

1960

Southern Pacific Company v. Mrs. Helen Sheehan Arthur et al : Brief of Respondent Helen Sheehan Arthur

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

SOUTHERN PACIFIC COMPANY,
a corporation

Plaintiff and Appellant,

vs.

MRS. HELEN SHEEHAN ARTHUR

and

MRS. GLENERA SHEEHAN HUNTER,

vs.

NICK CHOURNOS and wife,

vs.

MILTON A. OMAN et al.,

Defendants and Respondents.

FILED

FEB 10 1960

Clerk, Supreme Court, Utah

Case No.

9123

BRIEF OF RESPONDENT HELEN SHEEHAN ARTHUR

WALTER G. MANN,
Attorney for Defendant and Respondent
Helen Sheehan Arthur

TABLE OF CONTENTS and INDEX

	Page
STATEMENT OF FACTS	5
STATEMENT OF POINTS	9
ARGUMENTS AND AUTHORITIES	12

POINTS I and III

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING THE TESTIMONY OF CERTAIN WITNESSES OF RESPONDENTS AS TO THE VALUE OF THE GRAVEL AND FILL MATERIAL TAKEN BY APPELLANT; AND IN RECEIVING INTO EVIDENCE THE RESPONDENTS' EXHIBIT NO. 2 SHOWING OTHER GRAVEL SALES.

THE VERDICT IS NOT EXCESSIVE NOR THE RESULT OF PREJUDICE OF THE JURY, BUT IS IN KEEPING WITH THE TESTIMONY OF THE WITNESSES OF BOTH THE APPELLANT AND RESPONDENTS. 12

POINT II. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY SUBMITTING TO THE JURY THE QUESTION OF SEVERANCE DAMAGES, AND BY ADMITTING INTO EVIDENCE CERTAIN TESTIMONY PERTAINING THERETO..... 16

(a) THE FACTS OF THIS PARTICULAR CASE AND THE PHYSICAL MAKEUP OF LITTLE VALLEY AND

ITS PARTICULAR USE IN CONNECTION WITH DEFENDANTS' OTHER LANDS WAS PROOF OF ITSELF THAT THERE WERE NO OTHER SIMILAR LANDS AVAILABLE.	32
(b) THE DAMAGES TESTIFIED TO BY RESPONDENTS' WITNESSES WERE FROM APPELLANTS' OPERATIONS UPON LANDS OWNED BY RESPONDENTS AND THEIR RIGHT OF ENTRY THEREON.	35
(c) THE SO-CALLED "SEVERANCE" DAMAGES TESTIFIED TO BY RESPONDENTS' WITNESSES CONSISTED OF DAMAGES THAT WOULD RESULT TO AN OWNER IN THE USE OF HIS LAND IN LIVESTOCK OPERATIONS OR TO AN OWNER IF HE ATTEMPTED TO LEASE THE LANDS FOR A LIVESTOCK OPERATION BY THE LANDS BEING LESS DESIRABLE OR USEABLE TO A TENANT.....	35
(d) RESPONDENTS' DAMAGES WERE NOT ARRIVED AT BY ADDING THE VALUES OF DIFFERENT USES FOR THE LANDS TAKEN.....	37
(e) RESPONDENTS DID PRESENT COMPETENT EVIDENCE OF THE MARKET VALUE OF THEIR REMAINING LANDS CLAIMED TO HAVE BEEN DAMAGED.	35
(f) THE TESTIMONY DOES ESTABLISH SEVERANCE DAMAGE OF RESPONDENTS' LANDS AS THAT TERM IS CONTEMPLATED AND USED IN THE COURT DECISIONS AND THE STATUTES.....	37
CONCLUSION	39

CASES AND AUTHORITIES CITED

Baetjer vs. United States, 143 F2d 391, 323, U.S. 772.....	21
City of Stockton vs. Ellingwood, 275 P 228	23
Forest Preserve District vs. Draper, 387 Ill. 149, 56 NE 2d 410	20
In re Edward J. Jefferies Homes Housing Project, 306 Mich. 638, 11 N.W. 2d 272	21
Provo Water Users Ass'n. vs. Carlson, 133 P2d 777	33
Ramming Real Estate Co. vs. United States, 122 F2d 892..	20
Spring Valley Water Works vs. Drinkhouse, 92 Cal. 528, 28 P. 682	23
State of Utah vs. Peek, 265 P2d 630, 1 Ut. 2d 263	21
State vs. Cooperative Security Corp. of Church, 247 P2d 269	34
Temescal Water Co. v. Marvin, 9 P2d 335	22
Union Exploration Co. vs. Moffat Tunnel Improvement District, 89 P2d 257	24
Weber County vs. Ritchie et ux, 98 U 272, 96 P2d 744.....	31

TEXTS CITED

10 Cal. Jur. page 340	38
20 C.J. page 777	21
29 C.J.S. page 1028	22

STATUTES CITED

Section 78-34-2 (3) Utah Code Annotated 1953	6
Section 78-34-10 (2) Utah Code Annotated 1953	32

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STATEMENT OF FACTS

The above entitled three cases were, as stated by the appellant, consolidated for trial before the District Court of Box Elder County, Utah. I am the attorney for Helen Sheehan

Arthur, one of the respondents Civil No. 8071. Each proceeding is in eminent domain wherein Southern Pacific filed a suit to condemn gravel fill material from certain lands owned by the respondents. My client owns one half ($\frac{1}{2}$) interest in approximately fifteen thousand (15,000) acres of land on Promontory, which includes the North half of Section 1 and the South half of Section 2, T. 6. N., R 6. W. S. L. M. The material was sought for the purpose of re-location and construction of appellant's main line running across Great Salt Lake westerly from Promontory Point in Box Elder County, State of Utah. The appellant, in order to obtain said gravel and fill material also sought to condemn an easement over the properties of the respondents described in appellant's complaint, or a right of entry thereon for a period of three (3) years and then asked for an order of immediate occupancy which was granted October 22nd, 1957. Appellant proceeded evidently under Section 78-34-2 (3), Utah Code Annotated, 1953, which is:

"The right of entry upon, and occupation of, lands, with the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use."

