Meeting

7/31/61

Memorandum No. 26(1961)

Subject: Study No. 36(L) - Condemnation (Senate Bill No. 205 - Evidence)

Senate Bill No. 205, the Commission's bill relating to evidence in eminent domain proceedings, passed the Legislature but was pocket vetoed by the Governor. At its July meeting the Commission determined that it would examine Senate Bill No. 205 in the form it passed the Legislature and determine what changes if any should be made in the bill. This memorandum is designed to assist the Commission in making this determination. The memorandum first sets out background information concerning the purpose of Senate Bill No. 205 and its effect on the existing California law. Then the memorandum discusses the specific amendments made to the bill during the legislative process. A copy of the pamphlet containing the Commission's Recommendation and the research consultant's study is attached.

BRIEF STATEMENT OF PURPOSE OF SENATE BILL NO. 205

Senate Bill No. 205 provides that the only direct evidence of the value of the property involved in an eminent domain case is the opinions of expert witnesses. The bill provides that these experts may fully state the reasons for their opinions on direct examination. But their opinions may be based only on factors that buyers and sellers in the market place take into consideration to determine value. To give some certainty to this basic standard, Senate Bill No. 205 lists certain factors that may

be considered by an expert witness when relevant and lists certain other factors upon which an opinion cannot be based.

EFFECT OF SENATE BILL NO. 205 ON PRESENT LAW

The most important effect of Senate Bill No. 205 is to make clear that an expert witness may state all of the reasons for his opinion of value on direct examination. Whether the bill states or changes the existing law in this regard is in doubt. Before County of Los Angeles v. Faus[1] was decided in 1957, the law was settled in California that the sales prices of comparable property,[2] offers for the condemned property[3] and the capitalized rental value of the condemned property[4] were all inadmissible on direct examination.

Of course, these rules were desired by the attorneys for condemning agencies, for the burden of proving the value of the condemned property is on the condemnee. Hence, the more evidence that may be excluded on technical grounds, the harder it is for the condemnee to prove what his property is worth.

It was also settled, however, that even though such evidence could not be mentioned on direct examination, an appraiser could properly base his opinion on comparable sales,[5] upon the capitalized fair rental value of the condemned property[6] and upon offers to buy the property in question.[7] Moreover, it was held that an appraiser could base his opinion on the income from a lease based upon a percentage of gross income.[8]

1. 48 Cal.2d 674 (1957).
2. Central Pac. R.R. v. Pearson, 35 Cal. 247 (1868).
3. People v. LaMacchia, 41 Cal.2d 738 (1953).
4. City of Los Angeles v. Deacon, 119 Cal. App. 491 (1932).
5. Central Pac. R.R. v. Pearson, 35 Cal. 247 (1868).
6. People v. Dunn, 46 Cal.2d 539 (1956).
7. People v. LaMacchia, 41 Cal.2d 738 (1953).
8. People v. Frahm, 114 Cal. App.2d 61 (1952).

In County of Los Angeles v. Faus,[9] the cases holding that an appraiser could not state all of the reasons for his opinion on direct examination were overruled. The overruled cases involved offers to buy the condemned property,[10] evidence of income from the property[11] as well as comparable sales and sales of the condemned property, even though the Faus case itself involved only sales.

Despite the fact that all authorities for the exclusion of evidence of rental value on direct examination appear to have been overruled, condemners' attorneys cling to the notion that such evidence is inadmissible because the Faus case did not directly involve such evidence. On the other hand, California Speciality Handbook No. 4, California Condemnation Practive, Continuing Legal Education of the Bar (1960) § 13.55 at pp. 303-306, suggests that a capitalization of income study and a replacement cost less depreciation (summation) study may now be presented on direct examination. The present practice in many trial courts appears to be that the appraiser presents his capitalization and summation study in rather general terms on direct examination; but he is not permitted to go into the details of the studies.

Thus, it appears that Senate Bill No. 205 may not change the law at all insofar as it declares that the appraiser may give all of the reasons for his opinion on direct examination. Certainly, insofar as offers to buy the property being condemned are concerned, the bill appears to state

9. 48 Cal.2d 672 (1957).
10. People v. LaMacchia, 41 Cal.2d 738 (1953).
11. City of Los Angeles v. Deacon, 119 Cal. App. 491 (1932).
12. Deleted.

the existing law, for the courts have held on several occasions that such offers may be considered by an appraiser and stated on direct examination.[13] Insofar as the capitalized value of the reasonable rental value of the property is concerned, no case has arisen since the Faus case involving the problem. But the fact that the Deacon[14] case which involved income evidence was expressly overruled in the Faus case indicates that such data is now admissible on direct. And as People v. Frahm[15] held that the income from the property could be considered to determine the value of a lease which was based on a percentage of gross receipts, it is likely that this type of evidence, too, is now admissible on direct. However, if there is any doubt remaining concerning the right of the appraiser to give all of his reasons on direct examination, Senate Bill No. 205 removes that doubt.

Although the bill may not change the law insofar as it declares that an appraiser may give all the reasons for his opinion on direct examination, the bill does change the law in another respect. The law is now settled that sales of property to condemning agencies are admissible if such sales can be shown to be voluntary and not made under threat of condemnation.[16] The Commission was advised by the Department of Public Works while this recommendation was under consideration that this aspect of the decision in the Faus case has been a major factor in increasing the length of condemnation trials.[17] The Commission, too, was convinced that the

13. City of San Diego v. Boggeln, 164 Cal. App.2d 1 (1958); People v. Cava, 314 P.2d 45 (dismissed on rehg.) (1957).
14. 119 Cal. App. 491 (1932).
15. 114 Cal. App.2d 61 (1952).
16. County of Los Angeles v. Faus, 48 Cal.2d 672 (1957).
17. In a letter upon this subject, dated July 25, 1960, addressed to the Law Revision Commission, the Legal Division of the Department of Public Works stated: ". . . [O]ur experience has indicated that condemnation trials have definitely been lengthened, sometimes as much as several days, because of some of the statements contained in that opinion [in the Faus case]. However, this result has not ensued from the single point in that case that sales prices are admissible on direct examination. Rather, the delay has resulted from the language indicating that sales may be considered direct evidence of value, that acquisitions of the condemnor may be admitted if the court finds that they can be considered to represent market value, etc."

necessary foundation for this evidence is so difficult to lay and so few sales to condemning agencies are completely free from the influence of the threat of condemnation that litigating the admissibility of this type of evidence consumes an inordinate amount of trial time and occasions an inordinate number of appeals.[18] Therefore, the bill provides specifically that this type of evidence may not be used by an appraiser as a basis for his opinion of the value of the condemned property.

