36(L) 7/13/65

Memorandum 65-45

Subject: Study No. 36(L) - Condemnation Law and Procedure (Just Compensation and Measure of Damages Generally)

The policy questions involved in the problem of just compensation and measure of damages are complex and interrelated. A preliminary question is whether the market value concept should be retained as the basic measure of damages. Other major questions include: (1) Whether special benefits should offset the entire award or only the award for damages to the part remaining? (2) What constitutes the larger parcel (a matter that is primarily important for severance damages and special benefits)? (3) Should additional compensation be given for such items as incidental business losses, moving expenses, delay compensation, consequential damages, and the like?

Attached to this memorandum are the following research studies:

The Market Value Concept

Date of Valuation

Benefits

The Larger Parcel

The staff suggests that the Commission undertake its study of this area of eminent domain law with the objective of ultimately publishing a pamphlet containing a "Tentative Recommendation and a Study Relating to Just Compensation and Measure of Damages." The research study would be the result of combining a number of the research studies we have on hand covering various aspects of the problem and preparing material to cover matters not covered by the studies prepared by our consultant. If this suggestion seems sound, we will begin to devote the staff time necessary to consolidate and supplement the various studies. We may want, however, to distribute mimeographed tentative recommendations on particular aspects of the problem to our special

mailing list for comment prior to preparing the comprehensive tentative recommendation.

THE MARKET VALUE CONCEPT

As the attached research study on "The Market Value Concept" indicates, two possible alternatives to the present market value standard are: (1) value to the taker and (2) value to the owner. The research consultant concludes--and the staff agrees--that, despite its inherent weaknesses, the market value standard should be retained as the basic standard in eminent domain cases. Despite its limitations, it is probably more objective and ascertainable than either of the alternatives. Moreover, it usually has at least a rough correlation with value to the owner--indemnity. In the final analysis, the market value standard must be retained for lack of a better. See the research study for further discussion.

Thus, the preliminary policy question presented for determination is: Should the market value standard be retained as the basic criterion for just compensation in eminent domain cases? (Approval of the market value standard merely rejects the two other possible alternatives--value to the owner and value to the taker; it does not preclude later taking actions based on an indemnity theory, such as providing compensation for moving costs, lost profits, etc., as separate items of compensation or offsetting special benefits against the award for the part taken.)

GENERAL SCHEME FOR DETERMINING JUST COMPENSATION

It might be helpful in considering the various aspects of the problem of just compensation and measure of damages to have in mind a general scheme that might provide more assurance that the property owner will be made whole and, at the same time, provide protection against an undue increase in the cost of public improvements.

The general scheme suggested by the staff and by our consultant in various portions of his research studies is the one that was adopted by Wisconsin in its 1959 statute and by Pennsylvania in its 1964 code:

(1) The basic measure of damages is the market value standard (the market value of the part taken and the decrease in the market value of the part remaining).

(2) In addition to the compensation provided under (1), just compensation also includes damages for certain other injuries or expenses (which in Pennsylvania include removal of machinery, equipment, or fixtures, removal expenses, business dislocation damages, moving expenses, delay compensation, consequential damages, and damages for vacation of roads).

(3) Special benefits are offset against the entire award, not just the award for damages to the part remaining.

(4) Any change in fair market value prior to the date of condemnation that was substantially due to the general knowledge of the imminence of condemnation is disregarded in determining market value.

(5) The problem of what constitutes the larger parcel is clarified by expressly providing that several non-contiguous tracts owned by one owner which are used together for a unified purpose constitute one parcel.

The Pennsylvania scheme is set out in Sections 601-614 of the Pennsylvania Eminent Domain Code. The Wisconsin scheme is set out in Sections 32.09 and 32.19. The various elements of damages discussed above are covered in more detail later in this memorandum and in other memoranda.

DAMAGES FOR THE PART TAKEN, SEVERANCE DAMAGES, AND SPECIAL BENEFITS

Existing California law generally.

Section 14 of Article I of the California Constitution provides that: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . . ."

Where an entire parcel is taken, the market value of the property is the measure of just compensation.

Where only a part of a parcel is taken, the measure of just compensation is: The market value of the part taken plus the special damages and minus the special benefits (but not in excess of the extent of special damages), if either exists, to the remaining property caused by the taking and the construction of the public improvement in the manner proposed by the condemnor. (See Code of Civil Procedure Section 1248.) This type of damage to the remaining property is generally known as "severance damage." Generally speaking, it is measured by the difference in value, if any, between the remaining property in its "before condemnation" condition and considered as a part of the entire property, and the remaining property in its "after condemnation" condition and considered as a separate parcel.

Definition of "market value."

The California Supreme Court has defined market value as:

> . . . the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable.

Sacramento etc. R. R. v. Heilbron, 156 Cal. 408, 409, 104 Pac. 979, 980 (1909).

See Chapter 3 of California Condemnation Practice for a detailed consideration of fair market value.

The "highest price" rule is criticized in California Condemnation Practice at pages 42 and 43 as follows:

a. [§3.6] Highest Price v. Fair Market Value

> One California case has determined that "market value" is the highest price, estimated in terms of money, that the property would sell for on the open market, allowing a reasonable time to find a well-informed buyer familiar with the uses for which the property can be adapted. State v. Ricciardi (1943) 23 C.2d 390, 144 P.2d 799. In Ricciardi the Court stated that actual value is established by market value. Yet, it is doubtful that fair market value is the "highest price" obtainable for the property. Ricciardi followed Sacramento etc. R. R. Co. v. Heilbron (1909) 156 C. 408, 104 P. 979, in adopting the "highest price" rule. Heilbron has been cited many times, but only Ricciardi specifically adopted its rule of the "highest price."
>
> A "highest price" rule raises serious practical problems, for no appraiser can fix with reasonable certainty one single amount as the "market value" of the property. His appraisal necessarily consists of a range between two amounts. "Fair market value" is a value within the range from the "lowest market value" to the "highest market value." The appraiser cannot reasonably testify that a specific amount is the highest or lowest market value, but he can reasonably testify that a specific amount is the "fair market value." The use of the phrase "highest price in terms of money" in jury instructions and appellate court decisions should not be understood as the highest conceivable price in view of all the purposes for which the land is adapted. Undoubtedly, the phrase merely means that the jury should find the highest price that could reasonably be considered as fair market value of the property.

The use of the phrase "in terms of money" also causes confusion as is indicated by the following discussion from pages 43-44 of California Condemnation Practice:

b. [§3.7] Cash Value v. Value in Terms of Money

> Necessarily, fair market value can be expressed only in terms of money. Yet "cash value"--in the market place, in business, and in the economics of the facts of life--is entirely different from "market value" or from the value of the property "in terms of money."
>
> "In terms of money" is an expression used by experts in fixing an amount in money as a value--i.e., the market value of the property, instead of fixing the value in some other terms, as, for example, its value in beans, wheat, or steel. Thus, "money" does not mean "cash" or the medium of payment, but only the gross amount of money that may be paid by the purchaser, including that part paid in cash and that part paid for over a period of time and secured by an encumbrance.

The principal authority that market value is the cash value of the property is Sacramento etc. R. R. Co. v. Heilbron (1909) 156 C. 408, 104 P. 979. Heilbron approved an instruction by the trial judge to the effect that market value was based upon the ordinary cash value of the property. Heilbron held that the test for fair market value is not the value of the property for a special purpose but is its value in view of all the purposes to which it is naturally adapted. Two cases since Heilbron have referred to "cash value" in dictum. See City of San Rafael v. Wood (1956) 144 C.A.2d 604, 607, 301 P.2d 421, 424; Metropolitan Water Dist. v. Adams (1940) 16 C.2d 676, 680, 107 P.2d 618, 620. But in Pacific Sav. & T. Co. v. Hise (1945) 25 C.2d 822, 155 P.2d 809, the trial court eliminated the words "cash" and "cash feature" in an instruction defining fair market value, and this elimination was approved by the Supreme Court.

Heilbron merely approved an instruction that incidentally used the word "cash" instead of "in terms of money" and since the opinion, in phrasing the rule on measure of damages, uses the words "in terms of money," it is doubtful that the Court recognized a distinction between "cash" and "in terms of money." In State v. La Macchia (1953) 41 C.2d 738, 751, 264 P.2d 15, 24, Heilbron was quoted for its rule that measure of damages is "in terms of money." Since it is likely that Heilbron will not be followed as to its rule on instructions, counsel should not submit instructions using "in terms of money" rather than "cash." See § 12.45 for form of instruction.

In view of this analysis, we suggest that the substance of the definition contained in Evidence Code Section 814 (part of the 1965 evidence-in-eminent-domain-proceedings act) be incorporated into the proposed legislation. This proposed definition would read in substance:

> Fair market value is the price as of the date of valuation which would be agreed to by a willing purchaser and a willing seller, dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, taking into consideration the matter upon which an opinion as to the value of the property may be based under Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code.

By way of comparison, Evidence Code Section 814 reads:

> 814. The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property and which a willing purchaser and a willing seller, dealing with each other in the open market and 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 sell the property or property interest being valued, including but not limited to the matters listed in Sections 815 to 821, unless a witness is precluded by law from using such matter as a basis for his opinion

We believe that the proposed definition is consistent with, and is a desir[able] supplement to, Section 814.

It may be of interest to compare the proposed definition with Section 603 of the Pennsylvania statute:

603. Fair Market Value.--Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(1) The present use of the property and its value for such use.

(2) The highest and best reasonably available use of the property and its value for such use.

(3) The machinery, equipment and fixtures forming part of the real estate taken.

(4) Other factors as to which evidence may be offered as provided by Article VII.

The comment to this section of the Pennsylvania code should also be noted. The staff prefers the proposed definition suggested above to the Pennsylvania provision. You will note, however, that we have used some of t[he] Pennsylvania language in drafting the proposed provision.

It is of interest to note that Section 32.09 of the Wisconsin statute provides the rules governing determination of just compensation and uses t[he] term "fair market value" but does not define the term. However, one of th[e] rules stated is:

32.09. In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

* * * * *

(2) In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value.

We see no necessity for adding any similar language to the definition proposed by the staff.

See also the Maryland definition of "fair market value" set out on page 11 of this memorandum. The phrase "as of the date of valuation" in the definition proposed by the staff is taken from the Maryland definition.

Effect of prior notice of proposed improvement upon market value.

Should the condemnee be accorded any enhancement in market value due to the proposed taking and, by the same token, should any diminution in value because of the pending taking favor the condemner? Should the rule be uniform as regarding enhancement as well as diminution in value because of the effect that prior notice may have on the subject property or adjacent property?

These questions are the subject of the major portion of the research study on "Problems Connected With the Date of Valuation in Eminent Domain Cases." We summarize the pertinent portion of the research study below, but we urge you to read pages 6-55 of the study.

It is difficult to determine firm rules as to whether enhancement or diminution in market value will be considered when such enhancement or diminution is the result of an anticipated improvement or a delay in making an improvement. This is because the fact situations involved in the cases are such as to leave doubt as to whether the courts are including or excluding an enhancement or diminution due to the fact that the anticipated improvement is a contemplated one, a proposed one, one to which the condemner is committed, or one which may merely be possible or probable.

Enhancement in market value. It is fairly clear that in those situations where it is certain that a particular parcel of land will be taken in the

foreseeable and proximate future, the majority rule is that any enhancement, as a result of such knowledge, to that particular land or adjacent land is excluded and discounted in determining market value at the subsequent date of valuation. By the same token, the majority rule also would seem to be that if it is probable that particular land is to be included within a proposed or anticipated improvement, any subsequent enhancement as a result of that knowledge will be excluded in determining value at the date of valuation. The greatest difficulty in ascertaining the correct measure of value in light of the anticipated improvement unfortunately occurs in what is probably the bulk of the cases connected with this subject--when it is known the general area where a probable improvement might be constructed but it is uncertain what particular property will be taken. The majority of the courts seem to adopt a vague standard that enhanced value as the result of such knowledge is allowable to show market value providing it was not yet probable that the particular property would be taken.

The majority rule excludes enhancement of value directly due to the proposed improvement on the basis that it is unfair to the condemner to compel it to pay for a value that it has itself created. The courts have said that such a value can only be based upon speculation among buyers as to the amount the condemner can be compelled to pay.

At the other extreme, a few states hold that the property is to be valued as of the date of valuation, and this value is not to be discounted for any effect the condemnation may have had on the value. This view has the advantage of simplicity. It does not require the appraiser to speculate on what proportion of the increase in value is due to the anticipated public improvement. Moreover, inasmuch as the value at the date of valuation is the amount the condemnee might have sold the property for at that date, it may be argued that he should not be deprived of any of that value merely because the condemner has forced him to sell to it.

Although the California law is far from clear, the consultant reports that California today probably follows the majority rule insofar as enhancement in light of an anticipated improvement is concerned.

Diminution in market value. While it is difficult, in light of the paucity of decisions, to be certain what position constitutes the majority rule, it appears that the prevailing rule is that any diminution in light of an anticipated improvement is to be accorded the same treatment as an enhancement.

Although California probably adheres to the majority rule regarding enhancement, it appears that under California law the condemnee suffers any diminution in market value in light of an anticipated improvement. On its

face, the status of the law in this state is not only illogical but quite inequitable to the property owner.

Consultant's recommendation. The consultant recommends that a statutory provision be proposed which will adopt and adhere to the majority position regarding enhancement and that diminution be accorded the same statutory treatment. Please read pages 49-55 of the research study on "Problems Connected With the Date of Valuation in Eminent Domain Cases" for a discussion of the reasons that underly this recommendation.

The consultant suggests that an additional clause be added to Section 1249 of the Code of Civil Procedure (date of valuation) to read:

> Provided, that any enhancement or diminution in value of property directly resulting from the proposed improvement shall be excluded in assessing compensation.

The consultant states that it is important that Section 1249 be drafted so that it is clear that this provision has no application to the question of general and special benefits.

Other statutory language that should be considered in connection with this problem is found in Section 604 of the Pennsylvania code:

> 604. Effect of Imminence of Condemnation. Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

The staff suggests for Commission consideration the following language which is based on the Pennsylvania provision and the suggestion of the research consultant:

> Any change in the fair market value prior to the date of valuation which was substantially due to the general knowledge

of the proposed improvement, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

It should be noted that a key phrase in the proposed provision is the phrase "proposed improvement." Thus, this provision will still leave to the courts the problem of determining as to what point in time an improvement was no longer merely "contemplative" but had become "proposed." The staff believes that a provision drafted along the lines set out above will better insure the rights of both the condemnee and condemner, remove some of the ambiguities and uncertainties from the present law, correct an obvious injustice to the property owner, and generally facilitate the determination of just compensation. In connection with the proposed provision, we urge you to read the Pennsylvania comment to Section 604.

In connection with this problem, Section 6 of Chapter 52 of the Maryland 1962 Statutes--the comprehensive Maryland eminent domain statute--is of interest:

> Section 6. The fair market value of property in a proceeding for condemnation shall be the price as of the valuation date for the highest and best use of such property which a seller, willing but not obligated to sell, would accept for the property, and which a buyer, willing but not obligated to buy, would pay therefor excluding any increment in value proximately caused by the public project for which the property condemned is needed, plus the amount, if any, by which such price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of such property and the date of actual taking if the trier of facts shall find that such diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning such public project, and was beyond the reasonable control of the property owner.
>
> If the condemnor is vested with a continuing power of condemnation, the phrase the effective date of legislative authority for the acquisition of such property, as used in this section, shall mean the date of specific administrative determination to acquire such property.

In substance, use of the Maryland rule in California would disregard enhancement and diminution in value proximately caused by the public project occurring after the date of specific administrative determination to acquire such property. We believe this rule is too restrictive; but, on the other hand, it is more precise than the rule proposed by the staff and the Commission's consultant.

Special benefits.

Before any attempt can be made to draft a statutory provision specifying what constitutes just compensation and the proper measure of damages, a basic policy question must be decided: Should special benefits be offset against the entire award?

On pages 16-62 of the research study on "Special Benefits," the consultant discusses this question. Although special benefits are now offset against only the damages for the part remaining, the consultant recommends that special benefits should be offset against the entire award, including the award for the value of the land taken. His justifications for this recommendation are set out on pages 49-62 of the research study. He also recommends that general benefits not be offset at all. We believe that his recommendation is sound if it is adopted with the understanding that certain additional elements of compensation (such as moving expenses) will be provided in order to carry out the concept of indemnity which is the basic justificiation for offsetting special benefits against the entire award. We urge you to read the entire research study on "Special Benefits" prior to the meeting so that you will be in a position to make a decision on this basic question.

Note that both Wisconsin and Pennsylvania offset special benefits against the entire award.

The problem of what constitutes "The Larger Parcel."

We strongly urge you to read the research study relating to the "larger parcel" in eminent domain. We summarize the consultant's recommendations below, but we believe that a careful reading of the research study is needed to provide you with the necessary background on the policy questions involved.

Three factors are considered in determining what constitutes the "larger parcel"; the larger parcel is all that land which (1) has a unity of use; (2) is contiguous (or has physical unity); and (3) has common ownership or title. Whether a particular court adheres to a liberal or restrictive view of the larger parcel, it usually concerns itself with all three of these factors; however, those following a restrictive interpretation of "parcel" almost invariably demand all three of these factors to be present. California apparently follows the restrictive interpretation.

Generally speaking, all courts are in agreement that unity of use is required. Where there is no physical contiguity of the property, most courts require that this unity of use be actual, present, and existing. The two requirements that the consultant recommends be changed are the requirement of contiguity and the requirement of common title. These are discussed below.

Contiguity. Although the law is not entirely clear, California appears to follow the rule that physical contiguity of the part taken with the remaining property is required in order to have one parcel of property. Where the part taken and the remaining property are separated by an intervening fee ownership, physical contiguity is destroyed.

There is a minority view that integrated use, not physical contiguity, is the test. Physical contiguity is important, however, under the minority view in that it frequently has great bearing on the question of unity of use.

For discussion, see research study, pages 7-27.

The consultant recommends that the proposed legislation eliminate the present rigid rule that physical contiguity is always required. The test would become unity of use where the property was not physically contiguous and the consultant recommends that two limitations be imposed:

(1) Only property in the proximate vicinity of the part taken could be considered in ascertaining what constitutes the larger parcel; and

(2) Where properties are not contiguous, there must be a present existing unity of use in order to claim damages to the larger parcel.

Pennsylvania deals with this problem in Section 605 which provides:

> Section 605. Contiguous Tracts; Unity of Use.--Where all or a part of several contiguous tracts owned by one owner is condemned or a part of several non-contiguous tracts owned by one owner which are used together for a unified purpose is condemned, damages shall be assessed as if such tracts were one parcel.

It is apparent that Section 605 abolishes the requirement of contiguity and permits several noncontiguous tracts to be considered as one parcel if such tracts are owned by one owner and are used together for a unified purpose. Note that the requirement of unity of purpose is not imposed where the tracts are contiguous.

We suggest that the substance of the Pennsylvania provision be approved insofar as it deals with the requirement of unity of use and contiguity. However, in the interest of clarity, we suggest that the provision be revised to read in substance:

> (a) Where all or a part of several contiguous tracts owned by one owner is condemned, damages shall be assessed as if such tracts were one parcel except that any such tract that is devoted to a separate and distinct use from the part taken shall be considered as a separate parcel.

(b) Where all or a part of several non-contiguous tracts owned by one owner which are used together for a unified purpose is condemned, damages shall be assessed as if such tracts were one parcel except that any such tract that is not in the proximate vicinity of the part taken shall be considered as a separate parcel.

The clarifying change we propose is in subdivision (a) of the proposed provision--"except that any such tract that is devoted to a separate and distinct use shall be considered as a separate parcel"--is believed to be necessary to make clear that we are retaining the existing California law. See the following extract from California Condemnation Procedure:

2. [§4.7] Unity of Use Test

Generally, the unity of use test requires that the use made of the part taken be the same as that of the remaining property. Where the part taken has been devoted to a separate and distinct use from that made on the remaining property, this diversity of use precludes physically contiguous property under one ownership from being considered as one parcel. City of Stockton v. Marengo (1934) 137 C.A. 760, 31 P.2d 467.