Respondent sought to obtain the market value of the gravel and fill material taken and severance damage. The severance damage was caused by the appellant making huge excavations in the middle of respondent's range lands and particularly in places on the lands where sheep, when using the range for fall and winter pasture, must of necessity travel back and forth from the high to the low lands in order to utilize the range. The excavations, as left by appellant, created barriers which

divide the range, spoil its use and make it less attractive to new tenants who might seek range pasture in the future.

Little Valley, which will be mentioned considerably in the record, must be described in the interests of showing the problem that is peculiar to the respondents in this case. The Promontory peninsula extends from the North out into Great Salt Lake. It is on the west side and between three and a half to four miles north of the Southerly point of the peninsula from where the railroad line runs westerly across the lake that the appellant established its work camp called "Little Valley Camp." The camp itself was located in Section 11, T. 6 N., R. 6 W. S.L.M., and within a quarter of a mile of the lake shore on the westerly side. It was laid out on flat open plain that increased in elevation as you traveled easterly. Also, immediately to the east and slightly to the North of the camp, two steep hills or ranges of land run Easterly forming a canyon in between and as you proceeded East through the canyon these hills separated and formed a valley. The hill on the right, as you traveled East, turned Southerly until you reached near the center of Section 8, T. 6 N., 5 W. S.L.M., (Tr. 224) then turned back Northerly in a twisting fashion, passing South of the center of Section 4 and going on Northerly within a quarter of a mile of the East side of Section 33 in the township to the North, then Northwesterly toward the center of Section 29, thence Southwesterly toward the South side of Section 31, thence Westerly through Section 36, T. 7 N., R. 6. W. S.L.M., where it becomes the left hill as you enter the canyon East of the camp site. The valley that these hills form is known as "Little Valley" and the floor of this valley increases in elevation as you travel East and North from the

camp site. The only water in this valley was along the Easterly mountains on the foot-hills on the Hunter-Arthur property (Tr. 225). It was not too dependable and when the sheep could not pick up water from snow or the natural feed (Tr. 225) they had to go west, down through the canyon to the lake shore where there were springs (Tr. 225). There were established roads and trails from the West shore East into the valley (Tr. 227). The weather conditions on the East side of the promontory were more severe in the winter time and the snow laid differently in the Little Valley than on the East side (Tr. 227). The Little Valley itself, with its natural lay of the land, made it possible for the sheep to drift from the high lands to the low lands on the West lake shore line when the weather was bad and then back up when the weather cleared, all in a natural manner with great protection (Tr. 227). When the cuts were made by the appellant the big conveyor belts were placed right in the canyon of "Little Valley" and the materials were taken from one side across to the other and for great distances up through it. After the taking was finished the appellant had taken approximately, from all sources, 44 million cubic yards of fill (Tr. 303). They left the banks steep and dangerous so as to be a great hazard to livestock (Tr. 164-5). The appellant made no attempt to level out the sides of the cut and the jury was taken out and given a view of the premises which showed vertical sides varying from a few feet in height in some places to ten or twenty times that in others. This great hole in the entrance to Little Valley literally divided up the use that a livestock man could ever make of the area (Tr. 162-166). When this problem was approached in the course of the trial, that is, either severance

damage that the excavation had caused to the range, or damage which might result to the owner in costs in leveling out the steep banks so as to remove the hazard to the livestock (Tr. 167-168), the court insisted that an election must be made, that we could not have both forms of damage, and said:

“THE COURT: If you want severance damage, then the cost of pushing down the banks becomes immaterial. If you want the cost of fixing that so the sheep can go down there, why, you can pursue that. But I question that you can have both of them. In fact, I’ll require you to elect.” (Tr. 168, line 11-15).

As a consequence the respondents elected to pursue their right to severance damages and abandoned their efforts to make proof of the cost of restoration of the sides of the gravel pits so as to remove the hazard and danger to livestock.

Now in regard to the gravel itself. Appellant’s own witness testified that the appellant itself owned a gravel pit on the very point of the promontory where the railroad crosses (Tr. 306) located in Section 28, T. 6. N., R. 5 W., but did not want to use that because of the distance. He also said (Tr. 304) that they looked at other areas than those chosen that were at distances farther away varying more than a mile, but they picked these particular locations (Tr. 305) because of location and quality of material.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING THE TESTIMONY OF

CERTAIN WITNESSES OF RESPONDENTS AS TO THE VALUE OF THE GRAVEL AND FILL MATERIAL TAKEN BY APPELLANT; AND IN RECEIVING INTO EVIDENCE THE RESPONDENTS' EXHIBIT 2 SHOWING OTHER GRAVEL SALES.

POINT II

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY SUBMITTING TO THE JURY THE QUESTION OF SEVERANCE DAMAGES, AND BY ADMITTING INTO EVIDENCE CERTAIN TESTIMONY PERTAINING THERETO.

(a) THE FACTS OF THIS PARTICULAR CASE AND THE PHYSICAL MAKEUP OF LITTLE VALLEY AND ITS PARTICULAR USE IN CONNECTION WITH DEFENDANTS' OTHER LANDS WAS PROOF OF ITSELF THAT THERE WERE NO OTHER SIMILAR LANDS AVAILABLE.

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HE ATTEMPTED TO LEASE THE LANDS FOR A LIVESTOCK OPERATION BY THE LANDS BEING LESS DESIRABLE OR USEABLE TO A TENANT.

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POINT III

THE VERDICT IS NOT EXCESSIVE NOR THE RESULT OF PREJUDICE OF THE JURY, BUT IS IN KEEPING WITH THE TESTIMONY OF THE WITNESSES OF BOTH THE APPELLANT AND RESPONDENTS.