The Department of Public Works also advised the Commission that an uncertainty created by the Faus decision has resulted in increasing the length of condemnation trials.[19] This is the uncertainty whether the valuation data relied upon by an expert witness is admitted as direct evidence of value or whether such data is admitted only to explain and support the expert's opinion. The Commission has also been advised by its consultant that this uncertainty has resulted in conflicting decisions by trial courts and an increase in the amount of time consumed at trial. This uncertainty has also generated a number of appeals[20] and will continue to do so until the matter is finally laid to rest by a Supreme Court opinion or by statute. Senate Bill No. 205 resolves this uncertainty by declaring that the only direct evidence of value is the opinion of the expert. The data related by the expert is admitted only to show the basis for his opinion.

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18. Despite the fact that the Faus case settled the question of the admissibility of sales to condemning agencies, appeals still arise over the admissibility of sales. See, e.g., Covina Un. H. S. Dist. v. Jobe, 174 Cal. App.2d 340 (1959); County of San Mateo v. Bartole, 184 A.C.A. 461 (1960); So. San Francisco etc. Sch. Dist. v. Scopesi, 187 A.C.A. 54 (1960).
19. See letter, footnote 17, supra.
20. See e.g., People v. Nahabedian, 171 Cal. App.2d 302 (1959); People v. Murray, 172 Cal. App.2d 219 (1959); Redevelopment Agency v. Modell, 177 Cal. App.2d 321 (1960); People v. Rice, 185 A.C.A. 242 (1960).

CHANGES MADE IN SENATE BILL NO. 205 DURING LEGISLATIVE PROCESS

A copy of Enrolled Senate Bill No. 205 is attached. Exhibit I, attached (pink pages), shows the changes made to Senate Bill No. 205 as introduced. All of the amendments to Senate Bill No. 205 were considered by the Commission during the legislative session.

Many of the amendments to Senate Bill No. 205 are technical. The following changes made to the bill as introduced are, however, noted for consideration by the Commission.

(1) Owner's qualification to express opinion as to value. Section 1248.1 of the Code of Civil Procedure was amended to omit the provision that the owner of the property being condemned is presumed to be qualified to express opinions as to the value of the property. This provision was omitted to allay the fear of the public agencies that a jury instruction phrased in the language of the bill as introduced would give undue emphasis to the opinion of the owner. In lieu of the omitted provision, Section 1248.1 was revised to state that opinions as to the value of the property may be expressed by the owner. This is a change that the Senate Judiciary Committee wanted made in the bill. Public Works and attorneys for condemnees approve this change.

(2) Noncompensable items of value, damage or injury. Objection was made to the bill as introduced on the ground that it would permit an appraiser to consider noncompensable items of value, damage or injury in forming his opinion. The Commission believed that the bill as introduced did not permit an appraiser to base his opinion on these factors. Nevertheless, two amendments were made to the bill after its introduction to

eliminate any possibility that such a construction would be given the bill. Section 1248.2 was amended to require that the data relied upon by an appraiser be relevant to the item of value, damage or benefit concerning which the appraiser is giving his opinion. Section 1248.3(f) was revised to make it clear that an opinion of value, damages or injury may not be based on noncompensable factors. Public Works was apparently satisfied with these changes and attorneys for condemnees did not object to them. The Attorney General did object, however, when the bill was on the Governor's desk that the matter was still not clear. The staff believes that no additional amendment is needed to make it clear that an appraiser may not consider noncompensable items of value, damage or injury in forming his opinion.

(3) Use of percentage of gross receipts leases; capitalized value of reasonable net rental value. Objections were made when Senate Bill No. 205 was on the Governor's desk because, first, Section 1248.2 permits an appraiser, for the purpose of determining the value of the property by capitalizing its reasonable net rental value, to consider rental income based on a percentage of gross receipts -- subdivisions (c), (d) and (e); and, second, it permits an appraiser to consider, for purpose of determining the value of the property by capitalizing its reasonable net rental value, the reasonable net rental value of the land and the existing improvements thereon and the reasonable net rental value of the property if the land were improved by improvements that would enhance the value of the land for its highest and best use -- subdivision (e).

As originally introduced, Section 1248.2 permitted an appraiser to base an opinion of value upon, among other things, "the capitalized value

of the reasonable net rental value attributable to the property . . . , including reasonable net rentals customarily fixed by a percentage or other measurable portion of gross sales or gross income of a business which may reasonably be conducted on the premises . . . ." During the legislative session, a question was raised as to whether this language permitted an appraiser to attribute a reasonable net rental value to unimproved property based upon the reasonable net rental which would be derived from the property if it were improved for its highest and best use. Subdivisions (c), (d) and (e) of Section 1248.2 (as it appears in the enrolled bill) were rearranged and revised so that it would be clear that an appraiser might do so. The amendment was made in a form so that the public agencies could make their objections to specific subdivisions of the bill. The public agencies argued to both the Senate and Assembly Judiciary Committees that the capitalization of rental of hypothetical improvements should not be allowed and that gross receipts leases should not be taken into consideration. The Senate Judiciary Committee was strongly in favor of the provision for capitalizing the reasonable net rental value of hypothetical improvements and using gross receipts leases.

Subdivisions (c), (d) and (e) of Section 1248.2 contain the provisions relating to gross receipts leases. Note the limitation under subdivisions (d) and (e) -- gross receipts leases may be considered only in cases where the rental is customarily so fixed. Although the element of personal management is a factor that may have some effect on the amount of rental received under a lease based upon gross sales, the Commission has been advised, and individual Commissioners know from their own experience, that buyers and sellers know the potential business volume for a given location and know that any good management can reach that volume. Leases based upon a percentage of gross receipts are considered in sales entered into on the open market; they

should, therefore, be considered in the court room. Moreover, such leases are extremely common, this affecting many if not most sales of commercial property. During the discussion of this provision by the Commission, Commissioner Joseph A. Ball reported that the rentals in the majority of the commercial leases now prepared in his office are based upon a percentage of the gross receipts to be derived from the commercial operation. To deprive the condemnee of the right to introduce such evidence in cases where rentals are customarily fixed by gross receipts leases would be to deprive him of the right to introduce the evidence upon which the real value of his property in the open market is based.

To take a concrete example, suppose that the highest and best use for a given corner lot is for a service station. If the Standard Oil Company approached the owner of the lot to lease it for a service station, it would do so upon the basis of studies of traffic which would indicate with reasonable accuracy the amount of gasoline which could be pumped from the station. This would indicate to Standard the estimated revenue from the station and, hence, the amount that could profitably be invested in the station. Likewise, if a prospective purchaser of the land approached the owner, the purchaser would consult experts to determine the amount of rental income that could be derived from a lease to an oil company. The rentals in leases of this nature are, in many areas, now customarily fixed by a percentage of the gross receipts. But if experts are not permitted to consider leases of this sort in determining the value of the

land, the "market value" of the land as it is determined in the court house will bear little, if any, relation to the value of the land as it is determined in the open market.