Assume three contiguous city lots that are each improved with a separate residence but are under one ownership. A diversity of use results from the fact that the residential use of each lot is confined to that lot only. Thus, the three lots constitute separate parcels of property and the owner is not entitled to severance damage when one lot is taken for a public use. City of Menlo Park v. Artino (1957) 151 C.A.2d 261, 311 P.2d 135.

But, where a portion of physically contiguous property under one ownership is not under present use, this failure to use should be distinguished from actual diversity of use since a mere failure to use a portion of the property may not destroy the element of unity of use. Thus, where a portion of the property not taken is not devoted to any present use, it may be damaged by reason of the severance of the part taken. State v. Thompson (1954) 43 C.2d 13, 271 P.2d 507.

In determining the value of the part taken, under some circumstances, the part taken may have an enhanced value because of a prospective joinder with other separate parcels of property. However, in order to give rise to severance damage, the unity of use required is believed by some authorities to be a present unity of use. This unity of use must be actual, present, and existing. See State v. Ocean Shore Railroad (1948) 32 C.2d 406, 196 P.2d 570. The Ocean Shore rule may, in the opinion of some authorities, apply only where there is no physical contiguity of the property.

The "except clause" of subdivision (b) is recommended by the consultant. Note that Pennsylvania does not have a similar limitation.

Title or unity of ownership test. In addition to unity of use and contiguity, there is one further element "needed" to establish the larger parcel--unity of title. This third criterion is generally accepted by the majority of courts and is undoubtedly a proper one, at least to the extent that it requires the condemnee, in defining the larger parcel, to establish an interest both in the part taken and an interest in the remainder he claims to have been damaged.

The policy question is: Should title (fee ownership)--and not simply an ownership of a property interest--be a requirement for establishing the larger parcel? The general rule in the United States, with some notable exceptions, is that in order to establish the larger parcel, unity of title is necessary. California appears to follow the general rule.

The consultant recommends that unity of use should be the prime consideration; if the condemnee has a legal interest in the "remainder" and that remainder is in the proximate vicinity of the part taken and there is an existing unity of use (if the parts are not contiguous), the entire property should be treated as one "parcel"--whether for the purpose of ascertaining damages or for determining special benefits.

To effectuate this recommendation, the following additional subdivision--subdivision (c)-- could be added to the provision previously set out. The complete provision would read:

> (a) Where all or a part of several contiguous tracts owned by one owner is condemned, damages shall be assessed as if such tracts were one parcel except that any such tract that is devoted to a separate and distinct use from the part taken shall be considered as a separate parcel.

(b) Where all or a part of several non-contiguous tracts owned by one owner which are used together for a unified purpose is condemned, damages shall be assessed as if such tracts were one parcel except that any such tract that is not in the proximate vicinity of the part taken shall be considered as a separate parcel.

(c) For the purposes of this section, "owned by one owner" means that one owner owns a legal interest in each of such tracts, but such legal interest need not be a fee simple title.

One problem we anticipate with subdivision (c) is that there may be problems arising when the award is allocated between the fee owner and the lessee. If the Commission desires to add subdivision (c) to effectuate the consultant's recommendation, we will discuss the problems this subdivision may create when we consider the problem of allocation of the award.

Note that the proposed provision is applicable where all of several tracts are taken (determining market value) as well as when only a portion of such tracts is taken (determining severance damages and special benefits).

Respectfully submitted,

John H. DeMoully
Executive Secretary

#36 6/29/65

THE MARKET VALUE CONCEPT IN EMINENT DOMAIN PROCEEDINGS*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. This study is an extract from pages A-11--A-21 of "A Study Relating to Evidence in Eminent Domain Proceedings," 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-11 (1961).

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

A STUDY RELATING TO THE MARKET VALUE CONCEPT

Note: This study is an extract from pages A-11—A-21 of "A Study Relating to Evidence in Eminent Domain Proceedings," 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-11 (1961).

INTRODUCTION

The United States Supreme Court has defined "just compensation" as that which entitles the owner "to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken."[6] On other occasions, however, it has confessed that the standard adopted by the courts is often "harsh" and constitutes a derogation of the indemnity principle.[7] Other authorities, too, have argued that the present practice does not make the owner "whole." Orgel, after critically examining the market value concept, concludes in these words:

> We are therefore forced to the conclusion that market value, strictly interpreted as meaning probable sale price, cannot be defended as even an approximate measure of value to the owner in most of those cases which actually arise under the law of eminent domain.[8]

The reasons for this conclusion will be shown subsequently. Suffice it now to point out that this appraisal, in theory, is not seriously contested. Courts have readily admitted that regardless of the equities on the condemnee's side, the law is often against him.[9] Furthermore, because of this in part theoretical situation, a strong movement, led by lawyers and laymen and to some extent aided by legislatures, has sought to alter by statute the methods of valuation of property;[10] and to some extent they have been successful.[11]

But whereas the condemnees have called for a change in the concepts that the courts have adopted because, as owners correctly submit, these concepts work against indemnification, adherents of the condemnors' position have called for reform in the practices utilized for litigating condemnation actions. The position of some condemnors,[12] and one

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[6] See United States v. New River Collieries, 262 U.S. 341, 343 (1923). See also United States v. Miller, 317 U.S. 369 (1943).

[7] United States v. General Motors Corp., 323 U.S. 373, 382 (1945) ("the consequences often are harsh"); General Motors Corp. v. United States, 140 F.2d 272, 274 (7th Cir. 1944) ("hard law"); Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 398, 153 Pac. 705, 707 (1915) ("We are not to be understood as saying that this should not be the law when we do say that it is not our law."); Newark v. Cook, 99 N.J. Eq. 527, 538, 133 Atl. 875, 879 (1926) ("That is the law. It works hardships.").

[8] 1 ORGEL, VALUATION UNDER EMINENT DOMAIN 174 (2d ed. 1953) [hereinafter cited as ORGEL].

[9] The present "rigid rules" for measuring compensation were summarized by one court that stated, "Equitable principles, no matter how well founded, are rendered inoperative in a condemnation proceeding." United States v. 257.854 Acres of Land, etc., 72 F. Supp. 903, 914 (D.C. Hawaii 1947).

[10] See REPORT OF MASSACHUSETTS SPECIAL COMMISSION RELATIVE TO CERTAIN MATTERS PERTAINING TO THE TAKING OF LAND BY EMINENT DOMAIN, HOUSE NO. 3738 (1956); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 67 nn.12, 113, 115 (1957); *Recommendation and Study relating to Reimbursement of Moving Expenses When Property Is Acquired for Public Use*, REC. & STUDY CAL. LAW REVISION COMM'N C-1 *et seq.* (1960).

In the 86th Congress, a Bill, H.R. 1666 (1959), was introduced to establish a commission to study the adequacy of compensation for real property acquired by the United States. It declared, "Because many owners and tenants whose land is required for public works projects of the United States have not been able to move, relocate, and reestablish themselves and their families or business without loss, and because that inability denies persons and firms the equal protection of law, creates hardships, and in some instances places an inequitable burden on former owners and tenants or local communities, it is necessary to study the present methods of determining compensation, the adequacy thereof, and whether or not the procedures with respect thereto should be defined by statute to assure a clear definition of the rights of all concerned."

See generally Searles & Raphael, *Current Trends in the Law of Condemnation*, 27 FORDHAM L. REV. 529, 549 (1958-59).

[11] See, *e.g.*, Act of July 12, 1957, § 304, 71 Stat. 380; Act of July 14, 1952, § 401(a), 66 Stat. 624; N.Y. Sess. Laws 1957, ch. 798, § 1. And see Wis. Laws 1959, ch. 32, § 32.09 (effective April 6, 1960). See generally Pearl, *Review of Efforts To Minimize Losses in Condemnation*, 28 APPRAISAL J. 17 (1958).

[12] See, *e.g.*, Graubart, *Theory Versus Practice in the Trial of Condemnation Cases*, 26 PA. B.A.Q. 36 (1954); Lewis, *Eminent Domain in Pennsylvania, Preface* to PA. STAT. ANN. tit. 26, at 33-34 (1958).

that is supported by some independent authorities,[13] is that more often than not the condemnee is being over-indemnified. Particularly, their view is that the jury's natural sympathy for the condemnee,[14] the exigencies of administering condemnation programs,[15] the confusion produced in condemnation trials by evidentiary tactics and the allegedly unsupported estimates of the condemnees' experts[16] combine to produce excessive awards.[17] Those biased toward the condemnees' position also find numerous grounds for challenging the methods and procedures of conducting condemnation actions. But their main thrust is aimed at the rigidity of the market value standard adopted by the courts and the presentation permitted of and the interpretation given to it by the judges. Each "side," therefore, believes its rights to be violated; each "side" calls for reform.

Out of this cauldron of conflict, confused juries and oftentimes judges yield to the "practical" by "splitting the difference" between the condemnor's and condemnee's claims.[18] Although this arrangement tends to keep both parties reasonably satisfied and often produces just compensation, such a policy, on its face, is not and should not be the criterion of just compensation.[19]

Historically, the strictures of the market value system, the rigid interpretation given to the word "taken" and the restrictive definition given by the courts to the term "property rights" worked against the condemnee.[20] For some years, cognizant of these deficiencies, all concerned have sought to ease the onus of discrimination borne by the condemnee. Thus the position of the condemnee has been improved by state constitutional changes, such as the California Constitution

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[13] See 1 ORGEL § 46 and 2 ORGEL § 247; WALLSTEIN, REPORT ON LAW AND PROCEDURE IN CONDEMNATION 187 (1932).

[14] WALLSTEIN, *supra* note 13. For an example of how juries give compensation for legally noncompensable losses, despite apparent directions to the contrary, see Reeves v. City of Dallas, 195 S.W.2d 575, 580 (Tex. Civ. App. 1946). *But cf.* MASSACHUSETTS REPORT, note 10 *supra*, at 10, where it was stated that "a jury trial usually does not materially increase the amount available to the property owner had he accepted a settlement." Part of the reason behind this statement, however, may be the court costs, expert and attorney fees the condemnee must bear by going to trial.

[15] Considerable pressure by the public is often exerted upon public officials to liberalize compensation awards; this pressure is often accompanied by threats of political retaliation. See Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 64 n.13 (1957). Among other considerations administrators have to deal with is the fact that appraisers, even if competent, often make poor witnesses. Moreover, judges feel themselves not properly qualified to pass upon the evidence of value. MASSACHUSETTS REPORT, note 10 *supra*, at 3, 14. See generally 2 ORGEL § 247.

[16] See Graubart, *supra* note 12.

[17] The argument that condemnation awards are excessive has brought about two major investigations of statutory procedures and court practices in New York City. In 1932 as a result of the WALLSTEIN study, note 13 *supra*, the New York City Administrative Code relating to condemnation was drastically changed. See discussion *infra*. More recently, in 1958, the Mayor of New York appointed a special commission to investigate condemnation practices and procedures as a result of frequent revelations as to exorbitant condemnation costs. See N.Y. Herald-Tribune, June 19, 1958, p. 1; N.Y. Times, June 19, 1958, p. 32. The commission had not, at the writing of this instant study, filed its report.

[18] See note 13 *supra*. Courts often equate the terms "equitable," "practical" and "splitting the difference" in this area of the law. See, *e.g.*, State v. Ferris, 227 La. 13, 22-23, 78 So.2d 493, 496 (1955).

[19] It has been asserted that the very vagueness of the fair market standard permits courts "to adjust the rigid rules of law to the requirements of justice and indemnity in each particular case." Judge Frank, quoting ORGEL in Westchester County Park Comm'n v. United States, 143 F.2d 688, 692 (2d Cir. 1944). The general policy of "splitting the difference," however, casts serious doubt as to the wisdom of vagueness in this particular field of law.

[20] See Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893); 2 NICHOLS, EMINENT DOMAIN 285 (3d ed. 1950) [hereinafter cited as NICHOLS]; Kratovil & Harrison, *Eminent Domain — Policy and Concept*, 42 CALIF. L. REV. 596, 603 (1954); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 66-71 (1957).

adopted in 1879 which provides that the owner is given protection against "damage" as well as "takings";[21] by the expansion of the concept of "property" as exemplified by the landmark holding in *People* v. *Ricciardi*[22] regarding access and view; by periodic statutory changes providing for compensation in excess of market value;[23] and by judicial and administrative legerdemain with the market value standard (often in a manner that is not necessarily appropriate).[24]

But has the degree of improvement achieved in this manner been sufficient in light of the changing pattern, particularly the business scene, of modern society? It is advanced that existing business practices,[25] the nature of current takings for governmental development,[26] advances in appraisal methods,[27] and our changing concepts of public policy are such as to make much of the present law anachronistic.

The courts and the legislatures, while continuously asserting that the owner should be indemnified, have argued that any tinkering with or additions to the market value standard or any innovation in the methods adopted for proving market value would be speculative and dangerous.[28] In addition, courts have buttressed their position in this regard by often indicating that various losses do not constitute property or are merely *damnum absque injuria*.[29] While both of these reasons have some validity—though each has been subject to critical review [30]—a major reason, it is submitted, that the courts have frowned upon change in this field is that heavy or excessive condemnation costs might retard public improvements.[31] Accordingly, such a latent threat

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[21] CAL. CONST. art. I, § 14; see Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317 (1885).

[22] 23 Cal.2d 390, 144 P.2d 799 (1943).

[23] At the turn of the century a number of states authorized by statute the payment of incidental losses above market value in condemnations for water supplies. See Mass. Acts & Resolves 1895 ch. 488, § 14; Mass. Acts & Resolves 1896, ch. 450; Mass. Acts & Resolves 1897, ch. 450; Mass. Acts & Resolves 1927, ch. 321, § 5; 2 N.Y. Laws 1905, ch. 724, § 42, as amended, 1 N.Y. Laws 1906, ch. 314 § 9; R.I. Laws 1915, ch. 1278, §§ 12, 17. See also note 11 *supra*.

[24] *Cf.* "'[T]he law' as embodied in the cases has by no means invariably held to market value, . . . what the law has so generally adopted is a single form of words rather than a single standard of value." 1 BONBRIGHT, VALUATION OF PROPERTY 413 (1937). See also Pearl, *Appraiser's Guide Under Law Allowing Moving Costs*, 21 APPRAISAL J. 327, 330 (1953). See generally Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 81-88 (1957).

[25] See discussion in text at A-26 *et seq.*, *infra*.

[26] Compare Connecticut Senate Bill No. 610 (Feb. 1, 1955) declaring "The present statutes relating to the methods of appraising damages when land is taken for highway purposes were designed primarily for the appraisal of rural and residential property. They are recognized as being inadequate when the property to be taken is of an industrial or business nature."

[27] Interview of Charles Shattuck by authors, August 7, 1959; Interview of Nate Libott by authors, July 17, 1959. See also Dolan, *Market Value—the "Informed Guess,"* 20 APPRAISAL J. 330 (1952); Winner, *The Expert Witness—From a Lawyer's Viewpoint*, 23 APPRAISAL J. 254 (1955).

[28] See Olson v. United States, 292 U.S. 246, 257 (1934); see also the opinion of Mr. Justice Douglas concurring in part, in United States v. General Motors Corp., 323 U.S. 373, 385 (1945) ("promises swollen verdicts"); United States v. 8,544 Acres of Land, etc., 147 F.2d 596, 598 (3d Cir. 1945); Eagle Lake Improvement Co. v. United States, 141 F.2d 562, 564 (5th Cir. 1944); Housing Authority of Shreveport v. Green, 200 La. 463, 474, 8 So.2d 295, 299 (1942); Bailey v. Boston & P.R.R., 182 Mass. 537, 539, 66 N.E. 202, 204 (1903); Sawyer v. Commonwealth, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902); Sauer v. The Mayor, 44 App. Div. 305, 308, 60 N.Y. Supp. 648, 650 (1899).

[29] See Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 608-611 (1942). *Cf.* United States v. Causby, 328 U.S. 256 (1946).

[30] See generally Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

[31] Such an argument was raised though rejected in Bacich v. Board of Control, 23 Cal.2d 343, 350, 144 P.2d 818, 823 (1943) ("On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost."). Compare Davis v. County Commissioners, 153 Mass. 213, 225, 26 N.E. 848, 850 (1891).

has its brooding omnipresence in every eminent domain action and more particularly in every proposed reform. But a countervailing consideration—just compensation—is an equally cogent factor that must be achieved.

THE MARKET VALUE STANDARD

If the struggle in eminent domain is "between the people's interest in public projects and the principle of indemnity to the landowner,"[82] then market value is its fulcrum. The dictates of the federal and all state constitutions call for just compensation.[83] But nowhere in these constitutions is the phrase further developed. By and large, condemnation statutes fail to spell out the meaning of just compensation; generally, they merely state that the owner shall receive "value," "actual value" or "fair cash value."[84]

A few states, as well as England, have actually adopted in statutes the term "market value" to represent the measure of just compensation.[85] But despite such terminology or lack thereof in the statute, it is, as the California courts have stressed, "universally agreed that the compensation required is to be measured by the market value of the property taken."[86]

Approximately 500 different definitions of market value appear in *Words and Phrases*.[87] There is, in fact, a genuine dispute over the meaning of this term.[88] The controversy, however, is not so much what the term reasonably connotes as it is what the elements are that bring it about. That is to say, in regard to the standard definition of market value—"the price that can be obtained under fair conditions as between a willing buyer and a willing seller when neither is acting under necessity, compulsion, or peculiar and special circumstances"[89]—disagreements mainly concern the factors that must be considered to determine this hypothetical result rather than the "ideal" itself. True, there are conflicts as to whether this standard presumes that price which an "informed" buyer would consider or merely that price which the "average" buyer, whether he be informed or not, would consider. Moreover, there are conflicts as to whether the definition implies an average price or the highest price obtainable in the market. Both of these points are reasonably well resolved in California; in this State, both the *informed* buyer and the *highest* price he could get are elements of the standard.

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[82] United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266, 280 (1943).

[83] U.S. CONST. amend. V; CAL. CONST. art. I, § 14. All but two states have similar provisions in their constitutions. In those states, New Hampshire and North Carolina, this requirement has been read into the state constitutions by the courts.

[84] 1 ORGEL 79-89.

[85] See Acquisition of Land Act, 1919, 9 & 10 Geo. 5, ch. 57, § 2. See also PA. STAT. ANN. tit. 26, § 101 (1958); TEX. STAT., REV. CIV. art. 3265(2) (1948); WASH. REV. CODE §§ 8.04.112, 8.12.140 (1956).

[86] Rose v. State 19 Cal.2d 713, 727, 123 P.2d 505, 519 (1942); Sacramento So. R.R. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909); People v. Al. G. Smith Co., 86 Cal. App.2d 308, 194 P.2d 750 (1948). See also Spencer v. The Commonwealth, 5 Commw. L. R. 418 (Austl. 1907).

[87] 26(a) WORDS & PHRASES, *Market Value*, 66-118 (1953).

[88] 1 ORGEL 92 *et seq.*

[89] Maher v. Commonwealth, 291 Mass. 343, 348, 197 N.E. 78, 81 (1935).

As a working definition and as an accepted frame of reference, the California Supreme Court has spelled out the meaning of market value as:

> [T]he highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.[40]

The crux of the problem, therefore, is not the definition of this term, but rather the manner of ascertaining its elements, its inherent limitations and the method of its presentation in a trial.

ALTERNATIVES TO MARKET VALUE STANDARD

There are two other possible alternatives that might be established as the measure of compensation: value to the taker and value to the owner. Even a precursory study of these alternative standards quickly reveals the wisdom shown by the courts in rejecting either of these standards as the *basic* criterion of compensation.