ARGUMENT AND AUTHORITIES

POINT I

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POINT III

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Counsel for the appellant takes the peculiar position that unless the defendants could present evidence of market value of the property taken at the exact place of taking, that our hands are then tied and we have no alternative but to accept the unconscionable offer made by the appellant of 2/10ths of a cent a cubic yard for the material that they might want.

Gravel pits or gravel deposits throughout the State of Utah have a definite and fixed value of between one and one-half cents to fifteen cents per yard, but the market for a particular gravel pit generally depends upon a demand being created in a particular locality caused by construction of some kind, sometimes roads, sometimes industries and sometimes from other sources and any particular gravel pit or deposit is made marketable generally because of two or three different things, and this was set out in particular by one of respondents' witnesses, Douglas J. Fife, who has been in the general contracting and sand and gravel business for thirty years (Tr. 64 line 12) and during that time has had occasion to bid on many public work jobs. He was asked the question:

"Q. What makes a pit desirable, Mr. Fife, for construction work?

A. Well, of course, the demand. If they're building a new road through a section of country and there are no pits available, we go out and prospect and find pits, and then negotiate with the owner to buy the material.

Q. What do you look for in locating those? What is the desire in regard to accessibility or grades or types of formation of the sand?

A. Well, of course, we generally look for gravel and we try to find a pit as close to the project as possible to cut down the haul. (Tr. 65, lines 2-13).

Mr. Jack Parsons, another witness for the respondents, is in the sand and gravel business both at Smithfield, Cache County, Utah, and Brigham City, Box Elder County, Utah, and has been in the business for 25 years. He testified that

in the course of time he had opened up many gravel pits (Tr. 132 line 18) and he was asked the following:

“Q. What makes a gravel pit valuable to you as a contractor?

A. I’d say location, quantity and quality and probably accessibility.” (Tr. 133 line 6).

He was asked further questions as follows:

“Q. Does the gravel become more valuable per cubic yard the closer you can get it to your project?

A. Right.

Q. Is that because of the haul problem?

A. Yes, the haul would be lessened and the gravel itself wouldn’t be any more valuable, but the cost in producing it would be less.” (Tr. 133 lines 18-24).

He was then asked this question as follows:

“Q. And you consider this of an average quality. Now, do you have an opinion as to what the fair reasonable market value was, as of the 22nd day of October, 1957, per cubic yard in place, of the gravel that was in the north pits? You can answer that “yes” or “no” whether you have an opinion.

A. I do not have an opinion.

Q. As to what its value was?

A. No, I have an opinion of what I’ve paid for material similar on my own projects, but to place a value there, I wouldn’t have an opinion.

Q. I’ll ask you this way. What have you paid for material of similar quality on your own projects.” (Tr. 135 lines 2-13).

Mr. O'Conner at that point wanted to voir dire the witness and asked him this question:

"Q. Where is that other material located?

A. Well, I have seventeen miles of interstate highway going approximately forty miles to the north of our said exhibit at the present time, and that is similar material.

Q. You mean you're selling gravel to a project some forty miles to the north of this pit; is that it?

A. I'm not selling it. I'm buying it. That is a state highway." (Tr. 135 lines 24-30).

The court allowed him to answer as follows:

"THE COURT: Just give us a figure, Mr. Parson.

A. Two cents a yard." (Tr. 136, line 17).

He was then asked if he had other projects going on throughout the State of Utah where he had purchased fill material of similar kind and grade and again Mr. O'Conner, attorney for appellant, sought to question him on voir dire and asked him where the jobs were located, as follows:

"A. Well, from Smithfield north, one project and Grantsville west. There are two projects there.

Q. Was the source of the material close to the job on those two?

A. Yes.

Q. How far away approximately?

A. Oh, probably four or five hundred yards from the highway.

MR. O'CONNER: I see. Go ahead.

BY MR. MANN:

Q. And what did you pay for those?

A. The lowest was a cent and a half and the highest

I think about eight cents.” (Tr. 137 lines 4-14).

He was then asked again, as follows:

“Q. But you have used fill material then between one and a half to eight cents?

A. Right.” (Tr. 138 lines 11-13).

and of course he had already testified that they were of the same kind and quality and quantity as that that the appellant was seeking to take.

On re-direct examination he was asked again, as follows:

“Q. Mr. Parson, isn't it a fact that any gravel pit that you have opened up for construction work, there was not a market for that particular gravel until your project came into being?

A. Right.

Q. And when the job came into being, then there was a demand for gravel in the locality?

A. That's right.

Q. And that created an immediate market for it?

A. Right.” (Tr. 141 lines 4-12).

At the close of the testimony of Mr. Parsons (Tr. 143) it was called to the court's attention that we had a Mr. Hunsaker and a Mr. Germer, both contractors using sand and gravel, and that their testimony would be similar to that of Mr. Parsons and counsel for appellant and myself both stipulated that they would testify similar to Mr. Parsons, and the court said:

“THE COURT: You understand that. If Mr. Germer and Mr. Hunsaker were called, he'd testify the same as Mr. Parsons.” (Tr. 143 lines 9-11).

Now, Mr. Fife, who was called (Tr. 68 line 2) testified that the average market value in his opinion was five cents per cubic yard. Melbourne Ford, who was called as a respondents' witness, who was also a general contractor and had been in the business since 1948 (Tr. 89 line 28) at Provo, Utah, (Tr. 100 line 21) testified that the material taken by the appellant was worth five cents per yard. J. Gibbons of the firm of Gibbons and Reed Construction Company (Tr. 41 line 21) testified that in his opinion (Tr. 46 line 3) that the material was worth five cents per cubic yard. Lee E. Young, an employee of the State Land Board (Tr. 118 line 13), who had been employed for a period of ten years as manager, executive secretary and director, and also as Chief Land Examiner, stated (Tr. 118 line 27) that his duties were land management, land appraisal, land sales, land acquisition and mineral and surface leasing, and he testified (Tr. 119 line 16) about the Promontory gravel:

"A. Well, I was there on a gravel inspection in July of 1955."