The other objection of the public agencies was to the provision in Section 1248.2(e) that permits the appraiser to capitalize the reasonable net rental that would be derived from the land to be taken, damaged or benefited if the land were improved by improvements that would enhance the value of the property interest for its highest and best use. The Senate Judiciary Committee was strongly in favor of this provision. Some attorneys who frequently represent condemnees did not feel (in view of the strong objections of the public agencies) that the bill needed to go as far as it does. They would be satisfied if the capitalization study based on hypothetical improvements were limited to cases where there were not sufficient comparable sales. During the legislative session, however, the Commission considered and rejected this limitation. Senator Cobey and the Executive Secretary were authorized to amend the bill to insert this limitation only if it became necessary to do so. However, the bill was satisfactory to both the Senate and Assembly Judiciary Committees without such amendment and, accordingly, this limitation was not included in the bill.

The above provision of Senate Bill No. 205 would be useful where

land to be taken, damaged or benefited is unimproved or where the existing improvements do not enhance the value of the land for its highest and best use. In these cases, a capitalization of the reasonable net rental value of the land as unimproved or as improved with its uneconomical improvement would not be as useful as a capitalization study that capitalized the reasonable net rental value attributable to the land if it were improved by improvements that would enhance the value of the land for its highest and best use. For example, take an unimproved lot in the center of a city where there are no sales of comparable lots. Assume that the highest and best use of the lot is for an office building and that there are comparable sales of office buildings. The provision permits the appraiser to determine what the lot as improved by an office building would yield in rent and to capitalize that rent. The amount so determined is the market value of the lot and building. The cost of the construction of the office building is then deducted from the capitalized value of the rent and the remainder is the value of the lot.

(4) Nature of improvements on and uses of property in vicinity. Subdivision (g) of Section 1248.2 preserves the substance of the last sentence of Section 1845.5. Senate Bill No. 205 proposed the repeal of Section 1845.5. Subdivision (g) was added to Senate Bill No. 205 to eliminate objections that evidence covered by the last sentence of Section 1845.5 could not be considered (under Senate Bill No. 205) by the expert in forming his opinion. No one objected to the addition of this provision.

(5) Offers to purchase the condemned property. S.B. No. 205 -- Section 1248.2(c) -- as amended provides that a condemnee's expert may

consider, in forming his opinion of value, an offer which "(i) is an offer to purchase or lease which included the property or property interest to be taken, damaged or benefited, (ii) is a bona fide, open market transaction, not affected by the acquisition or proposed improvement and is made by a person ready, willing and able to buy or lease at the time the offer was made and (iii) is introduced by the owner of the property or property interest for which the offer to purchase or lease was made." The public agencies objected to this provision at the legislative hearings and when the bill was on the Governor's desk. Attorneys who ordinarily represent condemnees believe that this provision is very desirable although they would prefer to see all offers come in.

In its original form, S.B. No. 205 did not permit an expert witness to base his opinion of value upon any offers. The Commission recommended the exclusion of this type of evidence because oral offers are easy to fabricate and because of the difficulty of laying an adequate foundation for an offer. However, as the Commission's report (pages A-7 and A-8) indicates, the Commission had considered both offers on the property to be taken and offers on other property together. The matter was reconsidered during the legislative session, and the Commission concluded that the objection made to written offers generally -- that the range of collateral inquiry would be too great -- is a good deal less valid insofar as bona fide offers to purchase the very property being valued are concerned and that, as pointed out below, the relevance of such evidence is great. Hence, the Commission drafted the provision of the bill which permits offers to purchase the property being valued to be considered by the expert in forming his opinion -- but only if such offers are in fact bona fide

and are made in the open market by persons willing and able to buy. The Commission did not propose that the bill be so amended, however. The amendment was made by the Senate Judiciary Committee.

This provision of S.B. No. 205 is actually more restrictive than existing case law which indicates that opinions of value may be based on offers to purchase the property being condemned. It is true that People v. LaMacchia [21] held that it was error to permit the price offered for the property being condemned to be stated on direct examination. But Mr. Justice Traynor, concurring, said: "It is my opinion that when, as here, the offer is bona fide and is for the identical property, and is by a purchaser able and willing to buy, evidence of the offer should be admitted." [22] And, significantly, People v. LaMacchia was overruled in the Faus [23] case. This is a strong indication that offers may now be considered by appraisers and may be related on direct examination. Moreover, in City of San Diego v. Boggeln, [24] the court held that the trial court committed no error when it refused to strike the testimony of an expert who relied in part upon an offer made to the condemnee to purchase the subject property.

Thus, Section 1248.3, insofar as it relates to offers, is both sensible and conservative. The safeguarding foundational requirements will be difficult to establish. But, if they are, (in the words of Justice Traynor) "evidence of the offer should be admitted." [25]

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21. 41 Cal.2d 738 (1953).
22. 41 Cal.2d at 756.
23. 48 Cal.2d 672 (1957).
24. 164 Cal. App.2d 1 (1958).
25. 41 Cal.2d at 756.

(6) Consideration of taxes in determining reasonable net rental value. Objection was made that under Section 1248.3(d) the appraiser could not consider actual or estimated taxes in determining the reasonable net rental value of the property to be taken, damaged or benefited. Accordingly, Section 1248.3(d) was amended to make it clear that taxes could be considered for this purpose. No one objected to this amendment.

(7) Apportioning sales price of comparable sale between land and improvements. Subdivision (e) of Section 1248.3 was amended to provide that an appraiser could apportion the price of a particular comparable sale between land and improvements for the purpose of comparison with the property to be taken, damaged or benefited. The amendment was placed in the bill at the request of the Senate Judiciary Committee.

(8) Permitting cross-examination of a witness upon whose opinion a witness for adverse party based his opinion. At its July 1961 meeting the Commission decided to add the substance of the following section to Senate Bill No. 205:

> SEC. 5. Section 1248.6 is added to the Code of Civil Procedure to read:
>
> 1248.6. If a witness testifies to his opinion of the value of the property or property interest to be taken, damaged or benefited and testifies that such opinion is based in whole or in part upon the opinion or statements of another person, such other person may be called as a witness by the adverse party and examined as if under cross-examination concerning the subject matter of his opinion or statements.

If the above section is added, the remaining sections of the bill will be renumbered.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

An act to add Sections 1248.1, 1248.2, 1248.3 and 1248.4 to, and to repeal Section 1845.5 of, the Code of Civil Procedure, relating to eminent domain.