Value to Taker

In this context, the term is limited to basing the criterion of compensation to what the particular condemnor would pay, *if necessary*, on the open market. By such a definition, it is the worth to the condemnor —ignoring the fact that often the condemnor would not have to pay its "worth" to him but rather a compromise figure that usually falls some place between the "worth" to each of the parties. As an illustration, if the State of California needed one additional parcel of land to complete a freeway—and without that parcel a large portion of the freeway would otherwise be useless—the State conceivably might conclude that such a parcel is "worth" ten times what it would cost to buy a comparable piece of property. And without the power of eminent domain the State might have to pay such an amount solely because it is in a position to be "held up." Analogously, a condemned parcel might have a high value on the market and to the owner; but for the condemnor's purpose it is worth significantly less than could be demanded and received on an open market. Patently, to adopt value to

[40] Sacramento So. R.R. v. Heilbron, 156 Cal. 408, 409, 104 Pac. 979, 980 (1909). Compare Taeuber, *An Argument in Favour of the Acceptance of the Doctrine of One Value for All Purposes*, 24 APPRAISAL J. 561, 563 (1956), where the author, speaking of the definition of market value, states: "It may be argued that very few sales of property—the main source of a valuer's data—satisfy the requirements of that definition. That may well be the case but at the same time the definition provides a set of circumstances which are easy to visualize in the concept of the hypothetical sale. Better to consider the hypothetical sale as taking place under those conditions than to attempt to conceive a definition which will cover the infinite range of combinations of circumstances when either of the hypothetical parties do not satisfy the requirements of that definition. In making the valuation, the available data and the methods of application should be used to meet the demands of the market value definition. If this concept of market value is accepted there can never be any ambiguity over the meaning of a valuation."

the taker as the basic standard in eminent domain would be indefensible. It is for this obvious reason that the United States Supreme Court stated:

> [T]he value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes.[41]

Value to Owner

If indemnity to the landowner is the equivalent of just compensation, as the courts have repeatedly indicated,[42] then the criterion "value to the owner" should, in theory, be the measure of compensation. Although the courts are sometimes prone to stretch the market value standard or to declare there is no market value in order to effectuate indemnification, generally they are reticent to adopt the value to the owner standard in lieu of market value. The reason for this is basically a practical one.[43] Value to the owner is a subjective standard; it enables the condemnee to present a myriad of factors that may or may not in fact exist to enlarge his award. It opens the door to sham and fabrication. It has no limits, it has no control. By itself, it seriously weakens the concept of "just compensation"—"just" to the condemnor as well as the condemnee.

Experience has indicated that value to the owner is often an unworkable standard. In England from 1845 to 1919 the final criterion of compensation, established by judicial decisions, was the value of the land to the owner.[44] But in 1919, a special parliamentary report pointed out that the utilization of the formula "value to the owner" resulted in entirely unpredictable compensation and excessive condemnation costs. This criterion, the report asserted, often produced "highly speculative elements of value which had no real existence."[45] As a result of this report, that country adopted the market value standard. It should be noted here, however, that while Great Britain has adopted market value as the standard of compensation, Great Britain has also enacted other statutory provisions to allow compensation for losses in addition to market value.[46] In addition the method of proving market value is far more liberal than the method generally used in this country.[46a]

On the other hand, Canada fairly clearly has adopted value to the owner as the final criterion of compensation. And in so doing, that nation, unlike its neighbor to the south, has unequivocally refused to equate just compensation with market value. In 1951, after a period of some uncertainty, the Supreme Court of Canada in *Woods Manufactur-*

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[41] United States v. Chandler-Dunbar Co., 229 U.S. 53, 81 (1913).
[42] See, *e.g.*, United States v. Miller, 317 U.S. 369, 373 (1943) ("the owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken").
[43] *Id.* at 374-76.
[44] LAURANCE, COMPULSORY PURCHASE AND COMPENSATION 62 (1952); MINISTRY OF RECONSTRUCTION, SECOND REPORT OF THE COMMITTEE DEALING WITH THE LAW AND PRACTICE RELATING TO THE ACQUISITION AND VALUATION OF LAND FOR PUBLIC PURPOSES 8 (Scott Rep. 1918). The basic reason for this standard was the public distrust of private railroad enterprises. See note 42 *supra*. *Cf.*, Watkins, *Appraisal Practices in Great Britain*, 21 APPRAISAL J. 251, 253 (1953).
[45] LAURANCE, *op. cit. supra*, note 44.
[46] *Cf.* W. Rought, Ltd. v. West Suffolk County Council, [1955] 2 All E.R. 337 (C.A.); Acquisition of Land Act, 1919, 9 & 10 Geo. 5, ch. 57, § 2; Watkins, *Appraisal Practices in Great Britain*, 21 APPRAISAL J. 251, 253 (1953).
[46a] *Ibid.*

ing Co. v. *The King*[47] enunciated the final criterion and measurement of compensation. There the court pointed out that the principles of compensation as adopted in England (prior to 1919) are now in effect in Canada. Succinctly, in words adopted by the court, the final manner of measuring compensation is that:

> [T]he owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.[48]

Aside from indicating that the value-to-the-owner criterion "does not imply that compensation is to be given for value resting on motives and considerations that cannot be measured by any economic standard," the court went on to clarify further its interpretation of the measure of compensation:

> It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and, in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in *Pastoral Finance Association* v. *The Minister* [(1914) A.C. 1083 at 1088], has given what he describes as a practical formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.[49]

The Canadian practice, therefore, as shown by this and other cases,[50] is that if there is a discrepancy between the amount the owner could get on the market and the amount he would be willing to sell for, the latter figure is the final determinant of compensation. This practice is, at least from the American point of view, a radical standard. On one side, this country limits compensation, at least in theory, to market value. In addition, present methods of proving value are generally restricted to the real property itself. On the other side, Canada not only adopts value to the owner as the final determinant, but also allows for loss of "incidentals" and "disturbance" costs and even adds an additional ten per cent to the award simply because the owner must move against his will.[51] Furthermore, Canada, like England, permits a wide variety of factors to be presented to establish market value.

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[47] [1951] Can. Sup. Ct. 504, [1951] 2 D.L.R. 465 (1951).
[48] *Id.* at 508, [1951] 2 D.L.R. at 468.
[49] *Id.* at 507-08, [1951] 2 D.L.R. at 467-68.
[50] Diggon-Hibben Ltd. v. The King, [1949] Can. Sup. Ct. 712, 715, [1949] 4 D.L.R. 785, 787 (1949); Lake Erie & No. Ry. v. Brantford Golf & Country Club, 32 D.L.R. 219, 229 (Can. 1916); The King v. Northern Empire Theatres, [1951] Can. Exch. 321, 324 (1951).
[51] See generally Todd, *The 10% Allowance in Assessing Compensation Payable for Property Expropriated Under Statutory Authority*, 2 U.B.C. LEGAL NOTES 623 (1958).

Although the *final determinant* of compensation in Canada is value to the owner, it is to be noted that market value is still the *basic* criterion for ascertaining value. Thus the Canadian Supreme Court has said:

> The law requires that the market price of the land expropriated should constitute the basis of valuation in awarding compensation.[52]

It is, therefore, only when market value fails to indemnify the owner and make him "whole" that resort is made to the final determinant—value to the owner.

In instances where there is no market value (generally service-type property like a park, church, college campus, recreational camp) [53] and in rare other instances,[54] American courts have awarded compensation based on the value-to-the-owner criterion. Nevertheless, when courts carve out exceptions to the market value formula or circumvent its restrictions, they invariably stress that market value remains the general standard of compensation in eminent domain. Recently, however, some courts have frankly discarded the market value formula when it has failed to indemnify the condemnee for all his losses, particularly "incidental losses." For example, in *Housing Authority v. Savannah Iron & Wire Works, Inc.*,[55] a Georgia case wherein the court allowed for "good will," the following charge to the jury was approved:

> *I further charge you, gentlemen, that the Constitutional provision as to just and adequate compensation does not necessarily restrict the lessee's recovery to market value. The lessee is entitled to just and adequate compensation for his property; that is, the value of the property to him, not its value to the Housing Authority.* The measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the loss sustained by the owner, taking into consideration all relevant factors.[56]

And in 1958 the Florida Supreme Court allowed for moving costs, though recognizing that the weight of authority was clearly against its decision.[57] The court said:

> Although fair market value is an important element in the compensation formula, it is not an exclusive standard in this jurisdiction. Fair market value is merely a tool to assist us in determining what is full or just compensation, within the purview of our constitutional requirement.[58]

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[52] Toronto Sub. Ry. v. Everson, [1917] 54 Can. Sup. Ct. 395, 419, 34 D.L.R. 421, 438 (1917). See also The King v. Eastern Trust Co., [1946] Can. Exch. 115, 121, [1945] 4 D.L.R. 563, 567 (1945).

[53] Winchester v. Cox, 129 Conn. 203, 26 A.2d 592 (1942) (park); Idaho etc. Ry. v. Columbia etc. Synod., 20 Idaho 688, 119 Pac. 60 (1911) (college campus); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956) (recreational camp); *In re* Simmons, 127 N.Y. Supp. 940, 944 (Sup. Ct. 1910) (church). See Housing Authority of Shreveport v. Green, 200 La. 463, 474, 8 So.2d 295 (1942).

[54] See Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 85 nn.109, 110 (1957).

[55] 91 Ga. App. 851, 87 S.E.2d 671 (1955). The court admitted that the market value formula is the general measure of damages. However, unlike almost any other case at that time, it did not state that special conditions need to exist to set market value aside. Rather, the general standard was to be discarded if it failed to give fair and reasonable value to the owner.

[56] *Id.* at 854-55, 87 S.E.2d at 675.

[57] Jacksonville Expressway Authority v. Henry G. Du Pree Co., 105 So.2d 289 (Fla. 1958).

[58] *Id.* at 291.

Both of these decisions, and especially the language employed, are unusual. It is too early to suggest that they represent a definite trend in American law. Both clearly represent, however, a generally held belief that the present strictures of the market value formula often prevent just compensation.

The market value standard has been attacked from still another point of view: its alleged objectivity. Courts are reluctant to go beyond the market value system for fear of creating a wilderness in place of a standard of symmetry. But this overlooks serious imperfections in the existing standard, for often the application of market value "involves, at best, a guess by informed persons."[59] The market value system produces radically inconsistent results. A 1932 study of condemnation practices in New York City illustrates that in practice market value is far from objective: expert appraisals made for the condemnor and for the condemnee generally varied about 100 per cent.[60] Analysis of data on more recent Massachusetts takings reveals a more startling inconsistency. Not only do the figures confirm the New York findings (the difference between appraisals averaging 56 per cent and ranging to a maximum of 571 per cent) but they represent the estimates of two or more state experts, each acting on behalf of the condemnor and apparently lacking the conflicting interest that might be said to underlie the divergent estimates of the earlier New York study.[61]

But we must conclude that, despite its inherent weaknesses, the market value system should be retained as the *basic* criterion. First, despite its limitations, it is probably more objective and ascertainable than either of the alternatives.[62] Second, it usually has at least a rough correlation with value to the owner—indemnity.[63] Last, *the standard can be improved in both regards.* In the final analysis, the market value standard must be retained for the lack of a better.[64]

The problem is not answered by this conclusion, however; it merely raises other problems. The effort to insure just compensation in light of the retention of market value can take two fairly distinct approaches. First, the system can be improved by strengthening the methods of presenting and proving, in a court, the elements of market value, *i.e.*, the value of the property taken. This is the "internal" approach. The evidence study was principally directed along such a path. A second approach for insuring just compensation, the "external" approach, is not concerned with the evidentiary mechanics of arriving at market value. Rather it is directed toward those matters that should or should not be included as elements of just compensation in addition to the market value of the property taken, such as moving costs, lost profits, access and noise.

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[59] United States v. Miller, 317 U.S. 369, 375 (1943).
[60] WALLSTEIN, REPORT ON LAW AND PROCEDURE IN CONDEMNATION lv (1932).
[61] Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 73 (1957).
[62] Market value, like the appraiser in condemnation cases, may often be characterized as "that scoundrel who stands between the landowner and sudden wealth."
[63] *Cf.* 1 BONBRIGHT, *op. cit. supra* note 24, at 447-49; 1 ORGEL 79.
[64] *Ibid.*

These matters shall be examined in subsequent studies.[65] For now, it is important to keep these distinctions in mind.

Before turning our attention to the internal problem created by the market value standard, we may briefly direct ourselves to the consideration of whether the pertinent statutes in this State, which presently make no reference to *market value* but merely call for "value" and "actual value," should be amended to include the *market value* term. As pointed out above, both in England and in a minority of states the market value term is employed by statute as the basic measure of compensation. Yet, California, like other states without such statutory language, has adopted by judicial interpretation the market value standard, equating "value" with market value. Presuming that we are retaining the market value standard as the basic criterion, it would seem proper to include in the statute the substantive law as it exists. It would help to resolve the doubts of those who question the legal justification of using this standard; and provision could be made for those cases in which there is no market value. More important, however, it might help to avoid confusion that could arise in ascertaining an award figure should just compensation be made to include factors not within the market value formula, such as incidental losses. These latter factors could be separately spelled out in other statutory provisions; precedent for this statutory method exists in England.[66]

On the other hand, it is not necessary to include the term "market value" in the statute since it exists by judicial adoption. Moreover, in support of the status quo of silence in this regard, it might be said that the inclusion of this term might raise other problems, particularly in those cases where there is no market value for the property and courts have found it necessary to resort openly to the value-to-the-owner criterion. More important, however, it is believed that it would be wiser to make this change only in conjunction with a complete recodification of the laws of condemnation in this State.

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[65] The term "incidental losses" is used herein to describe nonphysical losses to the condemnee, such as moving costs, lost profits and good will. These losses usually occur when the entire fee is taken. Often the courts label such losses "consequential." "Consequential damages," however, is more appropriate for describing instances in which property is damaged though no part of the owner's property is taken. Another type of damage, also often misleadingly called "consequential," is that which occurs in partial taking cases. The proper term to designate the loss of value to the residue not taken is "severance damages."

[66] See Acquisition of Land Act of 1919, 9 & 10 Geo. 5, ch. 57, § 2.

#36 (L) October 21, 1960

A STUDY OF PROBLEMS CONNECTED WITH THE DATE OF VALUATION IN EMINENT DOMAIN CASES*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

PROBLEMS CONNECTED WITH THE DATE OF VALUATION IN EMINENT DOMAIN CASES

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PROBLEMS CONNECTED WITH DATE OF VALUATION IN EMINENT DOMAIN CASES.

I. The Scope of the Problems.

In a prior study relating to Taking Possession and Passage of Title, the subject matter of this study was referred to, though not discussed in any detail. It was said at that time:

> "Probably the most important and certainly the most complex aspect of the date of taking problem is the manner in which that concept affects the valuation of the property. Because the problem is so complicated and involves so many factors outside of the scope of this instant phase of the study, a separate study has been proposed to deal with this matter. For now, however, it may be helpful to mention some of the key questions that arise in date of valuation problems that are germane to date of taking considerations.
>
> "It is quite clear from the present statute that the date of valuation is that date on which summons is issued (or at the time of trial if over a year from the commencement of the action and the delay was not due to the defendant). But two major, often integrated factors involved with such a date continually plague the entire field of condemnation.
>
> "First, quite frequently the announced intention or proposed plan to condemn a general area for a particular project has a drastic effect upon values in that and the adjacent areas. Values may radically increase or decrease depending upon the nature of the property being taken. Often a blight upon the whole area may halt or impair the economic development of that designated area. In a theoretical, if not in a legal sense, a property owner may be the victim of a 'taking'. In at least one state, there has been a recent effort to compensate property owners for such economic loss suffered as a result of publicly known plans to condemn in the future. But the problem is so complex that no equitable system has been found to alleviate such 'injuries'. Related to this problem, and one also that both courts and

> appraisers must often wrestle with, is the valuation effect that a prior public improvement may have upon a similar or different taking subsequently made. This question was met in both United States v. Miller and, in California, in County of Los Angeles v. Hoe. Unfortunately, by the very nature of the problem, the results in these and other similar cases leave more questions posed than answered.
>
> "While these problems usually turn on and always concern themselves with the question as to when the 'taking' was made, they go a great deal deeper than that. In essence, these are policy more than technical questions that must be resolved on a policy level weighing the myriad and complex problems involved. Merely changing the date of taking will not resolve these conflicts. Perhaps to a large extent this problem cannot be resolved; but a mechanical attempt would certainly fail to accomplish an improvement."

The above statement adequately indicates not only the subject matter of this study but the complexity of the problems involved and the great difficulties encountered in any endeavor to solve them.

Simply put, the problems to be discussed in this study involve the following questions:

Is present Section 1249 of the Code of Civil Procedure written (and interpreted by the courts) in such a way so as to protect the interest of condemning bodies and so as to afford condemnees "just compensation" within the constitutional meaning of that term? Is the present date of valuation one which is satisfactory to both parties or should some other, alternative, date or dates be substituted? Should the condemnee be accorded any enhancement in market value due to the proposed

taking and, by the same token, should any diminution in value because of the pending taking favor the condemnor? Should the rule be uniform as regarding enhancement as well as diminution in value because of the effect that prior notice may have on the subject property or adjacent property?

Aside from the question as to value, is it possible and proper for condemnees to be awarded damages due to the loss of income and profits because of a preliminary announcement prior to the present date of valuation, when such announcements or advance notice, cause "injury" (presently non-compensable) to the real estate or to a business situated thereon?

And regardless of any substantive change which may be made in Section 1249, is the present wording of that section clear enough so as to protect both parties' rights in regard to the date of valuation when a new trial is had?

Lastly, is a condemnee adequately protected when he is made to suspend the construction of an improvement that is in progress at the time of the service of summons?

II. Statutory Background.

Section 1249 of the Code of Civil Procedure reads as follows:

> "For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously

> affected, in all cases where such damages are allowed as provided in section one thousand two hundred forty-eight; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. Nothing in this section contained shall be construed or held to affect pending litigation. If an order be made letting the plaintiff into possession, as provided in section one thousand two hundred fifty-four, the compensation and damages awarded draw lawful interest from the date of such order. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages."

This statute was first enacted in 1872 and a 1911 amendment added the proviso that in cases in which the issue is not tried within one year after the commencement of the action, the compensation and damages shall be deemed to have accrued at the date of the trial.[1] A number of western states adopted the 1872 provision but have failed to add the 1911 amendment.[2]

The date of valuation is not the same in all jurisdictions in this country. In some states the date of valuation is the date of trial. In others, it is the date of the Commissioners' report. Some states mark the date of the payment of the award into court as being the date of valuation and in some states for some purposes it is the date of the adoption of the resolution to condemn. One authority has given the number of states falling within each of the important aforementioned categories;[3]

Date of service of summons or institution of the proceedings (20 states);

Date of Commissioners' report (7 states);

Date of trial (3 states);

Date of payment into court (3 states);

Date of adoption of the resolution to condemn (2 states).[4]

Regardless of the particular date that any jurisdiction might select for determining the date of valuation, it is clear that they all follow a determined and fixed date of valuation and seldom deviate from this chosen date.[5] Except in the few instances as will be noted below, the statutory language in California and in other states as to the date of valuation has little effect one way or the other as to whether the condemnee shall be favored by any enhancement or suffer any diminution because of a change in market value due to the anticipated public improvement or any delay in that improvement.

Beginning from this premise, therefore, our major inquiry and discussion will be directed to the more significant question as to how enhancement or diminution in market value due to the anticipated improvement should be considered by the court. The important but somewhat less troublesome question as to the date of valuation per se will be discussed at a later stage of our study when this problem is raised in separate contexts.

III. The General Case Law in Regard to Enhancement or Diminution in Market Value Due to Anticipated Improvements or Delays in Undertaking Proposed Improvements.