He further testified that he had received an application to lease gravel on Section 36, T. 7 N., R 6. W. S.L.M., which is the section just adjacent to the Hunter-Arthur lands that were condemned by the appellant. He said that one J. P. Underwood of Ogden (Tr. 120 line 20) was seeking to make a gravel lease upon this section and that he found gravel deposits on it. He was asked about the lease as follows:

"Q. And in regard to lease on section thirty-six, was that leased at the minimum or maximum?

A. The minimum for gravel.

Q. And can you tell us why this was leased at the minimum?

A. For the reason that it isn't too accessible and there is a lot of waste on the section. Accessibility isn't nearly as available as the adjacent lands in that vicinity. Some of the adjacent lands." (Tr. 123 lines 2-9).

He then testified that it was leased to the individual for one and a half cents per cubic yard and the lease entered into.

He further testified (Tr. 127 line 1) that they have leases entered into by their office as high as fifteen cents per yard for gravel.

Mr. O'Conner stated on his opening statement to the jury as follows:

" . . . Much of our case has been presented by the witnesses for the defendant; that is through parts where I cross examined and their own answers. . . . " (Tr. 247 lines 18-21).

Counsel for the respondents feels that Mr. O'Conner's statement is true, that he made his case and in doing so also made the case for the respondents. The court's attention is called to the fact that on his cross examination and when he was cross examining J. R. Gibbons (Tr. 49 line 21) in regard to the cost of removing or transporting the gravel, he asked the question:

"Q. Is seven cents a ton mile sound reasonable?"

And again to the same witness he said:

"Q. Now, if the truck rate is even five cents a ton mile—that is, five cents for every ton hauled a mile from Promontory Point to any market—wouldn't that make the purchase of it at this five cents a yard pro-

hibitive as far as competing with the Brigham City market?" (Tr. 51-lines 3-7).

In his cross examination of Douglas J. Fife, about the cost of hauling per ton mile, it states:

"A. Well, you might get it hauled for six cents, but I think your figure of seven cents is a good figure." (Tr. 71 lines 19-20).

On his cross examination of Melbourne Ford, asking about hauling costs:

"A. I'd say from five to seven cents a ton mile." (Tr. 110 line 21).

All of which impressed the jury of the value of having the material as accessible as possible. Then when its own witness, Denny Reynolds Bagley, the project engineer, took the stand, he testified under direct examination that the value per cubic yard of materials taken from the Chournos and Hunter-Arthur properties was:

"A. Two mills per cubic yard." (Tr. 300 line 19).

On cross examination he was asked the ratio of two mills to five cents and he told the jury it was 1-25 (Tr. 302). He had testified that he had bought some gravel during the construction from the Fife Sand and Gravel Company at Brigham City, and had paid \$1.35. He was asked the comparison between two mills and \$1.35 and he said it was about 1-600 (Tr. 302 lines 14 and 15). He was asked if he checked the pit area to make sure it met the qualifications necessary to make the road bed fill (Tr. 302) and he said it was suitable and desirable for their needs. He was asked if he had checked other areas for the purpose of satisfying their

needs and he advised (Tr. 304 line 13) that he had checked areas South and East and that they were at greater distances bearing up to a little over a mile further in distance.

Consequently, I say in all earnestness, that when Mr. O'Conner brought out from nearly each and every one of our witnesses that the haulage cost of gravel was seven cents a mile that he, through his own efforts, impressed upon the jury that because of the location of out pits and their accessibility that there was a consideration that any buyer would give if he sought to purchase from a willing seller. He was then asked about why they picked these pits and he said:

"A. They were picked because of the combination of location and quality." (Tr. 305 lines 5 and 6).

Later on, on re-cross examination by Mr. Oman, Mr. Bagley was asked (Tr. 306 line 10) if Southern Pacific, the appellant, did not have a gravel pit just north of the old Promontory Station and he admitted that they did. He was asked why they did not take the gravel from that location and he advised (Tr. 306 line 22) because of the distance. Mr. O'Conner had played on distance and costs and again I say that the location and quality of material on respondents' land, together with their availability to any purchaser either now or in the immediate future was impressed upon the jury by Mr. O'Conner.

The courts are, of necessity, given wide discretion in placing limits on the extent to which other comparable sales are admissible in evidence for the purpose of establishing a market value (see *Ramming Real Estate Co. vs. United States*, 122 F2d 892 (8th Cir. 1941); *Forest Preserve Dist. vs. Dra-*

per, 387 Ill. 149, 56 N.E. 2d 410 (1944); In re Edward J. Jeffries Homes Housing Project, 306 Mich. 638, 11 N.W. 2d 272 (1943).

The case of State of Utah vs. Peek, 265 P.2d 630, 1 Utah 2d 263 (1953), has been referred to and quoted on page 17 of the appellant's brief; however, the quotation is incomplete and not fully understood without the remaining portion of the quoted paragraph being given, which portion is as follows:

"This is a preliminary question for the trial judge to determine before such evidence is admissible, and his determination should be followed by the appellate court in the absence of an abuse of discretion. It is also within the sound discretion of the trial judge to limit the amount of such evidence in the interest of avoiding confusion of the issues and the undue consumption of time." (1 Utah 2d page 273).

Another case in point is Baetjer vs. United States, 143 F.2d 391, 397 (1st Cir.) cert. denied, 324 U.S. 772 (1944):

"The questions of whether such transactions are near enough in time, or involve substantially similar lands, or significant amounts of land are all questions of the remoteness of the evidence offered and in consequence are for the trial court."