The people of the State of California do enact as follows:

SECTION 1. Section 1248.1 is added to the Code of Civil Procedure, to read:

1248.1. (a) The amounts to be ascertained under subdivisions 1, 2, 3 and 4 of Section 1248 may be shown only by the opinions of witnesses qualified to express such opinions and the owner of the property or property interest sought to be taken, damaged or benefited. Such a witness may, on direct or cross-examination, state the facts and data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion; and his statement of such facts and data is subject to impeachment and rebuttal. [~~The owner of the property or property interest sought to be taken or injuriously affected is presumed to be qualified to express such opinions.~~]

(b) Nothing in this section prohibits a view of the property or the admission of any other competent evidence, including but not limited to evidence as to the nature and condition of the property and the character of the improvement proposed to be constructed by the plaintiff, for the limited purpose of enabling the court, jury or referee to understand and apply the testimony given under subdivision (a) of this section; and such evidence is subject to impeachment and rebuttal.

SEC. 2. Section 1248.2 is added to the Code of Civil Procedure, to read:

1248.2. The opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is admissible only if the court finds that the opinion is based upon facts and data that a willing purchaser and a willing seller, dealing with each other with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the price at which to purchase and sell the property or property interest to be taken, damaged or benefited [~~or injuriously affected~~], which facts and data must be relevant to the amount to be so ascertained and may include but are not limited to:

(a) The price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest to be taken, damaged or benefited [~~or injuriously affected~~] or any part thereof if the sale or contract was freely made in good faith within a reasonable time before the date of valuation.

(b) The price and other terms and circumstances of any sale of or contract to sell and purchase [~~of~~] comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(c) The rent reserved and other terms and circumstances of any lease which included the property or property interest to be taken, damaged or benefited [~~or injuriously affected~~] or any part thereof which was in effect within a reasonable time before the date of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other

measurable portion of gross sales or gross income from a business conducted on the leased property.

(d) The rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on such property in cases where the rental is customarily so fixed.

(e) The capitalized value of the reasonable net rental value attributable to the property or property interest to be taken, damaged or benefited, [~~or injuriously affected, including reasonable rentals customarily fixed by a percentage or other measurable portion of gross sales or gross income of a business which may reasonably be conducted on the premises,~~] as distinguished from the capitalized value of the income or profits attributable to the [~~any~~] business conducted thereon, which may be based on a consideration of (1) the reasonable net rental value of the land and the existing improvements thereon and (2) the reasonable net rental value of the property or property interest if the land were improved by improvements that would enhance the value of the property or property interest for its highest and best use. In determining reasonable net rental value for the purposes of this subdivision:

(1) A witness may consider the rent reserved and other terms and circumstances of any lease which may be considered under subdivision (c) or (d) of this section.

(2) A witness may not base his calculation on an assumed rental under an assumed lease which is fixed by a percentage or other measurable portion of gross sales or gross income from a business on such property unless rentals of property for that kind of business are customarily so fixed.

(f) The value of the property or property interest to be taken, damaged or benefited [~~or injuriously affected~~] as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

(g) The nature of the improvements on properties in the general vicinity of the property or property interest to be taken, damaged or benefited and the character of the existing uses being made of such properties.

SEC. 3. Section 1248.3 is added to the Code of Civil Procedure, to read:

1248.3. Notwithstanding the provisions of Section 1248.2, the opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible if it is based, wholly or in part, upon:

(a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was made for a public use for which property may be taken by eminent domain.

(b) The price or other terms and circumstances of any offer made between the parties to the proceeding to buy, sell or lease the property or property interest to be taken, damaged or benefited, [~~or injuriously affected,~~] or any part thereof.

(c) The price at which an offer or option to purchase or lease the property or property interest to be taken, damaged or benefited [~~or injuriously affected~~] or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease, unless:

(1) [S]uch option, offer, or listing is introduced by a party as an admission of another party to the proceeding; but nothing in this paragraph

[~~subdivision~~] permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1248.1.

(2) Such offer (i) is an offer to purchase or lease which included the property or property interest to be taken, damaged or benefited, (ii) is a bona fide, open market transaction, not affected by the acquisition or proposed improvement and is made in writing by a person ready, willing and able to buy or lease at the time the offer was made and (iii) is introduced by the owner of the property or property interest for which the offer to purchase or lease was made.

(d) The value of any property or property interest as assessed for taxation purposes~~.~~ , but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest to be taken, damaged or benefited.

(e) An opinion as to the value of any property or property interest other than that to be taken, damaged or benefited; [~~or injuriously affected~~] but this subdivision does not prohibit a witness, who has considered a particular comparable sale, contract to sell and purchase, or lease, from apportioning the price of that transaction between land and improvements for the purpose of comparison with the property or property interest to be taken, damaged or benefited.

(f) The influence upon such amount of any noncompensable items of value, damage or injury.

(g) The capitalized value of the income or rental from any property other than the property to be taken, damaged or benefited [~~or injuriously~~

affected].

SEC. 4. Section 1248.4 is added to the Code of Civil Procedure, to read:

1248.4. If the court finds that the opinion of a witness as to the amount to be determined under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible because it is based in whole or in part upon incompetent facts or data, the witness may then give his opinion as to such amount after excluding from consideration the facts or data determined to be incompetent.

SEC. 5. Section 1845.5 of the Code of Civil Procedure is repealed.

SEC. 6. This act does not apply to any action or proceeding that has been brought to trial prior to the effective date of this act.

Mtg

6/26/61

MEMORANDUM RE: S.B. NO. 205

Senate Bill No. 205 was prepared by the California Law Revision Commission. The Commission understands that the Department of Public Works and the office of the Attorney General object to the bill on two grounds: First, that the bill would make certain undesirable changes in the existing law and, second, that the bill will result in increased costs of State property acquisition. This memorandum is submitted by the Commission to present background information concerning Senate Bill No. 205 and to present certain information relating to the objections of the Department of Public Works and the office of the Attorney General.

PURPOSE OF BILL

Briefly, S.B. No. 205 provides that the only direct evidence of the value of the property involved in an eminent domain case is the opinions of expert witnesses. The bill provides that these experts may fully state the reasons for their opinions on direct examination. But their opinions may be based only on factors that buyers and sellers in the market place take into consideration to determine value. To give some certainty to this basic standard, S.B. No. 205 lists certain factors that may be considered by an expert witness when relevant and lists certain other factors upon which an opinion cannot be based.

Senate Bill No. 205 is explained in considerable detail in the recommendation of the Commission contained in its pamphlet entitled "Evidence in Eminent Domain Proceedings." This pamphlet also contains the research study prepared by the Commission's research consultant.

