let us consider the thorough and careful procedure of the defendant's experts.

Each of them used as a basis for the quality and quantity of sand and gravel the report of an engineer of wide experience, Mr. A. Z. Richards, Jr. of the engineering firm of Caldwell, Richards & Sorensen. Mr. Richards surveyed the property, made cross section maps of the same, supervised the drilling of test holes on the same and made his

determination of the quality and quantity of the sand and gravel on the premises in accordance with sound engineering practices. His estimate was that there was 944,646 tons of removable sand and gravel mixture and 355,222 tons of removable sand. It is interesting to note that the state offered no evidence by engineers in refutation of Mr. Richard's testimony or in criticism of his methods of arriving at his figures.

Mr. Joseph P. Howa, an engineer and appraiser, who in his work had appraised much property for the State and was an engineer of wide experience, appraised the buildings on the premises. He testified that he spent three days on the premises, examined and measured in detail every structure and made blue prints of all of them which were introduced in evidence. Exhibit D-60. Being a builder himself and well acquainted with the use, value and costs of extraction and processing sand and gravel and using the engineering data of Mr. Richards as well as his own investigations as a basis of his determination of the amount and quality of sand and gravel on the premises, he estimated that the total value of the whole property was between \$270,000.00 and \$275,000.00.

Mr. Thomas E. Gaddis, a real estate appraiser for 49 years, testified that he spent days examining the property, making his own computations, examining engineering blue prints of buildings, studying engineering data as to the amount and quality of sand and gravel on the premises, talking with sand and gravel owners and processors, and following the generally accepted methods used by appraisers in determining values and decided that the property was worth \$291,000.00.

Mr. S. D. Rideout who has been appraising real estate for 28 years was acquainted with the property in question and from his own studies and examinations appraised it at \$260,000.00 to \$270,000.00.

Each of these appraisals were independent ones and were the results of thorough examinations of the premises and studies of available engineering data.

Each appraiser testified that the financial returns from the property to the buyer in the sale of sand and gravel and the other businesses on the property would be much higher than the appraised value he placed on it and that the purchaser at their respective figures would be able to earn large profits from their investment.

CONCLUSION

A review of the evidence clearly shows that the verdict of the jury for the sum of \$175,000.00 was definitely supported by ample evidence.

The verdict of the jury should be sustained.

Respectfully submitted,

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