In 20 C.J. page 777, under a title "Special Value to Taker and Adaptability to Purpose for Which Taken," the article says that we do not attempt, in condemnation proceedings, to have the value fixed on a basis of benefit which the property may be to the other party to the proceedings, but gives the exception, which is:

" . . . The true rule is that any use for which the

property is capable may be considered, and if the land has an adaptability for the purposes for which it is taken, the owner may have this considered in the estimate as well as any other use for which it is capable." (See cases cited thereunder).

Following this same theory in 29 C.J.S. on page 1028 we have, under "Special Value to Taker and Adaptability to Purpose for Which Taken" as follows:

"As stated supra Art. 136, compensation must be reckoned from the standpoint of what the landowner loses by having his property taken, not by the benefit which the property may be to the other party to the proceedings; therefore the value of the parcel to the condemnor, or the need of acquiring the particular parcel for the proposed improvement, or the value that would accrue to the land from the construction of the contemplated improvement, cannot be considered as an element of damage to the land owner; neither can an amount that has at some time been expended on the property in question, which has rendered it specially suitable for the use for which it is being condemned, be claimed by the landowner, but such improvements may be considered in so far as they enhance the value of the property. The rule that the value of the property to the condemnor is not to be considered does not mean that the adaptability of the land taken for the purposes of the condemnor may not be considered, along with any other uses for which the land is available, in determining its market value, provided the prospective demand for such use of the land by prospective purchasers or condemnors affects the present market value of the land."

There are many cases cited under this, two of which I wish to discuss. One is a California case, *Temescal Water Co. vs. Marvin*, 9 P2d 335. This was an action by a water com-

pany to condemn a reservoir site for the impounding of water and two hydraulic engineers testified. It appears from the evidence that they tried to testify and fix value to the condemnor according to his particular benefits, but not strictly market value and the court properly pointed out that the question was not what the property was worth to the person intending to acquire it, by condemnation, but it did state what could have been offered. On page 337, right hand column, it said:

“ . . . The jury had a right to consider the fact, in determining the market value, that the land in controversy was in proximity to a dam-site, and to consider its adaptability for reservoir purposes and to determine whether or not its market value had been enhanced by improvements put upon adjoining property; . . . ”

The court then went on to discuss a prior decision, being *City of Stockton vs. Ellingwood*, 275 P. 228, and in the right hand column, page 239, it said:

“In determining values in actions of eminent domain, where, for certain purposes, the lands are extremely valuable, and for other and different purposes are of little or no value, courts are confronted with many difficulties, the chief of which is sometimes the apparent fact that there is no market value, in the strict sense of the word, but that this does not entitle a plaintiff to take the lands sought to be condemned without paying just compensation.”

And the court again, quoted from *Spring Valley Water-Works vs. Drinkhouse*, 92 Cal. 528, 28 P.682:

“ . . . The question is thus presented whether, assuming that the land sought to be taken was specially

valuable for the purpose named, it was relevant and competent to show such value. There is undoubtedly some conflict in the authorities as to the admissibility of questions put in this form; but we think the point was decided in favor of the admissibility of such evidence in the case of *Land & Town Co. v. Neale*, 78 Cal. 63, 20 Pac. Rep. 372, and in the same case on a second appeal to this court, 88 Cal. 50, 25 Pac. Rep. 977 (11 L.R.A. 604)”

Another very interesting case also cited in the footnotes last referred to in 29 C.J.S. page 1028 is the *Union Exploration Company vs. Moffat Tunnel Improvement District*, 89 P2d 257, a Colorado case. In this particular action it was very necessary that a tunnel for the carrying of a railroad and water through the Continental Divide be made. The plaintiff went into possession of the property on an agreement providing that third parties would attempt to negotiate the value to be paid for the timber and easement. When the negotiators could not arrive at an acceptable solution, the action was commenced and considered one in eminent domain to determine how much would be paid to the Union Exploration Company. This is a lengthy decision with many cases cited. The testimony involved a great difference in values, such as one person's testimony of \$10.00 per acre as against the experts' testimony of a total of \$357,000.00. And the court, in the right hand column page 261, said:

“The present situation of the defendant's land is out of the ordinary. In determining the value of its lands, or the value to be paid it, it is difficult to find any precedent or any rule that can be applied. If we were to assume that the land is only valuable for pasture, or for timber purposes, the amount could be found in a very simple way, but when we have to con-

sider all of the facts and circumstances, and fix the value to this property, for all reasonable purposes, it is difficult under the testimony offered to apply any of the known rules of law in fixing values”

Starting on the right hand column, page 262, in the case case, we have:

“(4-6) Defendant’s counsel contend that “The most profitable and advantageous use to which the property is adapted is the basis upon which fair compensation should be determined.” We think this proposition is correct. Section 17, Chapter 61, ’35 C.S.A. Cases to this effect could be cited without number. We call attention to a few mentioned in defendant’s brief: Colorado M. Ry Co. v. Brown, 15 Colo. 193, 25. P.87; Denver & R.G.R.R. Co., v. Griffith, 17 Colo. 598, 31 P. 171; Denver, N.W. & P.R. Co. v. Howe, 49 Colo. 256, 112 P. 779; Scurvin Ditch Co. v. Roberts, 58 Colo. 533, 146 P. 233; Wassenrich v. Denver, 67 Colo. 456, 186 P. 533, 537 . . .

“We call attention also to Harrison v. Young, 9 Ga. 359, and Young v. Harrison, 17 Ga. 30. In its opinion in the latter case the court said: “It is not difficult to see that such prospective value of a piece of ground might be its chief element of value to its owner. An owner of land, peculiarly situated by reason of its proximity to some great city or great work of internal improvement, may look into the future and see that it will, at some distant day, become extremely valuable by reason of its situation, and that none other can be procured for the purpose for which he anticipates that it will be needed. He desires, accordingly, to keep it, knowing that it will be a fine property for his children, if not for himself. If deprived of that property for public purposes, and especially for the benefit, at the same time, of a private company, can he have ‘just compensation’ unless reference is had

to the prospective value of the land, and unless that is, to some extent at least, taken into account?"