HISTORY AND BACKGROUND OF BILL

Senate Bill No. 205 is the result of two years of study by the Law Revision Commission. Senate Bill No. 205 is the result of approximately

two years of study by the Law Revision Commission. The Commission considered a thorough research study prepared by the Commission's research consultant, the law firm of Hill, Farrer and Burrill of Los Angeles. This firm has practiced in this field for many years. The members of this firm who participated in the preparation of the study have extensive experience in the trial of condemnation cases. Some of them have had substantial experience as trial attorneys for public agencies. One or more members of the consultant firm attended Commission meetings when the study and the Commission's recommendation were being considered. Representatives of the Department of Public Works also attended most of the meetings of the Commission when the subject matter of Senate Bill No. 205 was considered and the comments and suggestions of the Department of Public Works were carefully considered by the Commission.

A preliminary draft of the recommendation and statute was prepared by the Commission and distributed to more than 200 persons (representing both condemnees and condemnors) who had indicated their interest in legislation relating to eminent domain. More than 100 pages (many single spaced) of comments were received from the Attorney General, The Department of Public Works, several county counsel offices, city attorneys, judges, appraisers and private practitioners. These comments were carefully considered by the Commission before the final draft was prepared.

Senate Bill No. 205 received exhaustive legislative hearings.

Senate Bill No. 205 received exhaustive legislative hearings. The Senate and Assembly Interim Committees on Judiciary each held a hearing on the bill prior to the 1961 legislative session. The Senate Judiciary Committee held two hearings on the bill and a subcommittee of the Senate Judiciary

Committee devoted about six hearings of approximately three hours each to the Commission's legislation relating to eminent domain. The Senate Judiciary Committee heard from a number of witnesses representing public agencies. The Subcommittee of the Senate Judiciary Committee heard witnesses representing both property owners and witnesses representing public agencies. During the legislative process a number of amendments were made. For the most part, these amendments were made to express more fully the Commission's intention so that there might be no doubt as to the statute's meaning, even to a person reading it in bad faith. There was one modification in principle, however, relating to the admissibility of prior offers to buy the property being condemned. The Commission met during the session and considered all of the suggested amendments and the objections thereto. The amendments adopted were drafted by the Commission.

The Assembly Judiciary Committee also held a long hearing on S.B. No. 205 during the 1961 legislative session, and representatives of public agencies were heard.

A State Bar Committee carefully considered the bill. A special committee of the State Bar was appointed to consider the Commission's recommendations relating to eminent domain. A majority of the State Bar Committee approved the bill in its amended form.

Conclusion. S.B. No. 205 and all of its amendments have been subjected to the most thorough scrutiny by the Law Revision Commission, its research consultant, attorneys representing both condemnees and condemnors and a special committee of the California State Bar. S.B. No. 205 represents a sound compromise of the extreme views of condemnors

and condemnees. The State Bar Committee recommends enactment of the bill as does the Law Revision Commission. The Assembly Judiciary Committee approved the bill unanimously and it is believed that the Senate Judiciary Committee also approved the bill unanimously.

EFFECT OF S.B. NO. 205 ON PRESENT LAW

The most important effect of S.B. No. 205 is to make clear that an expert witness may state all of the reasons for his opinion of value on direct examination. Whether the bill states or changes the existing law in this regard is in doubt. Before County of Los Angeles v. Faus[1] was decided in 1957, the law was settled in California that the sales prices of comparable property,[2] offers for the condemned property[3] and the capitalized rental value of the condemned property[4] were all inadmissible on direct examination.

Of course, these rules were desired by the attorneys for condemning agencies, for the burden of proving the value of the condemned property is on the condemnee. Hence, the more evidence that may be excluded on technical grounds, the harder it is for the condemnee to prove that his property is worth anything.

It was also settled, though, that even though such evidence couldn't be mentioned on direct examination, an appraiser could properly base his opinion on comparable sales,[5] upon the capitalized fair rental value of the property[6] and upon offers to buy the property in question.[7] Moreover, it was held that an appraiser could base his opinion on the income

1. 48 Cal.2d 674 (1957)
2. Central Pac. R.R. v. Pearson, 35 Cal. 247 (1868)
3. People v. LaMacchia, 41 Cal.2d 738 (1953)
4. City of Los Angeles v. Deacon, 119 Cal. App. 491 (1932)
5. Central Pac. R.R. v. Pearson, 35 Cal. 247 (1868)
6. People v. Dunn, 46 Cal.2d 539 (1956)
7. People v. LaMacchia, 41 Cal.2d 738 (1953)

from a lease based upon a percentage of gross income.[8]

In County of Los Angeles v. Faus,[9] the cases holding that an appraiser could not state all of the reasons for his opinion on direct examination were overruled. The overruled cases involved offers to buy the condemned property,[10] evidence of income from the property[11] as well as sales, even though the Faus case itself involved only sales.

Despite the fact that all authorities for the exclusion of evidence of rental value on direct examination appear to have been overruled, condemners' attorneys cling to the notion that such evidence is inadmissible because the Faus case did not directly involve such evidence. On the other hand, California Speciality Handbook No. 4, California Condemnation Practice, Continuing Legal Education of the Bar (1960) § 13.55 at pp. 303-306, suggests that a capitalization of income study, a replacement cost less depreciation (summation) study may be presented on direct examination.

Thus, it appears that S.B. No. 205 may not change the law at all insofar as it declares that the appraiser may give all of the reasons for his opinion on direct examination. Certainly, insofar as offers to buy the property being condemned are concerned, the bill appears to state the existing law, for the courts have held on several occasions that such offers may be considered by an appraiser and stated on direct examination.[13]

8. People v. Frahm, 114 Cal. App.2d 61 (1952)
9. 48 Cal.2d 672 (1957)
10. People v. LaMacchia, 41 Cal.2d 738 (1953)
11. City of Los Angeles v. Deacon, 119 Cal. App. 491 (1932)
12. Deleted
13. City of San Diego v. Boggeln, 164 Cal. App.2d 1 (1958); People v. Cava, 314 P.2d 45 (dismissed on rehg.) (1957)

Insofar as the capitalized value of the reasonable rental value of the property is concerned, no case has arisen since the Faus case involving the problem. But the fact that the Deacon[14] case which involved income evidence was overruled in the Faus case indicates that such data is now admissible on direct. And as People v. Frahm[15] held that the income from the property could be considered to determine the value of a lease which was based on a percentage of gross receipts, it is likely that this type of evidence, too, is now admissible on direct. However, if there is any doubt remaining concerning the right of the appraiser to give all of his reasons on direct examination, this bill removes that doubt.