The initial reaction of most authorities who have analyzed the voluminous cases on this point is that the courts are far from clear in their opinions and decisions as to the manner in which an enhancement or diminution is to be treated.[6] The fact situations involved in these cases are such as to leave doubts as to whether the courts are including or excluding an enhancement or diminution due to the fact that the anticipated improvement is a contemplated one, a proposed one, one to which the condemnor is committed, or one which may merely be possible or probable.

While, as will be seen, courts often try to differentiate and base their decisions on the nuances of the aforementioned criteria, the language employed by these courts is seldom clarifying. One of the prime reasons why the cases fail to establish firm rules is that it is often most difficult if not impossible to distinguish between a "contemplated", "proposed", "possible", "probable", or other similar types of anticipatory improvements. Indeed, despite the fact that some light has recently been shed on some aspects of the problem, the vagaries in the field remain, basically because it often proves impossible to set down a hard and fast rule.

Before we turn our attention to an analysis of the cases and an examination of the fact situations that are often involved, we might, for the moment, pose the question

as to whether there is or should be a distinction between an enhancement or diminution in market value, on the one hand, which is directly due to the anticipation of the improvement itself, and, on the other hand, an enhancement or diminution in value as a result of a delay in carrying through an anticipated or proposed improvement. One court has sought to make just such a distinction. In A. Gettelman Brewing Company v. City of Milwaukee,[7] a 1944 case, a Wisconsin court recognized the majority rule that a condemnor ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The court, however, said that the fact situation before it was different insofar as the condemnee there was seeking to exclude the decrease in value that came about because of a delay in the execution of the improvement.

The court noted:

> "However, there is not involved in the case at bar any question as to any increase or decrease in value due to the proposed improvement itself. The narrower question with which we are concerned here is solely whether there can be included in the damages to be assessed for the taking of property any amount for a decrease in the value thereof caused by the pendency and delay in the adoption and execution of the City's plans for making the improvement and its taking of the Company's property finally for that purpose." [8]

The above holding seems tenuous. While it is true that the delay in execution of the improvement may aggravate the trend downward in market value, the true underlying cause for the diminution in market value is directly attributable

to the anticipated improvement. It is more the nature of the improvement and its exact location rather than the delay in bringing it about, which devaluates the properties in the area. For it is clear that if the type of improvement which was proposed was one that would benefit the area, any delay in bringing it about would scarcely cause a diminution in values; it could only retard an enhancement in values. Consequently, our analysis leads us to the conclusion that a delay in the improvement as well as the anticipated improvement itself should be treated together insofar as they affect market value on the date of valuation. It is true that a delay in the execution of the improvement may bring about additional damages but this is an entirely different matter and will be treated subsequently in a separate section.

A. Enhancement in Market Value Due to an Anticipated Improvement or Delay in the Execution of the Improvement.

Though those in the field are hindered by the unusual difficulties in discerning exactly what the courts are really saying, as a general proposition it is fairly clear that in those situations where it is certain that a particular parcel of land will be taken in the foreseeable and proximate future, the majority rule is that any enhancement, as a result of such knowledge, to that particular land or adjacent land is excluded and discounted in determining market value at the subsequent date of valuation.[9]

By the same token, the majority "rule" also would seem to hold that if it is probable that particular land is to be included within a proposed or anticipated improvement, any subsequent enhancement as a result of that knowledge will be excluded in determining value at the date of valuation.[10] While the cases are even less clear here, the majority doctrine also indicates that lands adjacent to the condemned property cannot be utilized for the purpose of showing the value of the condemned property, at least to the extent that the adjacent property reflects an enhanced value due to the fact that the probable improvement and its exact location were anticipated.[11]

The greatest difficulty in ascertaining the correct measure of value in light of the anticipated improvement unfortunately occurs in what is probably the bulk of the cases connected with this subject -- when it is known the general area where a probable improvement might be constructed but it is uncertain what particular property will be taken.[12] The majority of the courts seem to adopt a vague standard that enhanced value as the result of such knowledge is allowable to show market value providing it was not yet probable that the particular property would be taken.

1. Policy Considerations.

Before coming to grips with these sundry situations as they appear in the cases and as they arise, though at times disguised, in the opinions, it would do well to set forth the policy arguments that are occasionally

advanced for either excluding or including any enhancement in value due to the anticipated taking.

To begin with, as has been noted, the almost universal rule is that in condemnation the owner is to be granted the market value of the property as of the date of valuation, regardless of when that date might be. Now if there is an enhancement in value which is directly due to the proposed or anticipated improvement, it logically, though not necessarily equitably, would follow that the condemnee should be accorded the enhanced value. For even if that enhancement constitutes nothing else but a speculative value based upon what a buyer might be expected to obtain in the condemnation suit, it is often difficult to separate such speculative factors from market value; indeed, it could be argued that a speculative value is its market value.[13] But the majority of the courts are not content with such a result and discount this speculative aspect.

Where from the very beginning the exact location of a proposed improvement is certain, the courts are most apt to discount any enhancement and to state clearly the policy reason for their so doing. The basic reason for denying the enhancement to the condemned property when the enhancement resulted from the prior knowledge of the exact location of the improvement is that, it is felt, the condemnor should not be made to pay for a value which it has itself created.[14] This policy argument is not restricted to situations

where the exact location of the proposed improvement was known in the beginning but probably is the basis of the rationale used by the majority of the courts for disallowing the enhancement even when the proposed improvement was uncertain or when its location was not definite.

The second basic reason that the weight of authority suggests for disallowing an enhanced value when the exact location of a proposed improvement is known is more germane. Since it is certain that the condemned property was to be taken prior to the date of valuation, any increment in the value of that property does not reflect the benefit that the property would receive (since the property is to be taken) but rather is based merely upon speculation as to what the condemnor might be willing or might be made to pay for it.[15]

The minority answer to this second point, and one that would allow enhancement in the value of property that is certain to be taken, argues that since the owners of adjacent property are to be benefited by the improvement, the condemnee should be given the same right since he would have realized such a benefit had his property not been condemned.[16] Furthermore, since a condemnee may do with his land what he wants to until the date of taking, he might have sold that land just prior to the date of valuation, or the date of taking, and have received the enhanced value. Moreover, the other party who bought such property after it had been enhanced and had paid the enhanced value would suffer a loss if that value

were not included in fixing his compensation.[17]

Whether or not the anticipated improvement might be either proposed or contemplated and whether or not the exact location be known, some courts, while indicating that the enhancement cannot be included in the compensation, permit the value of adjacent property to be used to ascertain the market value of the condemned property if for no other reason than because it is exceedingly difficult to arrive at the adjusted market value of the condemned property without resorting to such "comparable" sales.[18] However, the majority of the courts appear to reject the introduction of the value of adjacent property likely to have been enhanced by the proposed improvement, since they consider such an enhancement to be a windfall to the adjoining property owners, and, as Orgel has stated, "The aim of the court would then be to restrict the area of undeserved gain instead of enlarging it. . ."[19] In an effort to restrict this "windfall", the courts have, as indicated, sought to make distinctions between enhancements that result from a contemplated as distinguished from a proposed improvement; and they have also sought to distinguish property that was known at one of these two times to be "probably" within the area of the improvement from property that might "possibly" be within the area of the improvement. The following pages will illustrate the jagged course the courts follow.

2. Where the Taking of the Particular Property was Certain Prior to the Date of Valuation

(a) Majority Position

Where it is known with practical certainty that the subject property will be taken for the improvement, according to the great weight of authority, an enhancement, in the subject property or similar property in the neighborhood resulting from the anticipated improvement cannot be taken into consideration in determining market value and such enhancement must be excluded.

On this point most courts are content in following the rationale set forth by Nichols:[20]

> "If it is known from the very beginning exactly where the improvement will be located if it is constructed at all, the property that will be required for its site will not participate in the rise or fall in values, for, since such property is bound to be taken if the improvement is constructed, it can never by any possibility either suffer from or enjoy the effects of the maintenance of the public work in its neighborhood; and consequently it is well settled that in such case in valuing the land the effect of the proposed improvement upon the neighborhood must be ignored."

In excluding the enhancement to the subject property and in rejecting the enhancement to surrounding properties resulting from the proposed improvement most, but not all courts, seek to emphasize the distinction between an enhancement which results from a "contemplated" improvement and one which results from an improvement which is a practical certainty. For example, in United States v. Certain Lands, Town of Narragansett,[21] a 1910 federal case, the court rejected

the request by the condemnee for a ruling that the land should be valued as enhanced by the proposed improvement. In so acting, the court stated:

> "While such a rule is probably sound where the condemnation of adjacent lands is for the purpose of enlarging an old and fixed location, the rule seems of more doubtful justice in cases where, from the nature of the work, it is evident, from the moment of the passage of the legislation authorizing it, that the land in question will necessarily be required for the public improvement. Where, from the inception of the public improvement, it is known with practical certainty that the land will be required for the public project, this in itself negatives any supposed advantages which might accrue to the land held in private ownership by reason of its adjacency to the grounds of a public Capitol, park, or like improvement. If from the outset it is known that the lands must be taken for the public purpose, it is unsound to base their valuation upon any supposed advantages arising from their continuance in private hands as lands adjacent to public grounds.
>
> "The application of the rule that the date for the valuation is the date of legal condemnation, rather than the date upon which by legislative act or by practical and necessary inference from such act it became known that the lands would be required for public purposes, is a matter that seems to me to require some further and careful consideration.
>
> "The enhancement of price due to the public improvement, if based upon the reasonable expectation that the lands may be held by the private owner with the added advantages of adjacency to the lands improved by the public, is legitimate; <u>but when this expectation is destroyed by the practical certainty, as distinguished from legal certainty, that the lands are not to continue in private ownership adjacent to improved public lands, then the reason fails</u>. It is unsound to look merely at the date of filing a petition for condemnation in considering how far the value has been enhanced by the public project.

"In view of the fact that by the application of this rule the public has been compelled to pay private owners of lands an advanced value due to the very improvement which the public has undertaken, it would be wise, upon the institution of public works requiring the exercise of eminent domain, that officers of government, national, state, or municipal, should have some of the prevision shown by Jeremy Bentham, when, among other interesting occupations, he framed a project for a canal across the Isthmus of Panama, and in pursuance of his habit of foresight made provision that, in awarding compensation for lands taken, no compensation should be awarded for values created by the improvement itself." [Emphasis added]

That the enhancement in market value, brought about primarily because of the anticipated public improvement, necessitates the rejection of sales of similar property in the vicinity so affected has been clearly spelled out in detail in the leading case of Kerr v. South Park Commissioners.[22] In that case the Supreme Court of the United States approved the trial court judge's instructions which had distinguished between an enhancement that resulted from a generally anticipated but uncertain public improvement from any further enhancement that came about when the anticipated improvement and its location were certain, and when the condemnor had committed itself to go through with the project; the prior enhancement, but not the latter, may be included in a determination of just compensation. In that case the trial court instructed the jury as follows:

"A number of witnesses testified that the agitation of the park project, the anticipation that the legislature would authorize the

appropriation of lands to establish a park in the vicinity of the present South Park, and the introduction of the bill into the legislature, which finally became a law on the ____ day of February, 1869, materially enhanced the value of lands embraced in the present park lines, as well as the lands adjacent thereto and in that vicinity. Any resulting benefits to the lands within the proposed park from this and other causes, such as the growth and prosperity or the anticipated growth and prosperity of the City of Chicago, you should take in account in determining the amount that will fairly compensate the owner. But a number of witnesses also testified, and there seemed to be less agreement upon this point than upon some others, that the passage of the Park Act, its ratification by the people, and the fixing of the proposed park boundaries by the legislature, gave to the lands immediately fronting upon and in the vicinity of the park, including the Midway Plaisance and the boulevards, an additional value solely on account of their being without the proposed park lines, but adjacent to the park, the plaisance, and the boulevards, or near enough thereto to receive the special benefits resulting from such improvements. In the nature of things the lands within the proposed park, and which were to constitute it, could not have been thus specially benefited, and the owner of the lands in question should be allowed nothing on the ground that his property was thus specially benefited. Even the witnesses who testified upon this branch of the case for the owner admitted that the outlying lands received a benefit from their location or relation to the park which the lands constituting the park did not receive. Sales of property of like character and quality, similarly situated and affected by the same causes, made under circumstances likely to produce competition among bidders, are sometimes resorted to in determining the value of lands; but inasmuch as the lands adjacent to and in the vicinity of the park, plaisance, and boulevards received a special benefit, and were subject to a special burden by reason of the existence of the park, plaisance and boulevards, their situation and that of lands embraced within the park lines were relatively so different that outside sales afforded no just grounds for determining the character of the lands taken for the park, and hence all evidence of such

> sales was excluded, and you are again instructed that there is no such evidence before you. It is for you to say whether any of the experts in giving their opinions of the value of the two tracts in question were influenced, if at all, by knowledge of sales of lands which received a special benefit by reason of their peculiar relation to the park, plaisance, and boulevards. To the extent that any of the witnesses based their opinions upon a knowledge of such sales, their evidence should be disregarded. It is for you to say, however, whether any of the witnesses gave opinions upon this basis. . . . In that connection, however, you will bear in mind that many of the witnesses, most of them perhaps, testified that the final passage of the Park Act, and its ratification, resulted in special benefit to the lands around the park and in its vicinity, and that the lands within the park lines did not receive this special benefit. For this special benefit you will allow nothing."

These cases represent the majority and presently prevailing rule in situations where there is a practical certainty that the public improvement will take particular property.

(b) Minority Position

Some courts refuse to disallow enhancement even when the enhancement is directly and unquestionably due to the proposed improvement. Though a careful analysis of the language of most of the cases cited by the authorities for upholding the minority position leaves a good deal of doubt as to whether the courts were really allowing enhancement in the face of a certain improvement, or whether the courts allowed only that type of enhancement that occurs when the improvement is "contemplated", the few following cases undoubtedly permitted the inclusion of the enhancement resulting from a proposed

improvement that is certain.

In Guyandotte Valley R. Co. v. Buskirk,[23] a 1905 West Virginia case, the court allowed the condemnee the enhancement in his property which resulted from the known and definite fact that the railroad company was in the course of building a railroad through his property. The question, as the court saw it, was whether the condemnor or the condemnee

> "is to have the increase in value arising from the prospective construction of the proposed improvement. One or the other must take it or it must be held that there is none, or can be none. To hold that the [property owner] cannot have the benefit of such increase would conflict, not only with decisions of this court and the early Virginia decisions, but with the great weight of authority as well."

Similarly, in another railroad taking action, Gate City Terminal Co. v. Thrower,[24] a 1911 Georgia case, the opinion adopted virtually the same rationale advanced in the Guyandotte case. The Georgia court stated:

> "If at the time the market value of the property was to be estimated it was known or anticipated that the railroad company would construct a railroad and build the terminal station in the locality where the property was situated, and this fact served to enhance the market value, the owner would be entitled to the actual market value, as affected by reason of its being known or anticipated that a railroad station would be built in that locality." . . . "Where improvements in any locality of a certain kind, if made, would enhance the value of property in that locality, and a party having the right of eminent domain begins such improvements, and because of its being known or expected that the improvements will be carried to completion, the market value of property in that locality is enhanced, the party seeking to condemn such property cannot object to being

made to pay the actual market value of it before taking it because it has been enhanced by reason of the fact that the improvements which are known or expected to be made, will be made by the condemning party."

And in still another railroad taking situation, the Iowa court (Snouffer v. Chicago & N. W. R. Co.),[25] in allowing the condemnee the enhanced value, indicated that market value in condemnation should be no different than that which exists in private transactions. It said:

"Many of the considerations that tend to affect the value of town property are prospective only. Select a lot in any city, find a witness competent to express an opinion as to its value, and ask him with relation thereto, and as to the basis of his judgment, and it will be found that the facts upon which his conclusions rest are anticipatory, largely. . . It was right for the jury to consider every fact that tended to give value to this property on the day it was taken. And, if the fact that a depot was likely to be erected in its vicinity had given it an added worth at that time, it was proper to consider this fact, even though the depot was to be erected by the railway companies that sought to take the property. If this were an action for damages, brought by a person to whom the owner had contracted to sell this lot, we think no one would contend that the prospective location of the depot should be excluded from consideration in fixing the value of the property."

The above cases, which appear to allow for enhancement even when the proposed improvement seems a certainty,[26] as well as most of the other cases cited in the footnotes, usually involved: (a) railroad takings (b) rather old decisions and/or (c) cases that were subsequently overruled or ignored. But in a very recent Utah case, Weber Basin Water Conservation Dist. v. Ward[27] (December, 1959), the Supreme Court

of that state adopted the minority position and allowed the enhanced value that came about because of definite knowledge that the Conservation District was about to take the property. The court pointedly stated:

> "The basis of the attack made upon the defendants' expert evidence is that they relied upon the increased value of the land occasioned by Weber Basin's plans for improvement of the area in increasing farm values thereabouts. The plaintiff urges the view adopted by some courts that the value of the property for condemnation purposes should be determined without consideration for the fact that the condemnor has entered the market and plans improvements. The argument supporting such rule appears to be that the condemnee should not be allowed an advantage from the fact that the condemnor is improving the area and the latter be required to pay a higher price and thus in effect suffer a penalty because of its own improvements. The contrary view is that eminent domain statutes are designed only to give the condemnor the power to purchase property whether the condemnee desires to sell or not, but are not purposed to give the condemnor any superior bargaining position as to price. We are in accord with what appears to be the better view, adopted by the trial court, that the condemnee is entitled to the fair market value of his property at the time of the service of summons in the condemnation proceedings as provided by statute; and that all factors bearing upon such value that any prudent purchaser would take into account at that time should be given consideration, including any potential development in the area reasonably to be expected."

It is interesting and pertinent to note that the court in the Weber Basin case based its holding on the Utah statute. This statute was adopted from and contains exactly the same language as Section 1249 of the California Code of Civil

Procedure as it was enacted in 1872.[28]

3. Where it Was Known Prior to the Date of Valuation that the Condemnor Was "Committed to" the Improvement or that the Particular Taking Was "Probable".

(a) Majority Position

As was seen in the prior section, the majority of the courts, while denying any enhancement that results from the knowledge that public improvement in the area is certain, are willing to concede that the condemnee should be allowed an enhancement that comes about prior to the time that the project and its exact location became definite. This is the great battlefield of the conflict; even more precise, however, this is the "no man's land" of the controversy: Exactly at what point in time and by what means is a trier of fact able to ascertain and mark the cutoff?

The earlier trend of cases seemed to set up this formula: a "contemplated" improvement should not exclude an enhancement in market value that flows with it, whereas any subsequent enhancement must be excluded once the improvement is "proposed". One of the leading cases in this field, a 1913 Louisiana action, Shreveport Traction Co. v. Svara,[29] enunciated this distinction in the following way:

> "In other words, the possibility or probability, that some improvement affecting particular property will, or will not, be made, when, and with what effect, are commonplace factors, which, with others, determine, from time to time, the market value of such property. When, however, the period of uncertainty -- of mere hope, speculation,

> anticipation, or contemplation -- is past, and the time arrives when the property is demanded for the purposes of an improvement actually proposed, the state, having the right to take it, upon first making just and adequate compensation, should not be required to pay, in addition to its value, a further amount, merely because of the purpose for which it is to be used, inasmuch as that purpose is to promote the welfare of the entire community." [Emphasis added]

For thirty years thereafter, the courts throughout the country veered toward accepting this formula, and in so doing, by its very nature, found themselves in a caldron of confusion. Then, in 1943, the United States Supreme Court was confronted with the same general question in United States v. Miller.[30] There land had been taken for the relocation of a railroad which was to be flooded by a reclamation project. The project itself had been under consideration for a considerable period of time and it was generally known that the railroad would have to be relocated. The particular property finally taken had originally been designated as one of the alternate routes for the taking. But in the interim this very property was greatly enhanced by the benefits that accrued from a prior but integral part of the overall taking. Undoubtedly this enhancement was due in large measure to an expectation that other adjacent property rather than the subject property would eventually be taken. The court stated:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the

proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

"The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

"In which category do the lands in question fall? The project, from the date of its final and definite authorization in August, 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property. If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible purchasers from them, as to what the Government would be compelled to pay as compensation." [Emphasis added]

Numerous other courts have cited with approval and have adopted the Miller position.[31] In dissecting

the opinion, we are hardly able to draw any conclusion other than that the Miller standard creates little more than a semantic difference from the majority rule which had formerly prevailed. Indeed, it is not entirely clear exactly what the standard adopted by the Miller court really is, for the court uses three varying tests: (1) an enhancement is to be disallowed that results from the "likelihood" that the property will be taken; (2) the enhancement in the property is to be excluded once the condemnor is "committed to" take it; and (3) no enhancement is to be accorded the condemnee if his property was "probably within the scope of the project". It is this latter criterion that appears to be the principal one adopted and that which has since been most often utilized and which, as will later be seen, causes considerable confusion to appraisal experts. All these criteria, however, (assuming there be a difference between them), have already caused difficulties in late cases.