In *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 407, 25 L. Ed. 206, speaking with respect to compensation the court laid down the following rule: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities, or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"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 appraisal 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."

"In *Pittsburgh, C., C. & St. L. Ry. Co. v. Gage*, 286 Ill. 213, 121 N. E. 582, 587, the Supreme Court stated the rule as follows: "The owner of land appropriated

for a public use is entitled to its value for the most profitable use for which it is available, and a capacity for a future use which may be anticipated with reasonable certainty, though dependent upon circumstances which may possibly never occur is competent to be shown and considered by the jury in fixing the compensation if the capacity for such use in fact enhances the market value of the land ought to be taken in its present condition and state of improvement."

In summing this up it is quite apparent that we have this situation. The respondents offered testimony that throughout the State of Utah for any gravel pits that have been opened up, and some were within forty miles immediately north and others less than twenty miles, just across the Promontory Point in Ogden, and one immediately adjacent to the lands taken, that the price varied from one cent where the State Land Board dealt with the State Road Commission being the lowest figure, up to as high as fifteen cents for gravel of similar kind and quantity and quality, with the state minimum royalty to individuals or private corporations of one and one-half cents. When we compare this with the two tenths of a cent testified to by witnesses of the appellant, appellant's figure appears all out of reason. It was also shown that the appellant itself had other quantities of gravel right on Promontory Point, readily accessible for it, that it chose to condemn the lands of the respondents for the purpose of taking the gravel fill because of the location, quantity and quality of the materials sought to be condemned, or, in other words, the adaptability of this particular gravel deposit. If it were convenient and adaptable to appellant, it also had that same convenience and adaptability to any other individual that might wish to purchase in the future and ship to other

points. The testimony also shows that the appellant laid great stress on the cost of hauling gravel. All of which no doubt impressed the jury as to the adaptability of the respondents' supply. The price determined by the jury of three cents per cubic yard shows that they did not fix the price based on appellant's needs or its value to it, or it would certainly have been higher than the cost of hauling of a ton mile of seven cents because their nearest other source was more than a mile away. They did not reach the figure shown in any exhibit that the appellant, with tongue in cheek, says was prejudicial error to admit, nor did they go down to the unconscionable figure that appellant claimed. But, by the weight of all the testimony, the jury fixed the fair, reasonable market value of the gravel per cubic yard in place for its wonderful adaptability for a gravel pit.

When I say the appellant, with tongue in cheek, talks about prejudicial error or reversible error, I would like, for just one moment, to go into the testimony of the witness Dell Adams, offered by appellant in support of its contention of two tenths of a cent per cubic yard. Dell Adams was put on the stand as a witness for appellant, in the absence of a jury (Tr. 307 line 11), to determine the admissibility of his testimony. After considerable testimony to the effect that the contract for the purchase of the materials from him at two-tenths of a cent per yard not only covered the taking of the material but covered all severance damage and the leaving of the holes from which the material was removed in the exact condition they would be in after the material was taken, etc., counsel for the respondents moved (Tr. 317 line 2):

"MR. MANN: If it please the court, we move that the evidence be not admitted. The witness has now testified that it is not only for the price of gravel but it's for the damage done to the severance of the land and of every kind, and we have a Utah case that specifically sets out that if the price includes the purchase price and the damage, that it cannot be offered, and that's that case I cited to you."

After further argument, Mr. Adams was brought back before the jury (Tr. 326) and the court allowed him to proceed to offer in his contract (Tr. 330 line 25). He officially offered it at that time and before the court ruled on it, I asked to voir dire Mr. Adams (Tr. 331 line 11 to page 332 line 19):

"BY MR. MANN:

Q. Mr. Adams, in your discussions with these people and for the taking of 56,000,000 cubic yards, did you discuss that they would have to dig this yardage out of your lands?

A. That's all I could sell them was my lands.

Q. Yes. And that they would dig huge holes in taking it out in order to satisfy the requirement of your contract of 56,000,000 yards?

A. That's right.

Q. And did the price that you agreed on in this contract for taking out this 56,000,000 yards take care of all of the dirt taken out as well as the holes that might be dug upon your land and the leaving of your land, when they finished, with the holes in place without filling it back in any way?

A. That's right.

Q. Did you at that time consider that when they would pay you the sum specified in the contract, that

it would be payment in full of the purchase price and any damage done to your lands and the leaving of your lands in the condition that they would have to be left in?

A. I was quite willing to sell them this material, for up to 56,000,000 yards, at two-tenths of a cent a yard.

Q. Now you haven't answered my question. Did it include both the digging of the dirt—

A. Well, for a hundred thousand dollars, Walt, yes.

Q. And you understood that wherever they dug this topsoil out, that—

A. That was my loss.

Q. That was your loss?

A. That's right.

Q. That would be part of the loss you would sustain?

A. That's right.

Q. And when you sized it all up in every way with the loss taken into consideration and the dirt they would take out and the hole they would leave and the compensation that you would get, you accepted it and entered into the contract?

A. That's right.

MR. MANN: "Now for the purpose of the record we object to the offer going in, plaintiff's exhibit eight, or any testimony further in regard to price on this."

The court officially received it (Tr. 333 line 26):

"THE COURT: Well, I guess to be consistent the court should receive the contract, but I'm inclined to sustain the objection now and let the case go forward.

MR. O'CONER: You mean you're going to change your ruling?

THE COURT: Well, the witness has testified to the substance of the contract on cross examination. I want to be consistent, though. I guess in fairness to your side of the case I'd better receive the contract."

And the contract was received.