Although the bill may not change the law insofar as it declares that an appraiser may give all the reasons for his opinion on direct examination, the bill does change the law in another respect. The law is now settled that sales of property to condemning agencies are admissible if such sales can be shown to be voluntary and not made under threat of condemnation.[16] The Commission was advised by the Department of Public Works while this recommendation was under consideration that this aspect of the decision in the Faus case has been a major factor in increasing the length of condemnation trials.[17] The Commission, too, is convinced

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14. 119 Cal. App. 491 (1932)
15. 114 Cal. App.2d 61 (1952)
16. County of Los Angeles v. Faus, 48 Cal.2d 672 (1957)
17. In a letter upon this subject, dated July 25, 1960, addressed to the Law Revision Commission, the Legal Division of the Department of Public Works stated: ". . . [O]ur experience has indicated that condemnation trials have definitely been lengthened, sometimes as much as several days, because of some of the statements contained in that opinion [in the Faus case]. However, this result has not ensued from the single point in that case that sales prices are admissible on direct examination. Rather, the delay has resulted from the language indicating that sales may be considered direct evidence of value, that acquisitions of the condemnor may be admitted if the court finds that they can be considered to represent market value, etc."

that the necessary foundation for this evidence is so difficult to lay and so few sales to condemning agencies are completely free from the influence of the threat of condemnation that litigating the admissibility of this type of evidence consumes an inordinate amount of trial time and occasions an inordinate number of appeals.[18] Therefore, this bill provides specifically that this type of evidence may not be used by an appraiser as a basis for his opinion of the value of the condemned property.

The Department of Public Works also advised the Commission that an uncertainty created by the Faus decision has also resulted in increasing the length of condemnation trials.[19] This is the uncertainty whether the valuation data relied upon by an expert witness is admitted as direct evidence of value or whether such data is admitted only to explain and support the expert's opinion. The Commission has also been advised by its consultant that this uncertainty has resulted in conflicting decisions by trial courts and an increase in the amount of time consumed at trial. This uncertainty has also generated a number of appeals[20] and will continue to do so until the matter is finally laid to rest by a Supreme Court opinion or by statute. S.B. No. 205 resolves this uncertainty and declares that the

18. Despite the fact that the Faus case settled the question of the admissibility of sales to condemning agencies, appeals still arise over the admissibility of sales. See, e.g., Covina Un. H. S. Dist. v. Jobe, 174 Cal. App.2d 340 (1959); County of San Mateo v. Bartole, 184 A.C.A. 461 (1960); So. San Francisco etc. Sch. Dist. v. Scopesi, 187 A.C.A. 54 (1960).
19. See letter, footnote 17, supra.
20. See e.g., People v. Nahabedian, 171 Cal. App.2d 302 (1959); People v. Murray, 172 Cal. App.2d 219 (1959); Redevelopment Agency v. Modell, 177 Cal. App.2d 321 (1960); People v. Rice, 185 A.C.A. 242 (1960).

only direct evidence of value is the opinion of the expert. The data related by the expert is admitted only to show the basis for his opinion.

OBJECTIONS RAISED BY DEPARTMENT OF PUBLIC WORKS AND OFFICE OF ATTORNEY GENERAL

The Commission understands that objections have been raised to S.B. No. 205 on the ground that it changes the law as to the matters upon which an opinion of value may be based. In this connection, questions have been raised whether S.B. No. 205 will change the law (1) to permit an appraiser to consider the enhancement in value to the condemned property that is caused by the proposed public improvement for which the property is being taken, (2) to permit an appraiser, for purposes of determining the value of the property by capitalizing its reasonable net rental value, to consider rental income based upon a percentage of gross receipts, (3) to permit an appraiser to consider, for purposes of determining the value of the property by capitalizing its reasonable net rental value, the reasonable net rental value of the land and the existing improvements thereon and the reasonable net rental value of the property if the land were improved by improvements that would enhance the value of the land for its highest and best use, and (4) to permit an appraiser to consider bona fide offers to buy the property being condemned.

(1) Enhanced value caused by proposed improvement. The objection that S.B. No. 205 would permit an appraiser to base his opinion upon noncompensable factors -- such as enhancement in value resulting from the proposed improvement -- was raised during the legislative session.

Even though the Commission did not believe that the original bill changed the law, the Commission considered and approved two amendments to the bill to eliminate any uncertainty as to the bill's meaning.

So far as the original bill was concerned, Section 1248.2 specifies the matters upon which the opinion of an expert as to the amounts to be ascertained under Section 1248 may be based. As the Commission's recommendation states, Section 1248.2, and all of the rest of the bill, is concerned only with evidence -- not the elements of damage for which compensation must be made. It seemed apparent to the Commission, that an opinion as to the amount of compensation which may be made under Section 1248 could not be based upon items of damage which are noncompensable under Section 1248, for such an opinion would obviously not be an opinion as to the amount of damage for which compensation must be made. To preclude a misunderstanding as to the meaning of Section 1248.2, the Commission approved an amendment which provides that an opinion must be based upon facts and data "which must be relevant to the amount to be so ascertained," i.e., the amount of compensation to which the condemnee is entitled under Section 1248. And to make the meaning of the bill even clearer, the Commission also approved an amendment which added subdivision (f) to Section 1248.3. Section 1248.3(f) provides that an opinion as to the amounts to be ascertained under Section 1248 may not be based, in whole or in part, upon "the influence upon such amounts of any noncompensable items of value, damage or injury." Hence, since enhancement in the value of the condemned property which results from the proposed improvement is not compensable, an opinion based upon such an enhancement in value is inadmissible under S.B. No. 205. In this respect, there is no change in the existing law proposed in this bill.

(2) and (3) Capitalized value of reasonable net rental value. S.B. No. 205 clearly permits an expert witness to base an opinion of value upon the capitalized value of the net rental income that may reasonably be derived from the property to be taken, damaged or benefited where such facts and data are relevant. It is not clear that this is a change in the existing law. Under existing law, an appraiser may base an opinion of the market value of the condemned property upon the capitalized value of its reasonable rental income.[21] Moreover, he may base his opinion of the value of property being condemned upon a reasonable rental income fixed by a percentage of the gross receipts, and for this purpose evidence of a gross receipts lease may be offered in evidence.[22] In People v. Frahm,[23] the court permitted an expert to testify not only to the existing income from the lease, but to what the reasonable rental income would be from a hypothetical lease if the property were then leased at prevailing market prices.

S.B. No. 205 does no more than to permit an expert witness to relate his capitalization study on direct examination. Certainly, in the state of the real estate market in 1961, evidence of this sort should be received, because this is what buyers and sellers rely on in determining the price at which to buy or sell property. Although the element of personal management is a factor that may have some effect on the amount of rental received under a lease based upon gross sales, the Commission has been advised, and individual Commissioners know from their own experience, that buyers and sellers know the potential business volume

21. People v. Dunn, 46 Cal.2d 539 (1956)
22. People v. Frahm, 114 Cal. App.2d 61 (1952)
23. Ibid.

for a given location and know that any good management can reach that volume. If leases based upon a percentage of gross receipts were excluded from consideration, many leases entered into on the open market could not be considered in the court room. Commissioner Joseph A. Ball during the discussion of this provision by the Commission reported that the rentals in the great majority of the commercial leases now prepared in his office are based upon a percentage of the gross receipts to be derived from the commercial operation. To deprive the condemnee of the right to introduce such evidence in cases where rentals are customarily fixed by gross receipts leases would be to deprive him of the right to introduce the evidence upon which the real value of his property in the open market is based.