For a number of years after the Miller decision, Orgel, for one, expected that this vague test would plague the courts, though he reports that, at the time of his writing, cases had not arisen wherein these inherent differences might clash.[32]

Recently, however, at least two federal cases have exemplified the difficulties of applying these loose terms. For example, in Blas v. United States,[33] a Ninth Circuit opinion, where the Government was condemning property

for the purpose of a rehabilitation project, the court allowed the condemnee an apparent enhanced value that had accrued to the condemned property, located in Guam. For three years (1946-1949) prior to the taking, the United States Government had "developed the surrounding lands into a residential community, pursuant to its rehabilitation program". The Government claimed that the subject property had consequently been enhanced due to this program and, inferentially, due to the anticipation that the subject property would also be taken as part of the program. The court, however, citing Miller, rejected the Government's contention, noting that "There was no evidence in the record . . . [that there was] any general plan to acquire the land for Governmental purpose."

The opinion raises two questions. First, what constitutes a "general" plan and if there has been a "general" plan, would the enhancement have fallen into the scope of exclusion as set forth by the Miller case? Second, it is fairly clear that the Government had begun a rehabilitation program involving the construction of residential dwellings; could this in itself exclude an enhanced value insofar as such a program may have established a "likelihood" that the subject property would be taken? It seems that both questions might have just as easily been answered in favor of the condemnor, citing Miller, as in favor of the property owner.

Another 1959 federal circuit case,

Cunningham v. United States, raises similar questions. In that case the federal government was condemning harbor property in North Carolina for purposes of improving a channel. The project was "approved" by Congress in 1950, though no funds had been appropriated for the purpose and no work had been done at the time of the taking in 1953. In this case, the court disallowed the enhanced value that purportedly arose as a result of the anticipated improvement. The court stated:

> "We agree with the court in Iriarte [157 F2d 105] that the only question here is whether there was such a reasonable prospect of the improvement in the foreseeable future as to affect sales value in private transactions or only a hope that would have no recognizable value in commerce. In Iriarte, the harbor improvement had not been authorized by the Congress. The Chief of Army Engineers had not recommended it. The owner had no more than a speculative hope that federal aid might be forthcoming in an uncertain future. Here the project had been authorized by Congress. No funds had been allocated to the project, but the authorization created a substantial prospect of accomplishment of the improvement. Private individuals would not immediately negotiate on the assumption the work was done, but they would not ignore the Congressional authorization in their dealings.
>
> "As the District Court found, demand for the services of the boat yard was increasing. The Congressional authorization gave more than a vague hope of further increases to come."

Again, it can be seen that the court in Cunningham considered this situation to fall into the Miller doctrine despite the fact that there was but "a reasonable prospect of

the improvement in the foreseeable future", and there was, as the court termed it, "more than a vague hope" of the project being completed. It should be noted that an authorization to construct a federal government project is not the same as appropriating money for the project; indeed, in one instance the Government may be "committed" to it, though not necessarily in the other instance.

These recent cases depict the ambiguity that exists in the majority position from a legal viewpoint. We shall subsequently see that this standard also causes practical difficulties and dilemmas to appraisers who are confronted with these problems.

(b) Minority Position

Obviously, those jurisdictions adhering to the minority rule which allows any enhancement due to the proposed improvement, even when the improvement is certain and definite, would naturally allow the enhancement which is the result of what is only a probable improvement. Consequently, the minority courts are not particularly bothered by the nuances involved in the Miller doctrine.

4. Where Prior to the Date of Valuation the Anticipated Improvement was in the Contemplated or Expected Stage

(a) Majority and Minority Position

As can be seen from the prior pages, both the majority and minority jurisdictions are in accord that if the anticipated improvement is merely one which is contemplated

or generally expected, but has not gone beyond this rather "vague hope", the condemnee should be allowed any enhancement in the market value of his property that comes about in connection with this "phase of the improvement".

(b) The Massachusetts Rule

On the other end of the spectrum is the Massachusetts Rule. In that state a condemnee may not receive any enhancement in the value of his property that comes about in the wake of an anticipated public improvement, even though that anticipation may only be in the "contemplative" or "expected" stage. That jurisdiction, alone, seems to favor the condemnor to the extent that any enhancement resulting from a general agitation in the community that comes about before the definite commitment or exact location of the improvement may not be included in a determination of market value for the purposes of arriving at just compensation. A leading case in that state, May v. Boston,[35] advances the Massachusetts position in these terms:

> "Whenever there is an expectation of a public improvement, the market price of land in the vicinity is likely to advance, in anticipation of the more valuable uses to which the land can be put when the improvement is made. Its real value for use is not increased until the change in its surroundings comes. If the expected improvement involves the taking of land by the right of eminent domain, the value of the land taken will never be enhanced by the improvement, for the taking precludes the possibility of ever using it under improved conditions. In that respect it stands differently from other land in the vicinity which is not

> taken. . . . If it is known from the beginning exactly what land will be taken, it must also be known that that particular land can never be made more valuable by the improvements, since it can never be used by its owner under the improved conditions. If the plan is general, and it is not known exactly what land will be needed by the public, but only that some land will, whenever the plan takes definite form, and the location is fixed, it is known that the land to be taken has not received and never can receive, any benefit from the improvements. There is no injustice in saying that such land shall not entitle its owner to be paid out of the public treasury at a rate determined, not by its value for use, but by a prospective and speculative value of land in the vicinity, derived from an expectation of the benefit to come from the public use for which this is to be taken. One holding or buying or selling land in a neighborhood where the market price has risen in anticipation of the public improvements which will involve the taking of a part of it for a public use is bound to know that under the statute the land which will be taken for such a use can be paid for only at its value, unaffected by the improvements."

5. The California Position

California today probably follows the majority rule insofar as enhancement in light of the anticipated improvement is concerned. The principal case on this point, however, leaves a measure of doubt as to the firmness and scope of such a position in this state. In San Diego Land & Town Company v. Neale,[36] an 1888 decision, the plaintiff sought to condemn the property of the defendant for reservoir purposes. The trial court permitted an expert to estimate the value of the condemned property as it would be enhanced by the proposed irrigation facilities that the improvement would bring

about. The California Supreme Court held that the admission of this testimony was error and, in so doing, asserted that any benefit that arises from an improvement upon adjoining land may not be considered in determining the value of the subject property that is being taken for the same purpose. The court, however, went on to state that:

> "It is possible that they might get some benefit from it indirectly. That is to say, the public knowledge of a proposed improvement might cause an actual demand in the market and a subsequent advance in the current rate of price. In such case it would be impracticable for a court to analyze the price and determine the proportion in which any particular element contributed thereto. The scales of justice do not balance quite so delicately as that. But aside from this indirect benefit, and in a case where there is no actual current rate of price, and where in consequence the court must arrive at the value from a consideration of the uses to which the property may be put, it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land."

Though the court ends up by citing the prevailing standard of valuation in these circumstances as enunciated in Kerr v. South Park Commissioners (supra), the uncertainty of the holding results from the assertion that it would be impractical for a court to disallow a benefit that comes about "indirectly" and that any such subsequent advance in value that follows public knowledge of a proposed improvement may be allowed. Indeed, a careful analysis of the language employed by the court in Neale could easily lead one to the conclusion that that case adhered to the minority rule but simply went on

to disallow any known and direct benefit that the subject property might have received because of and after the taking.

Furthermore, the case may reasonably and alternatively be read to stand for the proposition that (1) the condemnor must pay for a general but not a special enhancement that results from the anticipated improvement,[37] or even (2) that the case merely holds that the property is not to be valued by its worth to the condemnor.[38]

Nonetheless, California, in 1955, apparently adopted the majority or Miller position. In County of Los Angeles v. Hoe,[39] the court, citing both Neale and Miller, asserted (in general terms) that in determining the market value of the condemned property any increase in the value of that property by reason of the proposed improvement must be excluded.

But while the Hoe case is fair indication that California would adhere to the "probable scope of the improvement" standard advanced in Miller, the whole opinion, itself, highlights the difficulties inherent in applying this standard. For in Hoe the court emphasized that the anticipated improvement had reached the state where there was a "proposed purchase", where the chief administrative officer of the county was "authorized to offer" a certain price, where the site plan had been "approved as representing the presently agreed construction program between the county and the city" and where the board of supervisors had in its order "approved" certain points of the agreement "to be accepted by the city as a

prelude to the consummation of the purchase". It would seem, therefore, that all these factors, certainly taken together, would indicate that the question might have fallen within the scope of the Miller rule, at least that part of the Miller rule which speaks of the "probable scope of the improvement". However, the court went on to state:[40]

> "It thus appears that the order of the board of supervisors was only a proposal submitted by the county to the city, and that the order did not establish that the county and city were committed to a joint condemnation enterprise or any joint project for the purpose of constructing a joint civic center . . . ." [Emphasis added]

In an even more recent case, City of San Diego v. Boggeln,[41] a California court edged more closely to the acceptance of the import of the Miller case. There the appellate court upheld the trial court's instruction that the jury was to exclude any enhancement in value due to the proposed improvement which was a practical certainty many years prior to the date of valuation. The case, however, indicates the practical difficulties of appraising such property, particularly the question of ascertaining comparable sales during and prior to the period when the proposed improvement was a certainty.

Though California law would seem to be in general accord with the majority rule, the elastic language of the Neale opinion and the particular holding of the Hoe case create some doubt as to the firmness of this position and the application of the Miller doctrine.

B. Diminution in Market Value Due to an Anticipated Improvement or Delay in Execution of the Improvement

If, as most courts state, it is inequitable to allow the condemnee any enhancement in the value of his property resulting from knowledge of an improvement, proposed or certain, it would seem to follow that it would be at least equally as inequitable to permit a condemnee to suffer diminution in value resulting from a knowledge that an improvement is probable or certain. While there is no method for determining which is more prevalent -- an enhancement or a diminution in the value of the subject or adjoining properties -- it is well-known that quite frequently the valuations of the properties in the pale of condemnation are affected adversely.

It would seem that the courts upholding the majority position regarding enhancement would logically compensate the condemnee when the reverse situation, i.e., a depressed market value in the wake of the knowledge of a pending taking, arises. Although there are few reported cases directly on the point, it does not seem that all courts adhering to the majority position follow this consistent pattern. By the same token, there is even less authority one way or the other indicating whether the minority position in regard to enhancement (i.e., those courts that permit the condemnee the enhanced value based upon the rationale that the date of valuation is to be the sole criterion) is as equally rigid in holding that the condemnee must bear any diminution resulting from the

knowledge of the proposed improvement.

1. Majority Position

While it is difficult, in light of the paucity of cases, to be certain what position constitutes the majority, it would appear that the prevailing rule is that any diminution in these situations is to be accorded the same treatment as an enhancement. That is to say, the court will measure market value as it existed prior to the proposed improvement.

In those cases where a condemning authority rezones an area for the purpose of depressing property values when such property is about to be condemned, most courts appear to take the position that such prior action amounts to an illegal confiscation.[42] Similarly, any diminution resulting from such action or from knowledge that a public improvement in that vicinity is a practical certainty -- often labeled "the curse" -- may not inure to the benefit of the condemnor but rather must be disregarded in ascertaining market value. For example, a Pennsylvania court, confronted with this problem, stated:[43]

> "When the appropriation takes place, this 'impairment of value' from these preliminary steps becomes merged, as it were, in the damages then payable; the matter being worked out practically, in assessing the damages, by simply ignoring the detrimental effect of the plotting, and treating the value of the property as though there had been no such harmful results."

The above view seems to be a reasonable one; and in many of the cases where the courts disallow the condemnee an enhancement they often couple such a holding with the statement

that the condemnee is not to be penalized by a diminution.[44]

2. Minority Position

A number of jurisdictions that appear to adhere to the majority position in regard to enhancement are not consistent when the situation is reversed and the proposed improvement brings about a depressed market in the area to be affected by the condemnation. Indeed, the pattern is such that we hesitate to call this the "distinct" minority rule.

In a 1957 New Jersey case, Sorbino v. New Brunswick,[45] the condemnee contended that the "blight" designation adversely affected the market value of properties in the area that was being condemned for a slum clearance project. The court refused to measure just compensation by the market value of the property on any other date except the usual date of taking and date of valuation and asserted that any "reduction or increase in the market value of property occurring by reason of legislation authorizing some public project are mere incidents of ownership and cannot be considered a 'taking' in the constitutional sense". The condemnee, therefore, was made to bear the depressed value of his property resulting from legislative action authorizing the taking.

Similarly, a prior federal case refused to relieve the condemnee of bearing the burden of depressed property values when his land was acquired for the expansion of a federal project.[46] The court said:

"It is possible that the long lapse between

> the time when Congress first publicly evinced an interest in this tract for the uses of the U. S. Military Academy and the commencement of these proceedings thwarted the efforts of the claimant fully to subdivide the tract and dispose of home sites and recreational facilities. I know, however, of no method of compensating an owner for such consequences of congressional action. Legislative debates or even unfounded rumors may affect market values favorably or adversely. The owner is entitled to no more than the market value of the property taken regardless of the myriad influences which combine to annex that value to the property."

And, in another interesting case, A. Gettelman Brewing Company v. City of Milwaukee, discussed at the outset of this study, the court there refused to measure market value prior to the property having become depressed by the practical certainty, eleven years beforehand, that it would be taken by the condemnor. As may be recalled, the court sought to distinguish the adverse effect on market value that is brought about by the anticipation or definite knowledge of a proposed improvement, on the one hand, and a "mere delay" in bringing about the improvement, on the other hand. As stated before, such a distinction appears untenable. The court, however, suggested that had the diminution been caused directly by the proposed improvement itself rather than the delay, the property owner would have been right in his contention that market value should be measured prior to public knowledge of the proposed improvement.

3. California Position

The status of the law in this state in regard

to diminution in value resulting from the proposed or anticipated improvement presents an anomaly. The language in the latest cases indicates that California would adhere to the majority rule regarding enhancement; indeed, the case involving diminution recognizes and accepts the majority rule regarding enhancement. But this very case, Atchison, Topeka and Santa Fe Railroad Co. v. Southern Pacific,[47] presents an incongruous result when the property becomes depreciated, rather than enhanced. The illogicality and inconsistency is based upon the peculiar reasoning of the court that because an enhancement or benefit arising from the proposed improvement may not be considered, it consequently follows that a detriment may not be considered. At first blush, this conclusion would appear reasonable. For, if it is proper that a benefit cannot be considered in determining market value, neither should a detriment be considered. That is exactly what the court said. But, paradoxically, a rule that requires the enhancement to be excluded, in arriving at market value, would also require the diminution to be excluded, not ignored, in determining proper value.

Essentially, what the Atchison court really did was to take the terminology and holding adopted in the Neale case and misapply it in the reverse situation. Specifically, in the Atchison case, decided in 1936, the property owners sought to introduce into evidence a 1927 Plan and map which indicated that their property was in the area that was proposed to be taken for

the improvement. The actual date of valuation was December 1933. Because of this:

> "It is appellants' contention that the commission's order of July 8, 1927, was an important element to be employed by anyone seeking to determine the market value as of the date of filing the complaint herein, namely, December, 1933, in that the very order itself, becoming known, retarded this area, i.e., 'stigmatized' it, and affected its market value. The law does not, however, lend a willing ear to speculation. While appellants may have evidenced change for the worse in the demand for real estate there between July, 1927, and October 4, 1933, when the commission issued its decision 26399, approving the Plaza Set Back Plan, yet the trial court would have permitted an indulgence in unfathomable speculation had it opened the road to the examination of witnesses, using the order of July, 1927, and said Plan 4-B as a basis in order to determine whether there was a slump in the market in this area, and if so, what it was due to, during that period. Appellants' statement: 'In other words, appellants were entitled to have the market value of this land determined as if the decision of the commission never had existed', to us is paradoxical. The market value is an effect and we are not governed by the cause that brings it about in order to determine it. The market value could have been neither greater nor less if the cause had been examined into. Such examination of the exhibit containing Plan 4-B was not relevant nor material in determining the market value as of the time of filing the complaint. [Emphasis in original]
>
> "The case of Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403 [25 L. Ed. 206], has no bearing on this case, nor is appellants' contention therein sustained. Here three islands were sought to be condemned for the purpose of a boom, i.e., to catch floating logs. It was not urged therein that the property had been 'stigmatized' by any agency, public or private, and the case of San Diego Land etc.

> Co. v. Neale, 78 Cal. 63, 75 [20 Pac. 372, 3 L.R.A. 83], referred to by appellants, expressly holds, ' . . . . it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land'. If the benefits may not be considered, why consider the detriment? A value so derived is too remote and speculative." [Emphasis added]

To begin with, the court states that in determining market value it is "not governed by the cause that brings it about . . . . The market value could have been neither greater nor less if the cause had been examined into." Obviously, such reasoning flies directly in the face of the logic upon which the majority rule regarding enhancement is based. Moreover, the patent inconsistency and the action of the court in refusing to "go behind" the market value as it existed on the date of valuation, is highlighted by its statement "if the benefits may not be considered, why consider the detriment?" The Atchison court failed to realize that in enhancement situations, the majority rule and probably that of Neale is that the enhancement must be excluded in arriving at market value. The benefit or enhancement certainly must be considered, for how else can market value, less the enhancement, be ascertained? In like manner, the detriment must be excluded, for how else can market value, in the absence of the diminution, be determined?

A 1959 California opinion presents the possibility that the Atchison case might not be reaffirmed today. In Buena Park School District v. Metrim Corp.,[48] the court, while

dealing with a problem related to but not part of the enhancement-diminution question, stated:

> "It is obvious that in determining that value the trier of fact must disregard the fact that at that time because of the filing of condemnation proceedings the property was not actually salable. It is a matter of common knowledge that a purchaser would not buy property in the process of being condemned except at a figure much below its actual value. It follows, therefore, that in arriving at their fair market value it is necessary that the jury should disregard not only the fact of the filing of the case but should also disregard the effect of steps taken by the condemning authority toward that acquisition. To hold otherwise would permit a public body to depress the market value of the property for the purpose of acquiring it at less than market value.
>
> "It follows, therefore, that the court could have, within the limitations of sound legal and equitable principles, advised the jury that they should treat the property as having the value that it would have had, had no preliminary action been taken by the board toward the acquisition of the property."

Nonetheless, based upon the Atchison holding, California appears to be the only state that has taken this peculiar position. On its face, the status of the law in this state is not only illogical but quite inequitable to the property owner.