The case that had been cited was Weber County vs. Ritchie et ux, 98 U. 272, 96 P2d 744, where it held, bottom left hand column, page 746:

"(3, 4) Appellants offered in evidence the testimony of another landowner of the vicinity. They sought to prove the value of the Ritchie land taken by proving what this other owner had received from the County for his land for the same project. However, on voir dire it was disclosed that the sum of money this landowner received included damages to his remaining land. The court ruled out the testimony of this witness upon the ground that it was not proper evidence of value. Under the authorities we think this was correct. Although the decisions divide upon the question of admissibility of amounts paid by the condemnor for other lands, there is little disagreement that compromise settlements, including damages, are not admissible. The proposed testimony did not segregate the sale price from the damages. It is questionable whether the price, had it been segregated, would have been proper testimony under the definition of market value as applicable to condemnation proceedings. 18 Am. Jur., p. 996, Sec. 352 and cases cited thereunder. Generally see 118 A.L.R. 869, citing Telluride Power Co. v. Bruneau, 41, Utah 4, 125 P. 399, Ann. Cas. 1915A, 1251."

It is beyond the writer's comprehension to understand how attorney for appellant can, at this stage of the proceedings,

after having his Exhibit No. 8 received as evidence, when a recent Utah case was presented to the court, which, in effect, held that it was improper, can talk about prejudicial error. Particularly so when he offered no cases to the court in support of any of his contentions at the time of trial.

POINT II

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY SUBMITTING TO THE JURY THE QUESTION OF SEVERANCE DAMAGES, AND BY ADMITTING INTO EVIDENCE CERTAIN TESTIMONY PERTAINING THERETO.

(a) THE FACTS OF THIS PARTICULAR CASE AND THE PHYSICAL MAKEUP OF LITTLE VALLEY AND ITS PARTICULAR USE IN CONNECTION WITH DEFENDANTS' OTHER LANDS WAS PROOF OF ITSELF THAT THERE WERE NO OTHER SIMILAR LANDS AVAILABLE.

The writer agrees that Section 78-34-10 (2) U.C.A. 1953, as set out by appellant in his brief is the statutory law governing what has been termed "severance damages" and as a consequence will not recopy the law.

In the statement of facts set out by the writer the Little Valley itself was particularly described because of its peculiar make up, how it is used in the winter months (which are the most hazardous to range livestock operations) which made this part of the range belonging to respondents (with their established personal rights to the use of trails and roads up

through the same when not on their own properties) exceptionally valuable to an owner. And that this was so whether the owner operated his own operation or whether as in the Hunter-Arthur case, they leased the same and were able to demand and receive a good high rental for the use of this valuable range.

The appellant dug a huge excavation across the lands of respondents and the roadways and entrances into Little Valley and on up into the Valley so as to actually create a barrier and then it left that barrier forever for the livestockmen to try and force their sheep or livestock around if they are to utilize their lands that were not taken. They, by this taking, created, or caused, damage to the remainder interest of the respondents in this. They must put up with the hazards of having their sheep stampeded or driven unintentionally with sheep dogs (Tr. 164-38) over the steep banks and injured or killed. They must put up with having the mother ewe separated from the lamb as the sheep seek water (Tr. 163-2); cave-ins, or the banks giving way (Tr. 165-14); working with the livestock in the night time when it becomes necessary (Tr. 165-21) around such a hazard; lambs playing in the vicinity and going over the sides to destruction (Tr. 165-29); and something unexpected that cannot be guarded against spooking the sheep and possibly a thousand of them at once going over the steep banks (Tr. 228-25). The hazard will be there forever if the land is left like it is now (Tr. 166-27).

The severance damage that was done by appellant here is not like the facts recited in the Provo River Water Users' Assn. v. Carlson, 133 P.2d 277. There they took the fee

title as to a pasture of 18.75 acres of land that was located about a mile and a half away from the owner's other farm property. Here they go right out in the middle of our holdings and take what earth, gravel and fill material they want and damage the use of the remainder. Under Mr. O'Conner's thinking, we had to show that there was no other land available to take the place of what they took. He forgets that appellant did not take the fee title. Appellant only took gravel fill and by doing so left a barrier right in the middle of our holdings that damages the use of the rest. I just hope he does not believe that we are under an obligation before we can obtain our severance damages to show that there is not other fill materials that we can buy with which to fill up the hole. The application of the cases he cites is just about that absurd, to the facts in this case. We must go on forever paying taxes on this land that the diggings are on. Nothing can replace it. It isn't the loss in feed that does the damage. It is the cuts, the great excavations, the high banks, that were not leveled out, the location of the same in that it goes from one hill across the canyon to the other and on up through the canyon so that livestock cannot naturally make use of the owners' land. It makes the remaining lands actually of less value, either from a use standpoint or a leasing standpoint. Consequently, unless the respondents are compensated for this difference in value that was there before the taking as compared after the taking, then the respondents will suffer and will not receive compensation as contemplated by the statutes of the State of Utah. *The State v. Cooperative Security Corp.*, 247 P.2d 269, has no application either to the facts in this case, for the reasons set out above.

(b) THE DAMAGES TESTIFIED TO BY RESPONDENTS' WITNESSES WERE FROM APPELLANT'S OPERATIONS UPON LANDS OWNED BY RESPONDENTS AND THEIR RIGHT OF ENTRY THEREON.

(c) THE SO-CALLED "SEVERANCE" DAMAGES TESTIFIED TO BY RESPONDENTS' WITNESSES CONSISTED OF DAMAGES THAT WOULD RESULT TO AN OWNER IN THE USE OF HIS LAND IN LIVESTOCK OPERATIONS OR TO AN OWNER IF HE ATTEMPTED TO LEASE THE LANDS FOR A LIVESTOCK OPERATION BY THE LANDS BEING LESS DESIRABLE OR USEABLE TO A TENANT.

(e) RESPONDENTS DID PRESENT COMPETENT EVIDENCE OF THE MARKET VALUE OF THEIR REMAINING LANDS CLAIMED TO HAVE BEEN DAMAGED.