To take a concrete example, suppose that the highest and best use for a given corner lot is for gas station purposes. If the Standard Oil Company approached the owner of the lot to lease it for gas station purposes, they would do so upon the basis of studies of traffic which would indicate with reasonable accuracy the amount of gas which could be pumped from the station. This would indicate to the gas company the estimated revenue from the station and, hence, the amount that could profitably be invested in the station. On the other hand, if a prospective purchaser of the land approached the owner, the purchaser, too, would consult experts to determine the amount of rental income that could be derived from a lease to an oil company. The rentals in leases of this nature are, in many areas, now customarily fixed by a percentage of the gross receipts. But if experts are not permitted to consider leases of this sort to determine the value of the land, the "market value" of the land as it is determined in the court house will bear little, if any,

relation to the value of the land as it is determined in the open market.

Because the trial in the courtroom is to determine the value of the property in the market, the Commission believes that the factors that are taken into consideration in the market should also be considered in court. S.B. No. 205 so declares. Whether this is a change in the existing law may be questioned. Certainly the fact that City of Los Angeles v. Deacon[24] (which merely held that this type of evidence is inadmissible on direct examination) was overruled by the Faus case and the holdings in the Frahm[25] and Dunn[26] cases are strong indications that experts may consider this evidence now. But, whether S.B. No. 205 changes the law in this respect or not, the rule it states is essential if the court is going to determine the value of the property as it exists in the open market.

Under Senate Bill No. 205 the appraiser is permitted on direct examination to advise the jury as to the methods he used in formulating market value. If the opinion is unrealistic and inconsistent with other reasonable opinions of value, it may be exposed on cross-examination and its weight destroyed in the eyes of the jury. If the opinion is based on pure speculation, or if the appraiser uses methods that are clearly inapplicable, the court may exclude the evidence as not relevant.

The report of the Southern Section of the State Bar Committee emphasizes the importance and the necessity of these provisions of the bill:

> Attorneys normally representing property owners, who are compelled to bear the burden of proof as to the value of the property and the severance damage to the remainder, feel that

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24. 119 Cal. App.491 (1932)
25. People v. Frahm, 114 Cal. App.2d 61 (1952)
26. People v. Dunn, 46 Cal. 2d 539 (1956)

legislation such as 1961 Senate Bill 205 is needed in order to make the burden of proof more attainable and to conform the considerations of an appraiser in a condemnation action to those considerations which that same appraiser would make or give in a normal "buyer-seller" appraisal in the open market.

* * *

It is common knowledge that where property is bought and sold for the purpose of producing income, such as multiple residential property, stores, gas stations, industrial buildings, mines, etc., the price which the prospective buyer is willing to pay for the property bears a direct or close relationship to the income which he expects to realize from the ownership of that property. It is also common knowledge that a buyer will not pay more for a particular building or improvement upon the property than it would cost him to rebuild or reconstruct such a structure on other lands. This last rule is, of course, subject to consideration of factors of depreciation and obsolescence.

In view of the above, the appraisal profession has formulated three basic studies upon which their opinions of value are most often based, (1) comparison of sales of similar property, (2) capitalization of income reasonably to be derived from the ownership of the property, and (3) the indicated value of the land plus the reproduction cost of the improvements less their depreciation and obsolescence. The purpose of 1961 Senate Bill 205 is to permit the appraiser to use and rely upon the same class of information which he would use and rely upon in an ordinary "buyer-seller" transaction in the open market.

* * *

Attorneys for the condemning agencies criticized the bill in that it permits the use of capitalization studies, and more particularly the capitalization of percentage leases. These attorneys point out that if the basic data upon which the capitalization study is based, such as gross rental, vacancy factor, capitalization rate, etc., are altered apparently only in minor degree, that substantial differences will result in the value indicated by that study. . . . Although the mathematical delicacy of the capitalization study is well known, such study is still one of the primary considerations made by buyers and sellers in the open market and should not be excluded from condemnation procedures where the jury is seeking to determine the price which could be fixed in such transaction. Where a capitalization study is manifestly illogical and unreasonable, the court, in the exercise of its discretion, will strike it from the record, and where there are substantial variances in such studies, still within the realm of reason, it is within the province of the jury to consider the credibility of the respective contentions.

(4) Offers to purchase the condemned property. Again, S.B. No. 205 clearly indicates that a condemnee's expert may consider, in forming his opinion of value, an offer which "(i) is an offer to purchase or lease which included the property or property interest to be taken, damaged or benefited, (ii) is a bona fide, open market transaction, not affected by the acquisition or proposed improvement and is made by a person ready, willing and able to buy or lease at the time the offer was made."

In its original form, S.B. No. 205 did not permit an expert witness to base his opinion of value upon any offers. The Commission's report, at pages A-7 and A-8, indicates that the Commission's original recommendation considered both offers on the property to be taken and offers on other property together. The Commission recommended the exclusion of this type of evidence because of the difficulty of laying an adequate foundation. However, the matter was reconsidered during the legislative session in view of the objections to the inclusion of bona fide offers on the subject property in the list of incompetent data. The Commission recognized that the objection made to written offers generally -- that the range of collateral inquiry would be too great -- may not be valid insofar as bona fide offers to purchase the very property being valued are concerned. Hence, the Commission drafted the provision of the bill which permits offers to purchase the property being valued to be considered by the expert in forming his opinion -- but only if such offers are in fact bona fide and are made in the open market by persons willing and able to buy.

If this provision makes any change in the existing law, it restricts the extent to which offers may be considered, for few offers will meet the rigid foundational requirements. Existing case law indicates that

opinions of value may be based on offers to purchase the property being condemned. People v. LaMacchia[27] involved an offer to buy the property being condemned. The Supreme Court held that it was error to permit the price offered to be stated on direct examination. Justice Traynor, concurring, objected to the rule which precluded the admission of relevant evidence on direct examination. He said, "It is my opinion that when, as here, the offer is bona fide and is for the identical property, and is by a purchaser able and willing to buy, evidence of the offer should be admitted."[28]

Significantly, People v. LaMacchia was overruled in the Faus[29] case. This is a strong indication that offers may now be considered by appraisers and may be related on direct examination. Moreover, in City of San Diego v. Boggeln,[30] the court held that the trial court committed no error when it refused to strike the testimony of an expert who relied in part upon an offer made to the condemnee to purchase the subject property.