C. The Practical Application of the Rules In Regard To Enhancement Or Diminution In Market Value Due To Anticipated Improvement Or Delays In Undertaking Proposed Improvements

To the appraisers the rules regarding enhancement and diminution in these circumstances are not only difficult for them to apply in theory, but are even more perplexing to

apply in practice. Most real estate appraisers are trained to evaluate property based upon its market value on the date of valuation; for that is, as they see it, the actual market value that exists though it may be greatly affected by the anticipated improvement. Nonetheless, appraisers confronted with these situations accept the strictures imposed by the courts and seek to abide by the applicable rules. Thus, it is believed, most experts follow the general postulates layed down in the Miller case regarding enhancement; but even in California, a number, if not most appraisers apparently fail to heed the dictates of the Atchison opinion. In other words, appraisers seek to abide by a standard which excludes both an enhancement and a diminution resulting from the anticipated improvement.[49]

But accepting the prevailing rules regarding enhancement and diminution really only begins the problem for the appraiser. He must then ascertain, initially, whether or not governmental plans had reached the stage wherein the project may be labelled "proposed". As has been pointed out at length, the courts tend to wallow as to the ambit of the definition "proposed". Responsibility for the "answers" therefore is initially and almost entirely placed upon the appraiser. Yet appraisers often disagree among themselves as to that point in time when the improvement shall have passed from the valley of indecision to the plateau of "proposed".[50]

But even when an individual appraiser has satisfied himself as to the particular date which is to be used for the

purpose of excluding an enhancement or diminution, he is immediately confronted with the second vexatious problem: Was the subject property at this after determined time within "the probable scope of improvement"? And, was similar property, not taken, in the vicinity or adjacent to the proposed improvement, likewise within the "probable scope of improvement"? Should it be concluded that this similar property is within such a "scope", how does the appraiser find "comparable" property?

Once thrown into this mystic and misty atmosphere, the appraiser can find little to support his determinations, excepting only his subjective judgment. Land value in adjacent areas may have witnessed a substantial increase or decrease for a myriad of reasons, only one of which may have been the proposed improvement. To separate and sift these factors does not lend itself to any scientific support, to say the least. It has been reported that, at times, in such circumstances appraisers have frankly told their clients that they cannot find data to substantiate an opinion which either excludes or, conversely, includes an enhancement resulting from the improvement.[51] Assuming the expert determines that only a certain portion of the enhancement or diminution was directly caused by the improvement, he must then establish a percentile factor to be added to or subtracted from the present market value of similar property. It is often difficult for him in court to defend such a percentage, save only by stating that it is based upon his "experience".[52]

Having arrived at this stage of his appraisal process, he immediately is tossed into another quandary. If he determines that all the property in the vicinity was within the probable scope of the improvement and consequently suffered an enhancement or diminution, where does he turn to find comparable sales and other data of a comparable nature so as to determine the proper value of such property? If he goes outside the vicinity into another area, it is questionable whether the property in this latter area can be accepted by the courts as comparable. And if a court should later hold it as non-comparable, the sad state of affairs is obvious.

Moreover, when the appraiser finds it necessary, by these dictates of law, to discount an enhancement affecting adjacent property, he is beset with a further intangible factor that he must consider: Whether the enhancement to adjacent property is a general or special benefit, and if only a general benefit, is it to be excluded? The language of the courts in these situations is of little aid.

As emphasized in prior studies, the technique of determining market value cannot be called pure science. As the Miller case stated, "the application of this concept involves, at best, a guess by informed persons".[53] This is particularly true in the area under discussion. If subjective factors greatly influence such matters as a capitalization study and a determination of a probability of joinder, they are even more marked in this area. The appraisers' general formula for

determining value -- data plus analysis plus judgment equals value -- would, in these instances, rely heavily on the "judgment" factor.

D. Present Constitutional And Statutory Provisions Affecting The Exclusion of Enhancement Or Diminution Resulting From A Proposed Improvement

Occasionally courts have resorted to existing statutes and constitutional provisions to resolve the question of excluding or including an enhancement or diminution resulting in the wake of a proposed improvement. Some legislatures have, at times, enacted provisions aimed to meet this specific question. Generally, both the efforts of the courts and the legislatures have not met with total success and even, at times, have further aggravated an already confused situation.

When first met with these troublesome questions, courts had a tendency to find answers in constitutional and statutory language which, in truth, probably was never intended to be applied in such circumstances. For example, many state constitutions and some state statutes contain the provision that the property owner is to receive compensation for his land "irrespective of any benefits from any improvements proposed" by the condemnor or, more specifically, by a condemnor that is a private corporation.[54] The California Constitution, Article I, Section 14, has this exact terminology.[55] It is quite possible that these statutes and constitutional provisions were adopted in large measure so as to discriminate between a public body and a private corporation

and to favor the former rather than the latter.[56] At any rate, it is doubtful that they were intended in any way to deal with any question other than the question of measuring and applying just compensation in severance cases when there were special or general benefits.

Nonetheless, the courts have stretched these constitutional and statutory provisions into the field of enhancement or diminution resulting from a proposed improvement. The Oregon court, taking this language then present in its statutes, held that such terminology clearly barred the condemnee from any enhanced value that accrued to his land because of the nature of the proposed improvement.[57] The State of Washington, with exactly the same state constitutional provision as California, after first agreeing with the holding of the Oregon court, reversed itself and held that this very same provision allows the condemnee to receive any enhanced value resulting from the proposed improvement.[58] In Enoch v. Spokane Falls R. Co.,[59] the court said:

> "Does this phrase [the provision of the Constitution: 'irrespective of any benefit from any improvement proposed by such corporation'] mean that the corporation making the appropriation may show that the value of the property, a part of which it takes for a right of way, has been enhanced by the construction or proposed construction of its road, and then deduct such enhancement from the present value of the land and only pay the remainder as damages? Or does it mean that a person whose land is taken for the use of a railroad is entitled to its fair market value without regard to the causes that may have contributed to make up

such value? The latter is the construction given by the highest courts of several of the states whose constitutions contain a similar provision."

The Enoch court relied upon the cases in other jurisdictions having similar constitutional or statutory language;[60] most of these cases involved takings for railroad purposes. Subsequent Washington cases, however, create doubt as to the prevailing rule in that state insofar as decisions there now appear to go both ways.[61]

Fortunately, California apparently has not followed the practice of utilizing the constitutional provision regarding benefits for the purpose of resolving the question of enhancement or diminution resulting from a proposed improvement. Though California cases have run a jagged course in interpreting this constitutional provision, as it applies to special and general benefits,[62] they have properly refrained from following the dubious path of applying a provision that undoubtedly does not have and never was meant to have application to the problem under discussion.

More closely germane to the instant problem are the statutory provisions present in two other jurisdictions. The Louisiana civil code has a provision which specifically states that compensation shall be measured "before the contemplated improvement was proposed and without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."[63] This statutory dictate comes closer

than that existing in any other jurisdiction for spelling out what is, generally speaking, the majority rule. A similar, though older Massachusetts statute lends some support to the unique position adopted in that state. That statute directs that no increase occasioned by the improvement shall be allowed the condemnee.[64] As was noted before, the courts in that state have apparently held that such a statute denies the condemnee the right to receive any enhancement which came about even when the improvement was only in the contemplative rather than the proposed stage.

Excepting for these 19 Century statutes in these two jurisdictions, it seems there was no direct or new legislation to cope with the problem; most jurisdictions were either content with or resigned to having the conflicts resolved in the courtroom.

Recently, however, the State of Arizona made a frontal effort to prevent condemnees from benefitting by enhancement resulting from an anticipated improvement. In 1958, that jurisdiction, "as an outgrowth of a major scandal in acquisition of right of way by the State Highway Department"[65] passed Section 18-155(D)[66] which allows the Highway Department, at its option, to assess compensation and damages for taking of property at the time of the resolution of the Highway Department indicating that the property is needed. That section reads:

> "For the purpose of assessing compensation and damages for the taking of property under the power of eminent domain for the purposes herein

provided, its actual value immediately preceding the date on which said highway commission by resolution establishes the necessity of acquiring said property for said purpose, shall be the measure of compensation and damages; and no sale, lease, agreement or other transaction affecting such property made thereafter shall constitute evidence of its value; and improvements placed upon such property subsequent to the date of such resolution shall not be included in the assessment of compensation and damages. Notice of the commissioners' action shall be given by filing a certified copy of the resolution together with a map showing the location and route of the highway affecting such property or properties in the office of the county recorder of the county in which the property is situated and by mailing a copy of said resolution and map to all persons having an interest of record in such property at their last known addresses. In the event that action is not commenced in the superior court in the county in which the property is situated within two years from the date of said resolution to acquire such property under the power of eminent domain, then the measure of compensation shall be as of the date of summons. The commissioner may at any time prior to payment of the compensation and damages awarded the defendants by the court or jury abandon the proceeding and cause the action to be dismissed without prejudice, provided, however, that the court may require that reasonable attorneys fees, expert witness fees and costs be paid as a condition of dismissal." [Emphasis added]

As the Attorney General's Office in that state has said:[67]

"The legislative purpose was to diminish the possibility of speculators' making money at the expense of the State Highway Department. In other words, when the date of valuation is the summons date there is often active speculation in land abutting a highway which is to be widened or constructed on a virgin route. This activity of course commences as soon as the Highway Department's plans are announced, and it usually happens that the condemnation suit itself is not filed for many months thereafter."

Despite the good intentions of this type of legislative action, such a course presents serious questions of equity and even more serious questions of constitutional validity. Indeed, already two Superior Court Judges in that state have declared the statute to be unconstitutional and the case is presently before the Arizona Supreme Court.[68] A policy of denying a property owner for a period as long as two years the right to improve his property and to deal with it as he pleases as well as the right to share a general rise in the market would be of dubious validity; and, in effect, it would be a taking without just compensation. It is believed that a California court would so hold.[69]

E. Conclusion and Recommendations

We are confronted with two questions: (1) Should California follow and adhere to the majority position regarding enhancement and (2) assuming that the majority rule that any enhancement be excluded in determining value is clearly adopted, should a diminution be accorded the same treatment? For the sake of clarity we shall answer the latter question first.

Presuming, for the moment, that California should follow the majority rule with regard to enhancement, it would be inequitable and untenable to hold to the apparent California rule that though a condemnee may not receive the benefit of any enhancement he must, under like circumstances suffer the injury

of any diminution. If a condemnee shall not receive the benefit of any enhancement due to the proposed improvement, there is no justification whatsoever that a diminution should redound in favor of the condemnor and to the detriment of the condemnee. Under these circumstances, we recommend that the holding of the Atchison case should be corrected.

The next question is whether California should adhere to the rule followed, at least in theory, in the majority of jurisdictions that any enhancement in value resulting from the proposed improvement is excluded in assessing compensation. There are good and substantial reasons that California should adhere to this rule to the extent it has and that it should be clarified to the extent that cases in this jurisdiction have created some ambiguity. Such a position receives support from the statements and holdings of the various courts that allowing a condemnee to benefit because of the improvement would be taking undue advantage of the condemnor and that the condemnor should not be made to pay for value which it itself has created.

Moreover there is some merit in the second rationale offered by the courts: To allow the condemnee an enhancement in these circumstances would not constitute a payment for the true value of the property but rather would be paying for value based upon speculation as to what the condemnor might be willing or might be made to pay for it.

And, in a larger sense, there is considerable justification in the argument, and indeed such an argument

may be the basic tenet of just compensation, that the condemnee should be put in a position after the taking, insofar as feasible, no worse off than he would have been had there been no taking at all.[70] Since an enhancement which is directly or mainly due to the proposed improvement is a factor which would not come about except for the improvement itself, the condemnee, perhaps, should not be heard to complain under an indemnification theory that he is, because of the exclusion, being denied just compensation. Following this line of reasoning, a departure from strict market value theory in these circumstances would be justified.

Another factor must be taken into consideration, however, before making such a conclusion final. As seen in this study, a number of courts have, at times, treated enhancement and diminution problems in the same fashion and with similar language as the problems connected with special and general benefits and damages in severance cases. The question that arises from this practice, therefore, is whether it is proper and feasible to treat these two problems in the same manner.

Adhering to the majority rule regarding enhancement and diminution is, upon close examination, in variance with the treatment accorded condemnee in partial taking cases where special or general benefits or damages are involved. In these latter situations the large majority of jurisdictions, including California, permit the property owner who has suffered a partial taking to receive any <u>general</u> (though apparently not any <u>special</u>)

benefit that the remainder of the property may gain because of the nature of the improvement.[71] In other words, in these situations, the affected condemnee is to be left after the taking no worse off than his neighbors who also share in the general benefit. In effect, therefore, just compensation in these circumstances is interpreted as allowing the property owner not only indemnification for that property taken, but accords him an increase in value (general benefits) to the remainder of his property that is due to improvement. In reality he is left after the taking in a <u>better</u> position than he would have been had there been no taking at all.

The majority rule in regard to enhancement and diminution resulting from the proposed improvement excludes not only any special but any general enhancement. While such a rule may not be in derogation of the indemnity principle, it is, at least in theory, in conflict with the analogus position adhered to by the courts in partial takings.

Of course, it can be argued, as indicated before, that the condemnee should not profit at the expense of the condemnor because of the condemnor's proposed improvement; but in severance cases, since a condemnee may retain general benefits, a condemnee does profit at the expense of the condemnor. Likewise, it can be argued that by denying a condemnee any enhancement due to the proposed improvement, the condemnee will be put into a position after the taking as if there were no taking at all. But once again, this same rationale does not

follow in partial taking cases. There is possibly one further basis (inferentially raised by some courts) for treating enhancement differently than special and general benefits: In the former, but not in the latter situation, the property owner is in no position to be able to take advantage of the public improvement since his property has been entirely taken.

While this dilemma very largely centers around the scope and definition of the concept of indemnity, there remains an apparent or at least partial conflict between the two rules. In resolving this conflict, we recommend adherance to the majority position in regard to enhancement and diminution. We take this stand because in the ever-present need to balance the equities as between the condemnor and condemnee in eminent domain,[72] we do not consider it vital that the condemnee be indemnified to an extent which puts him in a position so as to pay him for an enhancement resulting from the proposed improvement which, after the taking, he could not take advantage of or share in.

Having drawn these conclusions, there are two basic alternatives available to the legislature. It can either (1) take no action and allow the courts to work out solutions or to follow present case law; or (2) it can enact statutory language so as to correct and clarify the California position on these points.

Because of the difficulties, discussed at length in this study, in defining "the probable scope of the

improvement" or similar terminology, at first glance there would appear to be some justification in taking a laissez-faire position and in allowing the courts to continue to handle these situations on a case-by-case method. Unfortunately, however, such a course would not be justified in California. For this state has, it appears, taken the unique position that a condemnee must suffer a diminution. Such case law must be corrected, and the most appropriate method for correcting the Atchison case would be by statutory reform. Moreover, the ambiguity of the Neale case also justifies and perhaps necessitates statutory correction.

Recognizing, therefore, that a statutory provision dealing with these matters is necessary, the question then becomes one of determining the exact language to be employed. We must initially reject the Arizona type of statute insofar as it is not only of dubious constitutional validity, but is clearly unjust to the property owner. The Massachusetts statute, on the other hand, must also be discarded insofar as it denies the property owner any enhancement that may occur years before the public improvement is proposed.

Taking a lead from the Louisiana type of statute, discussed before, we would suggest that Section 1249 of the Code of Civil Procedure have inserted an additional clause reading as follows:

> "Provided, that any enhancement or diminution in value of property directly resulting from the proposed improvement shall be excluded in assessing compensation."

The authors recognize that this definition -- and, indeed, virtually any definition -- will still leave many problems that will have to be resolved by the courts, particularly a determination as to what point in time an improvement was no longer merely "contemplative" but had been "proposed". Moreover, present Section 1248 of the Code must continue to show that this provision has no application to the question of special and general benefits. The language above should, nonetheless, be of beneficial guidance to the courts in problems connected with this area.

It is believed that language of this type shall better insure the rights of each of the parties, improve the ambiguities and injustices of the present status of the law, and facilitate the determination of just compensation.

IV. Damages Resulting From a Delay in Bringing About the Proposed Improvement.

In previous phases of this study we discussed at length how an enhancement or diminution in market value due to the anticipated improvement affects the question of just compensation. Related to that subject is the problem of damages incurred by condemnees as the result of delays that occur between the time when the proposed improvement became generally known and the date of taking or the time when the condemnee receives the award.

As indicated, quite frequently the announced intention or proposed plan to condemn a general or particular area for a public improvement not only affects the value of that and adjacent areas but, in addition, causes owners and lessees of property irreparable financial losses insofar as a blight upon the area impairs the economic development of that property. For example, tenants often move and new tenants hesitate to occupy the premises, and business generally declines in the face of a population exodus.[73] As one appraiser has put it:

> "The moment a condemnation project is announced, the property to be taken is placed under a shadow. It becomes difficult to lease or sell it. The owner dreads investing in any substitute improvements to make the property more desirable, knowing that such additional expenditures may not be recoverable legally if made after suit is commenced. Also it may be difficult to recover from a practical standpoint even if renovation is begun after the project is merely publicized. In such case the owner cannot afford to offer leases for any length of time; and thus desirable prospective tenants will not risk renting

> space in the property knowing the danger of being dispossessed through eminent domain. Furthermore, the proceedings often drag on for years, and they may even be abandoned finally by the condemning authority after the location has been economically undermined."

While some of the effects of this adverse situation may be alleviated by adhering to the prevailing rule (thus far apparently not followed in California) of assessing value prior to the proposed announcement and by excluding the allied diminution, such a move will not, in and of itself, afford relief to the property owner who suffers out-of-pocket losses and damages in the interim between the initial announcement and the final taking. The problem of damages due to the delay in the taking is, therefore, a separate one from the question of enhancement or diminution in market value as a result of the anticipated improvement.

Essentially, the question here involves compensation to lessors for lost rentals and indemnity to lessors and lessees alike for lost profits directly attributable to the delay in bringing about the proposed improvement. Any reflection on this subject will indicate the close similarity between this problem and that involved with the question of compensating condemnees for Incidental Losses. Indeed, damages because of delay are distinguishable from incidental losses only in regard to the time factor. Generally speaking, incidental losses concern those damages arising in the wake of a taking but which actually are incurred during the course of and

subsequent to the time the condemnee must move from the premises. For discussion purposes, they may be labelled the after-effect damages. On the other hand, those damages which are precipitated by the delay in bringing about the improvement occur (at the announcement of the proposed taking) and cease (at the time of the taking) before incidental losses are sustained. More so than in the case of incidental losses, these prior damages are more easily ascertainable at the time of trial.

Presently, the great weight of authority denies compensation for these types of damages; only one jurisdiction, as will be seen, has enacted legislation affording relief in these situations, and that statute is of very recent vintage. Most courts are content with following the position of Nichols on this question.[74] That authority has stated:

> "The uncertainty caused by the probability that the proceedings will be carried through and the proposed work constructed over his land differs in degree only from that shared by the owners of all property which may at any time be taken by eminent domain, whenever it may chance to lie in the path of a public improvement, and the decrease in income or other losses he may suffer from such uncertainty is held to be damnum absque injuria."

Recent efforts by condemnees to have courts reverse themselves on this position have met with even less success than remuneration for incidental losses. For example, in Sorbino v. New Brunswick (supra), the court cited many authorities for upholding the proposition that advance announcement of a proposed public improvement which creates a blight on the

property is not a "taking" in a constitutional sense; consequently, any damage that occurs because of such an announcement or such knowledge is not compensable.

The Wisconsin courts, among others, have also adhered to the majority position in rejecting claims for damages in these circumstances. As noted before, in the case of A. Gettelman Brewing Company v. City of Milwaukee, the weight of the law was such that the condemnee, who sought to have excluded the diminution in market value resulting from the protracted delay in bringing about the taking, was willing to concede that he was not entitled to recover for his loss of rents as a result of this delay. In the course of the opinion in this case, the court quoted from another authority to the effect that:[75]

> "It is generally held that damages for negligence or delay in the prosecution of condemnation proceedings are not recoverable in such proceedings, and that the proper remedy for recovering them, where they are recoverable at all, is by an independent action or proceeding. This is on the ground that any damage on account of such proceedings is of a personal character, as distinguished from damage to the property itself, and is not an element to be considered in assessing benefits and damages in the proceeding."