When this problem was approached in the course of the trial, that is, what was Mr. Chournos testifying about when he gave his opinion as to the loss the respondents Hunter-Arthur would suffer? The matter was completely threshed out and all agreed that it involved the Hunter-Arthur lands only (Tr. 172 line 1-24).

Mr. Chournos later stated (Tr. 175-24):

"A. I figured I've been damaged the same amount of money as the Sheehan people has."

Mr. Keller, a rancher with years of experience and who at one time had all of the lands that are in coloring on the

exhibit showing ownership, either as owner or lessee (Tr. 221), was asked (Tr. 230-12):

“Q. Do you have an opinion as to whether or not the value of this land, for livestock operations, has been reduced on account of the pits that have been dug, in their present locale? I’m talking of the Hunter-Arthur lease.”

He gave his opinion (Tr. 232-4) that they would be reduced in value in his opinion 25% or \$1,750.00 per year and that would be based on a twenty (20) year period.

There is another interesting thing that should be brought to the court’s attention and that is that Mr. Adams, the chief witness for the appellant, had the Hunter-Arthur lease at the time of the hearing and testified that he would be willing to renew it (Tr. 263-4) but it later developed, after he was cross-examined, that he had been inconvenienced in his sheep operation because of the railroad’s operations and cuts (Tr. 277) and he admitted that the Southern Pacific had taken care of him. The question was asked (Tr. 277-18):

“Q. In other words, the Southern Pacific Railroad considered that you and your leases and your operation were injured because of the digging and so on up through there.

.
A. Yes, sir.”

And he admitted (Tr. 278-3) that they had paid him the sum of \$2,500.00 per year. He later said (Tr. 285-21) that is what they gave him for disturbance and later said (Tr. 287-16) that it didn’t cover acreage, it’s the nuisance. Consequently we get right down to this. He had the leases on

the Hunter-Arthur lands. He had some lands of his own. He couldn't run his sheep operation or enjoy the leases or the fruits therefrom in the same manner that he had done before the appellant came in to disrupt everything. The appellant, through its engineer at the location of the project, recognized the injury due to the taking and the resulting damage that was caused to the lessee of the Hunter-Arthur people and as a result paid him \$2,500.00 annually over and above any sums due by contract for the fill material. The damages testified to by respondents' witnesses were not so great but the injury will be forever the same.

Mr. O'Conner claims tha the damages as testified to cover profits and/or losses to a business carried on, but we do not interpret it as such. The loss of rental that would be suffered yearly was converted to purchase price or market value by formula (Tr. 232) over a twenty year period.

(d) RESPONDENTS' DAMAGES WERE NOT ARRIVED AT BY ADDING THE VALUES OF DIFFERENT USES FOR THE LAND TAKEN.

(f) THE TESTIMONY DOES ESTABLISH SEVERANCE DAMAGE OF RESPONDENTS' LANDS AS THAT TERM IS CONTEMPLATED AND USED IN THE COURT DECISIONS AND THE STATUTES.

The writer does not quarrel with the attorney for the appellant on the law or what the cases he has presented attempt to prove, but rather on his interpretation of the facts of the case. We claim and I sincerely believe that the evidence proves that we are entitled to:

1. The reasonable fair market value for the fill materials taken.

2. We also claim that at the place appellants chose to take the fill materials and from the manner in which they have taken them, that they have rendered our remaining lands less useful and as a consequence we have been damaged by the lands remaining having a smaller reasonable fair market value, after the taking, than they had prior to the taking.

We are not claiming loss of forage from the gravel pits. If we did, then we would be claiming double damages. This case is not one where the fee is taken, but one where the whole face of the land is changed by the taking.

Our statute, in condemnation, is somewhat similar to the California Code. In 10 Cal. Jur., page 340, we have:

“Article 55. Damage to Property Not Taken:—Where the property sought to be condemned constitutes only a part of a larger parcel, the compensation to be awarded includes not only the value of the property taken but also the damages which will accrue to the remainder by reason of its severance from the portion sought and the construction of the improvement in the manner proposed. So whatever tends directly and substantially to diminish the value of the tract left to the owner should be weighed and considered in awarding him damages. Thus it is proper to consider such a depreciation in value as is caused by the enhanced danger of floods or seepage on the property not taken from the manner of the use of the property taken. And such damage may be considered as the cutting off from a tract of streams or springs of water, the inconvenient form or shape of the remaining land on account of the public use, and other like injuries

to the property not taken. It has been held that double damages are not assessed against a condemning party when the jury takes into consideration the value of the land taken arising from its availability for use in conjunction with the land not taken, and also the damage caused to the land not taken by its availability for use in conjunction with the land taken.” (See numerous cases cited.)

CONCLUSION

It appears to the writer at the present time there are really two judgments before the court. One for the value of the materials taken and one for the severance damages. It also appears that this court may affirm both judgments, or may affirm one and send one back, or may send both back.

We are now at the point in this condemnation proceedings that has been promised that we would be in by counsel for the appellant. That is, that if we didn't take its offer that any judgment we might obtain would have to be supported by a Supreme Court decision. We, in turn, have advised it that we were not afraid to present our case to the Supreme Court in order to obtain our legal and equitable rights in this matter. We further say, however, that the cost of these proceedings are not as easily borne by us as they might be by the appellant. That if the court should determine that any portion of the matter should be tried over, then, I assume the court would sustain the balance of the judgment. This would then make it possible for respondents to be compensated, and they would then have the wherewith to carry on the fight. The record shows that appellant took possession October 22nd, 1957. Any portion of this that might be retried will again have to go

before two courts if we proceed on our past experience with this appellant.

We sincerely believe, however, from the evidence presented, that we are entitled to the full amount as determined by the jury and that the judgment of the lower court should be sustained for the reasons set out in our brief.

Respectfully submitted,

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Helen Sheehan Arthur