As a matter of fact, in City of Los Angeles v. Deacon,[31] the court pointed out that it is customary for buyers to rely upon evidence of this sort as well as other types of evidence which is made admissible by S.B. No. 205. The court said:

> The only legitimate object of all this testimony was to obtain an answer to the one question: What was the market value of the property being condemned . . .? (Sacramento etc. R. Co. v. Heilbron, (1909) 156 Cal. 408.) In arriving at an answer

27. 41 Cal.2d 738 (1953)
28. 41 Cal.2d at 756
29. 48 Cal.2d 672 (1957)
30. 164 Cal.App.2d 1 (1958)
31. 119 Cal. App. 491 (1932)

> to this question for himself, a person of ordinary business judgment would want to know the answer to a number of preliminary inquiries. It is just possible he would want to know at what figure the property was assessed by the county assessor. He might find it of interest to know what value was put upon it by the appraisers when it was recently involved in a probate proceeding. He certainly would be interested, if it was the market value he sought to determine, in any offers that had been made for the property, and in the price at which it and property similarly situated had recently been sold. He would, most likely, be interested in the amount of profit that had been made in the use to which the property had been put.[32] [Emphasis added.]

The court went on to hold that, despite the relevance of this type of evidence, an appraiser could not explain how such evidence supported his opinion on direct examination. S.B. No. 205 merely declares that the court may hear such relevant evidence as it endeavors to determine what a person "of ordinary business judgment" would pay for the land.

As the courts have indicated, it would be absurd to think that a reasonable buyer, knowing that a seller has declined a previous offer from a willing and able purchaser, would believe that the seller would accept less than the previous offer. And it is difficult to persuade a property owner who has declined a well secured offer because he thought it was not high enough that his property is not worth at least the amount of the offer.

Section 1248.3, insofar as it relates to offers, is a very conservative statute. The safeguarding foundational requirements will be difficult to establish. But, if they are, the Commission believes (in the words of Justice Traynor) "evidence of the offer should be admitted."[33]

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32. 119 Cal. App. at 492-3.
33. 41 Cal.2d at 756.

INCREASE IN COST OF STATE PROPERTY ACQUISITIONS

The Commission understands that the Department of Public Works and the office of the Attorney General believe that Senate Bill No. 205 will increase the cost of State property acquisitions. These public agencies state that the bill will increase the time required for the trial of a condemnation case and the time required to prepare a condemnation case for trial. Moreover, they believe that the bill will result in increased awards in condemnation cases. These objections are considered in some detail below.

Will Senate Bill No. 205 increase the time required for the trial of a condemnation case and the time required to prepare a condemnation case for trial? It is the considered opinion of the Commission that the enactment of S.B. No. 205 will shorten trial time and will not lengthen the time required to prepare for trial. The uncertainties created by the Faus case in regard to the effect of valuation data and in regard to the admissibility of sales to condemners -- which have been the major cause of lengthened trials since that decision -- will be eliminated by this bill. Moreover, under the law as it existed prior to the Faus case, it was necessary for a party to attempt to get his valuation data into evidence through cross-examination of the adverse party's expert witness. (The Commission is advised that this is still true in some trial courts insofar as valuation data, other than sales, are concerned.) Thus, prolonged cross-examination was generated as parties attempted to introduce evidence through indirection that they could not introduce directly. Under this system, the witness principally relying upon particular data never was given the opportunity to explain its relevance -- he was

always asked about the data that supported the adverse party's case. The Commission has been advised that the Faus case, insofar as it declared that sales evidence is admissible on direct examination, has expedited the admission of this data. S.B. No. 205 makes clear that the same rule is applicable to all valuation data. The bill does not make any new evidence admissible -- it merely provides that what is now admissible may be shown on direct examination by the expert who relied on it. Thus, no additional time should be required to prepare the case for trial. In fact, by permitting the evidence to be introduced at the trial in an orderly manner, S.B. No. 205 may actually expedite the preparation of a case for presentation. Accordingly, by substituting a direct method for the introduction of relevant evidence for an indirect, by eliminating the uncertainty concerning the admissibility of this evidence on direct examination, this bill will shorten trial time and will result in better informed juries.[34]

Not only does the Commission believe that the enactment of this bill will shorten trial time, this same opinion has been expressed by the report of the Southern Section of the State Bar Committee:[35]

> The practical effect of this bill will be to shorten trial procedures. The common practice in condemnation trial matters is to test the quality of an appraiser's opinion after he has testified, by motions to strike his testimony, opposing counsel raising the general ground that the opinion of the expert has been based upon improper, irrelevant, and immaterial considerations. Each of these motions requires research and argument on the part of the attorneys and compels

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34. The following excerpt from a letter dated July 29, 1960, sent to the Law Revision Commission by James E. Cox of Tinning and DeLap, Martinez, California, expresses the thoughts of many practitioners in this field of law: ". . . This field of law is ridden with petty, technical restrictions of all kinds which simply prolong trial and all too frequently prevent these matters being tried on their merits. Your basic idea to admit any evidence reasonable people in the real world consider in fixing consideration is extremely sound . . . ."

35. The Northern Section of the Committee did not make a written report.

the judge to make a ruling based upon numerous case authorities, many of which are, or appear to be, in conflict. Senate Bill 205 will clearly define the basis upon which such motion to strike testimony can be made, and where such grounds manifestly do not appear, none will be made, and the time of the court will not be consumed in ruling upon them.

Will S.B. No. 205 increase awards in condemnation cases? No one can tell what effect this bill will have on awards. There is authority that the evidence it permits to be introduced is now admissible and may now be used as the basis for expert opinion, although condemners' attorneys generally assert that such evidence is not admissible on direct examination. Certainly, it must be conceded that some trial courts do follow the pre-Faus cases and exclude valuation data, other than sales, on direct examination. But others do not. In any event, appraisers base appraisals on the type of information involved here at the present time. If appraisers are permitted to express their reasons on direct examination, the juries will be able to understand their opinions better and, as a result, verdicts will be made by better-informed juries. But, no one can predict whether this will increase or decrease awards. An inordinately high verdict is as apt to be made by an ill-informed jury as it is by a well-informed jury --perhaps an inordinately high verdict is more apt to be made by an ill-informed jury. No one can say. All that can be said with confidence is that, if this bill is enacted, the jury will have before it the same considerations that buyers and sellers in the open market take into consideration in determining the price to be paid. As the price that such buyers and sellers would agree upon is what the jury is trying to determine, the Commission believes that this bill will result in more just verdicts. Whether such verdicts will, on the average, be higher or lower than present verdicts, it is impossible to predict.