This latter argument -- the in rem-in personam dichotomy -- was discussed at length in the Incidental Losses, Moving Costs, Evidence, and other studies. As an obstacle to relief, it is of dubious validity.

Moreover, it is clear that in almost all jurisdictions, including California, the condemnee is prevented from bringing an independent action so as to hasten the taking and

prevent further financial losses, both in lost profits and rentals. In California, for example, the property owner in Silva v. City & County of San Francisco,[76] a 1948 case, brought an action for a declaratory judgment so as to force the condemnor to assess the value of his property after the time of the adoption of the resolution to condemn rather than to continue to delay filing of suit and assessment of compensation. In other words, the property owner, as well as others, was aware that the property would be taken and desired that the property be assessed before its value was depressed. The court, however, held that a property owner cannot bring an action to force the condemning agency to institute condemnation proceedings under these circumstances when the resolution authorizing such a taking contained no such limitation on the agency. It is clear, therefore, that any property owner who is a victim of a blight causing out-of-pocket losses, lost profits and loss of rentals is in no position to hasten the eventual taking so as to prevent or lessen these losses.

This situation was squarely presented to a Special Commission studying eminent domain problems in Massachusetts in 1957.[77] The Commission noted:

> "Property is now valued as of the date of taking, yet there is frequently a long period of publicity before a taking. As a result, tenants move and value of the property decreases solely because of the threatened taking. It is a loss that the property owner suffers because of the taking, and he ought to be able to fix his value in its true sense before the unfavorable publicity arose, and he also ought to be compensated for the loss of income due

> to vacancies between the time of the publicity and the actual taking. Neither is compensable at the present time."

A proposal was made to that Commission that this problem be alleviated by legislation which would allow the landowner to

> "show a vote by the taking authority of its probable intention to take its property . . . [and to] have the right to introduce evidence and have its value fixed as of the period immediately preceding such a vote concerning the proposed taking"

and to include

> "as an element of damage, the net profitable income lost in the period between such vote and the date of actual taking".

This latter suggestion was turned down by a majority of the Commission who were "of the opinion that no practicable provision could be made therefor without opening the door to speculative damages". Another authority in that state, commenting on this proposal, felt that it would impose an excessive burden on the taking authority to determine the extent of these losses.[78]

The State of Wisconsin, in 1960, despite a long line of precedent to the contrary, had no reservation in enacting such "remedial" legislation. In making major revisions to its condemnation statutes, that state included as an element of compensation the following:[79]

> "Rental loss exceeding normal experience where proved to be caused by the public land acquisition project and when the vacancy occurs after the parcel is shown on a relocation order".

The consultants recommend enactment of similar legislation in California. The "in rem-in personam" barrier should not be used in this instance, as well as in others, to deny a condemnee just compensation. While it is true that the delays in expediting condemnation proceeding may not be deliberate nor the fault of any particular condemnor, the condemnee is an innocent victim. Practically, if not legally speaking, the condemnee has suffered a taking. Here, as in all other cases where it is feasible, the condemnee should be put in a position, pecuniarly, after the taking as he would have been had there been no taking at all. If the condemnee suffers such damages as a result of the mechanics involved in condemnation he should receive equal compensation.

It should be noted that the Wisconsin statute does not include compensation for lost profits, as distinguished from lost rents, resulting from and in the course of preliminary steps taken to condemn the property. As in the case of incidental losses, it is appropriate that lost profits be taken into consideration in ascertaining just compensation. Indeed, there is even more reason for allowing for such lost profits since they are neither as conjectural nor as difficult of ascertainment as future profits. At the time of the trial, they can be fairly examined and determined. The payment for such losses, moreover, at the present time might well help give the needed experience for allowing similar incidental losses to be compensated for at some future time.

V. Additional Problems Related to Date of Valuation.

In fixing value on the date specified by CCP §1249, or on any particular date for that matter, problems of compensation arise that would not arise but for the necessity of determining value on the particular date chosen. While this type of problem does not often occur and seldom appears in the cases, it is believed that statutory provisions, protecting condemnees in these instances, would nonetheless be proper.

The first of these troublesome situations arises when a property owner, while in the course of constructing an improvement on his property, is served summons notifying him that his property is to be taken. The issuance of summons, of course, establishes the date of valuation in most of these instances and, consequently, the property would probably be valued (in absence of an estoppel theory) as it exists on that date with, conceivably, a half-completed building.[80] While no reported cases have highlighted such a situation, there was one action recently settled where the facts were quite similar to those just presented.[81]

Valuing property in this condition is both detrimental and unfair to the property owner. A half constructed building usually will have a market value a good deal less than the owner has paid for the half-completed construction costs. Yet, since in the market he could not realize his cost, he would probably sustain a serious out-of-pocket loss in a condemnation proceeding.

This situation may be rectified by making the owner "whole" again in a similar fashion to relief given to him in a private contract damage action. Analagous contract law would support a recovery which would allow the owner either the cost of the money that he has paid toward the construction, or the value of the improvement as though completed, less the cost of completion.[82] Since the condemnor is, practically speaking, in the same position as a private party who has caused injurious harm, it is believed that a statutory provision should grant the condemnee the same recovery as he would be entitled to in a private action.

Somewhat less closely related to the date of valuation but still tangent to it is another damage suffered by a property owner in the wake of the filing of an action of condemnation. In this latter instance, a condemnee has not necessarily begun the construction of the improvement to his property but has contracted and paid for architectural designs and engineering plans. These often are costly undertakings and such plans and designs seldom have any value to the condemnee following condemnation. Unlike the previous situation, this type of damage has manifested itself in case and statutory law in other jurisdictions.

In California, some authorities are of the opinion that this type of loss can be recouped by the property owner by asserting that such plans and designs increase the value of the subject property and, accordingly, should be reflected in the

market value. This theory, however, has not been fully aired in any reported case and it is questionable whether it would be clearly accepted in many instances by appraisers and courts. A more frontal effort to compensate the owner for his losses suffered in this way has been made in two jurisdictions.

In New York, in the case of Application of Westchester County,[83] a similar situation arose. There, in the course of rejecting the condemnee's claim for numerous types of incidental and consequential damages, the court did afford the condemnee the expenses of engineers' and architects' surveys and plans relating to the subject parcel and proposed buildings being condemned. These amounted to $7,500. The court, apparently, did not consider these expenses within the market value formula but allowed them "as a separate item of damage". In theory it is difficult to find any statutory basis for considering it as a separate compensable damage. The court got by this obstacle, however, by stating:

> "In any event it is decidedly true that each condemnation case necessarily involves different facts and is to be considered by itself, and further, that general rules are to yield in exceptional cases where necessary to properly compensate the owner for the land taken".

In Wisconsin, the relief was granted by somewhat more orthodox methods - the adoption of a statutory provision specifically on point. In 1960 the Wisconsin legislature passed, as part of its overhauling of condemnation law, a provision[84] allowing for the condemnee to be compensated for

"Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking".

The above statutory provision seems the most direct and proper way to alleviate condemnees who are injured in this way. It is recommended that similar language be added to either §1248 or §1249 of the Code of Civil Procedure.

VI. Date of Valuation.

A. The Effect of Present C.C.P. Section 1249

The principal question concerning C.C.P. Section 1249 is the determination of what is and should be the appropriate date for ascertaining value and damages for the taking of property. In the study entitled "Taking Possession and Passage of Title" we dealt with many of the problems what are involved with the date of taking. On of the most important, if not the most crucial, of the problems connected with the date of taking is the date of valuation. We noted at that time that these two dates are not the same in all instances. Indeed, in California they are at times quite different.[85] And this difference has a tremendous effect upon the law of eminent domain, in general, and the question of just compensation, in particular.

The recommendations of the consultants made in that prior Study and especially the actions of the Commission concerning it, have the effect of declaring that at least in immediate possession cases, the time of taking possession is to be equated for most purposes with the date of taking and that since at such a time there had been, at the least, a "constructive taking" all the indices of ownership that formerly inured to the property owner (excepting bare title) now are placed upon the condemnor.[86] The philosophy behind that recommended change also calls for special study into the problem of the relationship between the date of taking and the date of valuation. While a

reappraisal of the date of valuation in this state was proper, even in the absence of any change in the law regarding immediate possession, it now becomes necessary.

Section 1249 of the Code of Civil Procedure, as indicated at the outset of this study, holds that the date of valuation is that date upon which summons is issued or, if the action is not tried within one year from its commencement, the date of valuation is the date of trial (if the delay in trial is not caused by the defendant). The original 1872 statute fixed the time of the issuance of summons as the date of valuation; the 1911 amendment, adding the one year proviso, apparently was introduced to protect the condemnee.[87] In adopting the 1872 provision, Califfornia adhered to a position that few if any other jurisdictions in the nation followed at that time; a number of western states thereafter adopted this California position into their statutes. No state, however, appears to have adopted the further provision added in 1911.

In the absence of problems causec by the taking of immediate possession, it can be stated as a general proposition that the present Section 1249 as it relates to the date of valuation works fairly well in practice. While there are some difficulties that have developed in connection with it (particularly when there is a second trial) and while it may be vulnerable to attack in theory, it has generally afforded each party fair protection in arriving at just compensation.

Although, as indicated at the beginning of this study, there is no uniformity among the various states in regard to the date of valuation and although there are a number of different dates selected by these jurisdictions, there is, nonetheless, a common basis for determining the respective dates of valuation in most of these states. This "common denominator" is not applicable to the California procedure. Most jurisdictions, in selecting the date of determining and assessing value, choose that date that is most related and akin to the date of taking or the date of appropriation. In other words, the date designated coincides with that time that the property is legally or practically transferred from the condemnee to the condemnor. In some states, this time is the date that the condemnor takes possession of the property and the date that title passes;[88] this is the system utilized in most of the eastern jurisdictions adhering to the administrative method of condemnation rather than the judicial method.[89] In other states, it is the time that the commissioners issue their reports;[90] this is essentially the time of trial. And in many of the other states where the date of valuation is based upon the date of the filing of the petition to condemn, either interest accrues at the time or if there be a taking of possession prior thereto, the date of assessing damages relates back to the earlier time.[91] While there are many variations among as well as within state procedures in each of these categories, the gravamen of most of these methods is that value and damages should, insofar as possible,

be measured from the time that the condemnor has effectively divested the condemnee of the principal indices of ownership. To that extent, therefore, most jurisdictions attempt to equate the date of valuation with the date of taking.

The rationale behind the policy adopted by most of the states was expressed many years ago in the leading case of Parks v. Boston.[92] There the Massachusetts court stated:

> "The true rule would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder Court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary by the forms of law, to conduct the inquiry....."

While, realistically, California does not adhere to this rationale, the present procedure in this state nonetheless offers a modicum of protection to each of the parties. The present rule which directs that value and damages should be ascertained at the time summons is issued or at the time of trial if not within a year from the commencement of the action and delay was not caused by the defendant, in most cases, excepting where there be immediate possession, produces the same result as the policy adopted in the majority of jurisdictions.

Usually, a condemnation action is brought to trial within six to eight months from the time of the issuance of summons. It follows, therefore, that there is in most instances no appreciable difference in the value of the condemned property

from the time the summons was issued to the time of trial; of course, in a rapidly rising or falling market this time differential can be of great importance. Moreover, under present practice, if there be an undue delay on the part of the condemnor bringing the case to trial, the condemnee can always move the court to set the action on the trial calendar. Furthermore, the 1911 amendment, the one-year proviso, further protects the rights of the condemnee by establishing the trial date as the date of valuation in those cases where the condemnor unduly "drags its feet" or prolongs the proceedings beyond one year.[93]

Thus, to a large extent, condemnees (as well as condemnors) are protected by the present statute, despite the fact that they may not be as fully protected, particularly in today's market, as are property owners in other jurisdictions. The theory, however, upon which the California policy is based, i.e., that the issuance of summons is a "constructive taking",[94] is a difficult one to accept and even more difficult to reconcile with the present procedure for determining value in immediate possession cases.

Assuming for the while that it is both fair and proper to retain the present policy as set forth in §1249 or the Code of Civil Procedure, one principal problem still remains. At the time of this writing, there is before the Supreme Court of California a case directly concerning the question that is herein raised. In People v. Murata,[95] the court is being

asked to interpret §1249 so as to determine, in an action wherein the plaintiff appealed the decision of the trial court and succeeded in having the appellate court reverse that decision, whether the date of valuation in the second trial should be the date of the issuance of summons (as in the first trial), or whether (since it was over a year from the commencement of the action) it should be the time of the second trial. The appellate court held the latter date was the proper one.

It is believed, as indicated in the case of City of Los Angeles v. Tower,[96] that the 1911 Amendment sought to protect the condemnee in a rising market. Thus, unless the delay in bringing the trial to fruition was "caused" by the condemnee, he should be able to realize the value of his property as benefited by the rising market, at least in those instances when the condemnor fails to bring the case to trial within a year after the issuance of summons.

The "fault" that would deprive the condemnee of this increased value (and, indeed, that could be, in a falling market, a decreased value) would appear to be the type of fault which is deliberate or negligent. It is not believed that the intent of the 1911 Amendment was to make it difficult, if not impossible, for one side or the other to make reasonable objections during the course of a trial because of the fear that a reversal and a new trial would either establish an anachronistic or new valuation date. Rather, it seems probable that what the legislature rightfully had in mind in enacting this amendment

was to partially "close the gap" between the date of valuation and the date of "taking."

While there is scant authority decisive of the above issue (mainly because the California procedure is fairly unique), what little authority that exists here and elsewhere would seem to favor the rule that the date of valuation on a re-trial should be the time of the second trial[97] --insofar as it is the nearest time to the date of taking. Regardless of how the Supreme Court of California rules in the Murata case, we recommend that the statute be amended so as to clarify such a policy. This may be done by modifying §1249 so as to have the applicable clause read:

> "Unless the delay is caused by the defendant and is unreasonable."

The added words should connote to the court that good faith and reasonable objections raised by counsel during the course of the trial do not constitute grounds for denying the defendant the safeguard granted by the 1911 Amendment.

It should be noted, parenthetically, that neither the 1911 Amendment nor this proposed modification protects the condemnee in a falling market. When real estate values are declining, nothing in §1249 can effectively prevent the condemnor from unduly protracting the litigation and from causing delays in bringing the action to trial. In these circumstances the later the action is brought to trial, the less the condemnee will receive. It might be advisable to add an additional

provision protecting condemnees in these situations. It is to be noted, however, that this problem would be alleviated by the alternate proposal advanced in lieu of §1249 to be discussed at a later stage in this study.

The Department of Public Works, in an apparent effort to equitably resolve the "one year proviso" conflict, has suggested statutory language which would modify §1249 in this regard.[98] The specific statutory proposal offered by the Department of Public Works reads as follows:

> "Upon a new trial after the granting of a motion for a mistrial, or after the granting of a motion for new trial or after an appeal, the compensation and damages shall be deemed to have accrued at the date used in the original trial; provided that in any case in which the new trial is not brought to trial within eight months after the date of the order granting the mistrial or new trial or the date of filing of the remittitur, whichever date is later, unless the delay is caused by the defendants, the compensation and damages shall be deemed to have accrued at the date of the commencement of new trial."

The above proposal unfortunately fails to afford the condemnee adequate protection; indeed, it is questionable whether in most instances, it would afford him any additional relief over what is now present in §1249. The eight months period commencing from the time remittitur will usually result in permitting a condemnor to retain the date of valuation in the original trial even though the second trial may not commence for as much as two and one-half years or more from the issuance of summons. This is so because in the usual situation, the original trial commences approximately six to eight months following service of summons. Thereafter, if

there is an appeal following the original trial, such an appeal or appeals usually take between six months and a year and one-half before a new trial is ordered and remittitur entered. Consequently, the condemnee, in a rising market, would have his property valued at a date between one and one-half and two and one-half years prior to the time it was taken. Accordingly, the above proposal should be rejected insofar as it would not be equitable and in accord with the purpose of the 1911 Amendment.

B. Alternatives and Additional Recommended Changes to §1249.

1. The Effect of Immediate Possession.

Aside from the change suggested as to the "one year proviso" presently within §1249, one further policy change is definitely advocated by the consultants. California takes the peculiar and somewhat irreconcilable position that the issuance of summons constitutes a "constructive taking", yet at the same time, that a subsequent taking of possession of the property by the condemnor; (under the immediate possession provisions) is not a taking, and inferentially, not even a "constructive taking".

It is difficult to perceive how the courts can hold that the issuance of summons, without possession and without the transfer of any rights and interest in the property to the condemnor, constitutes a constructive taking so as to establish the date of valuation, on the one hand, and to hold, on the other hand, that taking of actual possession by the condemnee is not a taking for the purposes of valuation. Yet, the California

court in City of Los Angeles v. Tower, in a lengthy discussion of the problem held that where the date of trial was approximately five years subsequent to the time of issuance of summons, the date of valuation is the date of trial rather than the date of possession which occurred soon after the issuance of summons.[99] The court states:

> "We are also met with the contention that the ascertainment of the amount of appellant's compensation as of the date of trial, pursuant to Section 1249, deprives appellant of a claimed constitutionally guaranteed right to compensation as of the date of 'taking' of its property. Appellant's insistence that the value should have been fixed as of 1942, rather than 1947, is predicated upon its claim, to be referred to more fully later, that the values were greater in 1942. The legal basis of the contention that the 1942 values should have been considered, necessarily is that appellant had a constitutional right to have compensation fixed as of the date when plaintiffs entered into actual possession, and that the Legislature therefore was without the power to provide that values should be fixed as of any other time. The contention is not sound unless entry into possession by the condemnor was a 'taking' of appellant's property, which would require that compensation be assessed according to the value at that time."
>
> * * * *
>
> "An owner who is deprived of the use and occupancy of his land before he is actually compensated in the amount of its value is entitled to be recompensed for his loss. To that end, an allowance of interest on the amount of the award to the time of judgment is proper. (Metropolitan Water Dist. v. Adams, supra, 16 Cal. 2d 676; Los Angeles Flood Control Dist. v. Hansen, 48 Cal. App.2d 314 (119 P. 2d 734).) But it cannot be successfully contended that the mere entry into possession by the condemnor amounts to such a complete and irrevocable taking as to require application of the rule that the owner is entitled to the value of his land at the time it is taken. The Constitution guarantees that he be compensated only for whatever is taken from him--the value of use for the time he is deprived of it, and the value of the fee or easement, and damages as of the time

> when title either actually or constructively passes. No doubt it would have been competent for the Legislature to provide that compensation should be assessed according to values at the time the condemnor enters into possession before trial, which is frequently at the time or shortly after summons is issued....."

In another California case, City of San Rafael v. Wood, on very similar facts, the appellate court adhered to the rationale posited of the Tower case.

As indicated, the above rationale is incongruous with the reasoning which equates the date of valuation with the issuance of summons. Moreover, the Tower case is in conflict with the actions and logic advanced by the Law Revision Commission and consultants to the effect that immediate possession passes all the rights and obligations and all the indices of ownership of the condemnee to the condemnor, save possibly mere legal title. Pursuing the rationale of the Commission, it is only logical that the date of possession rather than any subsequent date, should be used for measuring and assessing compensation.

Furthermore, the position of the California courts as expressed in both the Tower and the Wood cases is not concurred in by most jurisdictions, even in those states that hold that the date of trial rather than the commencement of the action establishes the date of valuation. While there are a few jurisdictions that hold that the date of trial, despite prior possession by the condemnor, is the proper date of valuation,[101] the majority of states which fix value at the date of trial make an exception when the condemnor takes possession

prior thereto.[102] For example, the New York court in the leading case of the Application of Westchester County,[103] after noting that the New York and general rule is that the date of valuation is the date on which title passes or the date of trial, went on to state:

> "A recognized exception to the general rule exists where the condemnor, under legal authorization, enters into possession of the realty before he takes title. Under such circumstances, the value date is moved back to the date of compliance with the legal conditions for possession before title. 29 C.J.S., Eminent Domain, § 185, page 1071; Nassau Electric R. Co. v. Cabot, Boylan, Intervener, 173 App.Div. 253, 255, 159 N.Y.S. 473, 475; City of Binghamton v. Taft, 125 Misc. 411, 415, 211 N.Y.S. 683, 687; City of Corning v. Stirpe, 262 App. Div. 14, 15, 27 N.Y.S.2d 418, 419, affirmed 293 N.Y. 808, 59 N.E. 2d 176. . . ."

> "A review of the decisions leads to the conclusion that the rule generally to be applied in condemnation proceedings in this state is that the title vesting date or possession date, whichever is the earlier, shall be regarded as the value fixing date . . . ."

In light of the above considerations and authority, it is strongly recommended that, even should §1249 be kept intact in regard to the primary date of valuation being the date of issuance of summons (or the time of trial if more than a year thereafter), a clear exception ought to be established by statute in instances where possession is taken prior to time of trial. Whenever a condemnor chooses to take possession of the property prior to trial, the date of such order permitting the condemnor to take possession should be the date upon which value of the property is determined rather than the date of trial, in those instances when the date of trial would

otherwise be the date of assessing compensation.

In a rising market, such a statutory provision would in no way be injurious to the condemnor insofar as the applicable date of valuation would be the earlier of these dates -- possession or trial. Should the condemnor, under this provision bring the case to trial within a year from the issuance of summons, the date of valuation would remain that date upon which the summons was issued, regardless of whether the condemnor took possession or not. It is clear, therefore, that the justification for this proposed provision lies in the fact that if California is to continue to consider the issuance of summons as constituting a "constructive taking", it should logically consider the taking of possession as no less of a "constructive taking".

2. A Possible Alternative to CCP §1249.

Thus far, we have recommended two changes to §1249:

(1) A clarification of the "one-year proviso" so as to insure the condemnee of the intended benefits of the 1911 Amendment, and

(2) The addition of a statutory provision so as to establish the date of possession as the date of valuation in those instances where the action is not tried within one year from the issuance of the summons.

Both of these recommended proposals are advanced in an effort to establish procedural consistency within the underlying basic policy of §1249. It has been assumed, therefore, that

the basic policy of §1249 is a proper one and needs only to be strengthened in its internal consistency.

While it is recognized that the principal date of valuation established under §1249 has given a fair degree of protection to each of the parties, the policy underlying that section has some shortcomings both in theory and in practice. It seems appropriate, therefore, to suggest a possible alternative to §1249.

As indicated through these pages, California is in the minority in holding that the issuance of summons rather than the date of trial or the date of taking is the proper date of valuation.[104] Orgel has stated:

> "A greater diversity in choice of valuation dates prevails among those states which employ the method of condemnation by judicial decree. In these latter jurisdictions, the date most often selected as the time of valuation is the commissioner's award or the date of trial, where compensation is determined by a jury."

And Nichols has added:[105]

> "but in the majority of jurisdictions the damages are assessed either as of the date of trial or the award of the commissioners."

Our research of the cases also supports this conclusion.[106]

Despite the fair implementation of the policy behind §1249, two reasons may justify a change to the majority position. First, from a theoretical point of view, it is difficult to sustain the position that the issuance of summons constitutes a "constructive taking" and yet not allow the condemnee at that time interest on the award nor, more important, require

the indices of ownership to be transferred from the condemnee to the condemnor.

Second, despite the fact that the lapse of time of six or eight months between the issuance of summons and the time of trial usually does not significantly affect the question of valuation, in a number of instances this difference in time can have a major effect on valuation. This is particularly so in a rapidly rising or declining market.

These two considerations may warrant the acceptance of the alternative to §1249. Possibly, however, such a major change may handicap the parties' preparation for trial, particularly, the condemnor's preparation. This may be so because condemnors quite often rely upon staff appraisals which are made well before the date summons is issued. And where pre-trial conferences are many weeks or even months prior to the time of trial and discovery may have to be concluded at that time, the valuation figures brought forth by each party may prove to be quite lacking at the time of trial.

Lastly, changing the basic date of valuation from issuance of summons to date of trial could conceivably hinder settlement as some condemnees may be reticent about settling their cases insofar as they may hold out a hope that the action may not come to trial for some time in a rising market. On this score, however, it should be noted that either party may always set the cause on the trial calendar after the action has begun.

In conclusion, therefore, it is recommended that if §1249 should remain largely intact, the internal changes to that section, as advocated above, be adopted. The consultants advanced the possible and feasible alternative of adopting the majority rule and providing that the date of valuation should be "the date of trial or the date of possession whichever is earlier". The advantage of this latter alternative is that it will make certain at an early date in virtually all cases what the date of valuation will be and will allow counsel to better prepare for condemnation actions. Moreover, as indicated before, it will protect the condemnee in a falling market. Lastly, it will equate the date of valuation with the date of taking, which at least theoretically is the appropriate procedure.

FOOTNOTES

(1) See 19 West Annotated California Code, Civil Procedure, 564, 565.

(2) See e.g., Eminent Domain Statutes of the states of Utah, Arizona, New Mexico, Wyoming and Montana.

(3) See Kaltenbach, Just Compensation, 011, §1-3.01 (1958).

(4) Kaltenbach, in stating that two states hold that the date of valuation is the day of the adoption of the resolution to condemn, apparently has made reference to Oregon and Pennsylvania. The Oregon case, Keane v. City of Portland, 115 Ore. 1, 235 P. 677 (1925), involved a local ordinance. This ordinance had the effect of giving notice to the property owner and an answer was to be filed at that time by the property owner. In other words, the ordinance had the effect of a complaint. Moreover, in a later case, State v. Mohler, 115 Ore. 562, 237 P. 690 (1925), the court seemed to indicate that the date of valuation was the date of the commencement of the action. The other state referred to by the author, Pennsylvania, does not, on further analysis, treat the passage of a resolution as the date of valuation, on the one hand, and consider the date of taking, on the other hand, to be a subsequent time. For example, in the Petition of Lakewood Memorial Gardens, 381 Pa.46, 112 A. 2d 135 (1955), the court said: "The ordinance was no mere authorization to institute

proceedings to take, it was the condemnation". Furthermore, as of that date, the condemnee is permitted interest on his award.

This question in Pennsylvania, however, is not entirely resolved and as Phil H. Lewis has written, there is a great deal of "room for confusion" regarding this question in that state. See Lewis, "Eminent Domain in Pennsylvania", 26 Purdon, Eminent Domain 1, 32 (1958).

More appropriately, the recent statute in Arizona would appear to be more applicable insofar as that statute equates the day of the adoption of the resolution to condemn with the date of valuation. This statute is later discussed in text.

(5) See Comment, 1 Vill. L. Rev. 105, 107 (1956). Note 9 Baylor L. Rev. 204 (1957).

Some courts have deviated from the chosen date of valuation when that date occurs during a period of economic recession or depression or when after the date of valuation valuable mineral deposits are discovered on the condemned property. See Howell v. State Highway Department, 167 S.C. 217, 166 S. E. 129 (1932); City of Little Rock v. Moreland, 334 S. W. 2d 229 (Ark. 1960); Alishusky v. MacDonald, 117 Conn. 138, 167 Atl. 96 (1933).

Provision in other California codes establishes alternate times when the right of compensation shall be determined. See Street and Highways Code, §4203, and Government Code, §38090.

(6) See 1 Orgel on Valuation Under Eminent Domain, §99; Kaltenbach, Just Compensation, Special Bulletin No. 4 "Change in Market Value Due to the Improvement" (May 1958); see, also, "Time of Valuation" Special Bulletin No. 3 (1959); 4 Nichols on Eminent Domain §12.3151 (3rd Edition); Annotation, 147 A.L.R. 66-103.

(7) 245 Wisc. 9, 13 N. W. 2d 541 (1944).

(8) The court here apparently used the word "damages" in a colloquial rather than a technical sense. It undoubtedly meant compensation; damages, as such, were not asked for as subsequent portions of the text will indicate.

(9) 1 Orgel, §§99, 100; 4 Nichols §12.3151, 147 A.L.R. 66.

(10) United States v. Miller, 317 U. S. 369 (1943); idem.

(11) See e.g., Kerr v. South Park Commissioners, 117 U. S. 379 (1886); Cook v. South Park Commissioners, 61 Ill. 115 (1871).

(12) See 1 Orgel §98.

(13) Interview between Charles Frisbie and authors, August 18, 1960.

(14) See United States v. Certain Lands, Town of Narragansett, 180 F. 260 (1910).

(15) 147 A.L.R. 68.

(16) Idem.

(17) Idem.

(18) See 1 Orgel 425, 430.

(19) 1 Orgel 426.

(20) 4 Nichols §12.3151 [1].

(21) 180 F. 260 (1910).

(22) 117 U. S. 379 (1886).

(23) 57 W. V. 417, 50 S. E. 521 (1905).

(24) 136 Ga. 456, 71 S. E. 903 (1911).

(25) 105 Iowa 681, 75 N. W. 501 (1898).

(26) Sunday v. Louisville & N. R. Co., 62 Fla. 395, 57 So. 351 (1911); Ranck v. City of Cedar Rapids, 134 Iowa 563, 111 N. W. 1027 (1907); Giesy v. Cincinnati, W.& Z. R. Co., 4 Ohio St. 308 (1854).

In City of Binghamton v. Taft, 211 N.Y.S. 683, 125 Misc. 411 (1925), the New York court, relying upon the Ranck case (supra) held that a general enhancement in the neighborhood can inure to the benefit of the condemnee though a special enhancement under these circumstances cannot. The court, therefore, adopted the rule usually applied in severance cases. However, it is difficult to discern from the case whether the general enhancement accrued prior to or after the time when the proposed project became a practical or probable certainty. It appears that the enhancement came about while the proposed improvement was still in the contemplated stage.

(27) 10 Utah 2d 29, 347 P. 2d 862 (1959).

(28) See Utah Code Annotated, §78-34-11 (1953).

(29) 133 La. 900, 63 So. 396 (1913).

(30) 317 U. S. 369 (1943).

(31) See e.g. City of San Diego v. Boggeln, 164 Cal. App. 2d 1, 330 P. 2d 74 (1958); County of Los Angeles v. Hoe, 138 Cal. App. 2d 74, 291 P. 2d 98 (1955); A. Gettelman Brewing Co. v. City of Milwaukee, 245 Wisc. 9, 13 N. W. 2d 541 (1944).

(32) 1 Orgel 429.

(33) 261 F. 2d 636 (9th Cir. 1958).

(34) 270 F. 2d 545, 550 (4th Cir. 1959).

(35) 158 Mass. 21, 32 N. E. 666 (1911). See also Cole v. Boston Edison Co., 157 N. E. 2d 209 (1959), where the court stated that "if the original scheme includes the possibility that a parcel will be taken and that parcel is in fact subsequently taken as part of the original scheme and not some other, the owners are not entitled to recover the enhancement resulting from 'the general originally indefinite, plan'." The court, however, goes on in such a way as to indicate that the Miller standard of "likelihood" of the taking may be a better definition of the Massachusetts position.

(36) 78 Cal. 63, 20 P. 372 (1888).

(37) See discussion of this case in 147 A.L.R. 71, 72. At least one other state has apparently sought to equate an enhancement situation with a severance situation. As indicated in Footnote 26, the New York court in City of Binghamton v. Taft, 211 N.Y.S. 683, 125 Misc. 411 (1925), indicated that a general enhancement will be allowed

whereas a special enhancement will not be allowed in determining market value. It is to be noted, however, that such an enhancement apparently occurred prior to the time when the proposed improvement was probable.

(38) See 17 Cal. Jur. 2d §81, "Eminent Domain".

(39) 138 C. A. 2d 74, 291 P. 2d 98 (1955).

(40) This case may need to be further distinguished on its facts since the complaint failed to "indicate that the condemnation of defendants' property was sought as a part of any joint enterprise".

(41) 164 C. A. 2d 1, 330 P. 2d 74 (1958).

(42) Cf. City of La Mesa v. Tweed & Gambrell Mill, 146 C. A. 2d 762, 304 P. 2d 803 (1956). See 1 Orgel 447.

(43) Herman v. North Pennsylvania R. Co., 270 P. 551, 113 A. 828 (1921).

(44) For a clear holding that the diminution is to be excluded, see Aero v. State Roads Commission, 218 N.Y. 236, 146 A. 2d 558 (1958), see also Murray v. United States, 130 F. 2d 442, 444 (D. C. Cir. 1942).

(45) 43 N. J. Super. 544, 129 A. 2d 473 (1957).

(46) United States v. Certain Lands in Town of Highlands, 47 F. Supp. 934, 937 (S.D.N.Y. 1942).

(47) 13 Cal. App. 2d 505, 57 P. 2d 575 (1936).

(48) 176 ACA 274, 278 (1959).

(49) Interview between Charles Frisbie and authors, August 18, 1960.

(50) Ibid.

(51) In the construction of the Harbor Freeway in Los Angeles this problem apparently arose and appraisers for both parties were unable to ascertain the effect of the proposed improvement on property values.

(52) See n. 49, supra.

(53) 317 U. S. 369, 374-75 (1943).

(54) See 1 Orgel §103; 147 A.L.R. 98-101.

(55) "Private property shall not be taken or damaged for public use without just compensation having first been made to or paid into court for the owner and no right of way or lands to be used for reservoir purposes shall be appropriated . . . until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation . . . ."

(56) See San Bernardino and Eastern Ry. v. Haven, 94 Cal. 489 (1892). Cf. Moran v. Ross, 79 Cal. 549 (1889); Beveridge v. Lewis, 137 Cal. 619, 67 P. 1040 (1902) (dissenting opinion).

(57) Portland-Oregon City R. Co. v. Penney, 81 Ore. 81, 158 P. 404 (1916).

(58) See Northern P.& P.S.S.R. Co. v. Coleman, 3 Wash. 228, 28 P. 514 (1891), overruled in Enoch v. Spokane Falls R. Co., 6 Wash. 393, 402, 33 P. 966 (1893).

(59) Idem.

(60) The court cited Giesy v. Cincinnati W.& Z.R. Co., 4 Ohio St. 308 (1854) and relied upon a number of other cases which were not as clearly in point.

(61) Compare Seattle & M. Ry. Co. v. Roeder, 30 Wash. 244, 70 P. 498 (1902) with Pierce County v. Duffy, 104 Wash. 426, 176 P. 670 (1918).

(62) See Note 56. See also People v. Thompson, 43 Cal. 2d 13, 28, 271 P. 2d 507 (1954); Podesta v. Linden Irrigation Dist., 141 C. A. 2d 38, 296 P. 2d 401 (1956).

(63) See Shreveport Traction Co. v. Svara, 133 La. 900, 63 So. 396 (1913).

(64) See Dorgan v. Boston, 12 Mass. (Allen) 233 (1866).

(65) Letter to Authors from Attorney General, State of Arizona, August 24, 1960.

(66) Arizona Revised Statutes (1958). The original of this Bill, H. B. 234 (1958) made this procedure the exclusive method of determining value rather than alternative method. That original Bill stated: "The value of property acquired by condemnation or eminent domain shall be determined to be the value thereof immediately preceding the date on which public notice is given by the Highway Department of intention to establish highways or make additions or modifications thereto."

(67) See Note 55.

(68) Ibid.

(69) See Note 42, supra. See also 2 Nichols §6.12; State v. City of Euclid, 130 N.E. 2d 336 (Ohio).

(70) United States v. Miller, 317 U.S. 369, 373 (1943); United States v. New River Collieries Co., 262 U. S. 341 (1923).

(71) See Beveridge v. Lewis, 137 Cal. 619, 625-626, 67 Pac. 1040 (1902); People v. Thompson, 43 Cal. 2d 13, 28-29, 271 P. 2d 507 (1954).

(72) See United States ex rel. TVA v. Powelson, 319 U.S. 266, 280 (1943).

(73) Slonim, "Injustices of Eminent Domain", 24 Appraisal Journal, 421, 424 (1957).

(74) 2 Nichols, Eminent Domain (2d Ed), p. 1106.

(75) 13 N.W. 2d at 546, citing 18 Am. Jur., §372.

(76) 87 Cal. App. 2d 784, 198 P. 2d 78 (1948).

(77) Report of Special Commission Relative to Certain Matters Relative to the Taking of Land by Eminent Domain, 12-13 (1957) (Massachusetts, H. 2738).

(78) Murphy, Memorandum on Recommendations of Special Committee on Eminent Domain, 42 Mass. L.Q. 19-20 (October 1957).

(79) Chapter 639, Laws of 1959, State of Wisconsin, §32.09 (5) (m).

(80) Present §1249 effectively prevents the condemnee from improving his property subsequent to service of summons. The last sentence thereto reads "No improvements put upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages."

(81) This situation arose in a case in Southern California in 1960.

One other California case, Gibson Properties Co. v. City of Oakland, 12 Cal. 2d 291, 83 P. 2d 942 (1938) touches upon these questions discussed in text. In that case, however, the question of damages came about following abandonment by the condemnor. The condemnee was not allowed damages that resulted from construction alterations necessitated by the proposed taking, primarily because from a factual standpoint it was not proven it had suffered such damages. Nor, since the theory of estoppel was not applicable, the condemnee was not allowed additional expenditures made for redesigning the building, necessitated by the proposed taking.

(82) See 5 Corbin on Contracts §1089.

(83) 204 Misc. 1031, 127 N.Y.S. 2d 24 (Sup. Ct. 1953).

(84) Chapter 639, Laws of 1959, State of Wisconsin, §32.09 (5)(n).

(85) See discussion of tax and interest problems in "Taking Possession and Passage of Title" Study.

(86) See City of Los Angeles v. Tower, 90 C. A. 2d 869, 872-75, 204 Pac. 2d 395 (1949) and cases cited therein. See also Consultants Study on "Taking Possession and Passage of Title" and Recommendations of the Law Revision Commission pertaining thereto.

(87) See Tower case, 90 C. A. at 874.

(88) 1 Orgel §21, N. 29; 3 Nichols §8.5 [2].

(89) Ibid; see also Kaltenbach, Just Compensation, 011, §1-3.01 (1958); see, e.g. Maine Statutes, Chapter 23, §21 (1954).

(90) Idem.

(91) See, e.g. Petition of Lakewood Memorial Gardens, 381 Pa. 46, 112 At. 2d 135 (1955).

(92) 15 Pick (32 Mass.) 198 (1834).

(93) 90 C. A. 2d 869, 872-75, 204 P. 2d 395 (1949).

(94) Ibid.

(95) 179 A.C.A. 587 (May 1960), argument on appeal was heard in September, 1960.

(96) 90 C. A. 869, 872-75, 204 P. 2d 395 (1949).

(97) See 3 Nichols §8.5 [2]; Superior Court case, People v. Loop, No. 574,769 (Los Angeles County, July 1955). Cf., State v. Landry, 219 La. 721, 53 S. 2d 908 (1952).

(98) Letter to California Law Revision Commission from California to Department of Public Works September 1, 1960, pp. I-4, 5.

(99) 90 C. A. 2d at 872-76.

(100) 144 C. A. 2d 604, 301 P. 2d 421 (1956).

(101) See Kistler v. Northern Colo. Water Conser. Dist., 246 P. 2d 616 (Colorado 1953); East St. Louis Power Co. v. Cohen, 333 Ill. 218, 164 N.E. 182 (1928). See also Blankenship v. State, 160 Wash. 514, 295 Pac. 480 (1931).

(102) Yoder v. Sarasota City, 81 S. 2d 219 (Flo. 1955); Casa Loma Springs Devel. Co. v. Brivard County, 52 Fla. 216, 112 So. 60 (1927); Saulsberry v. Kent. & W. Va. Pur. Co. 226 Ky. 75, 10 S.W. 2d 451 (1928); City of Binghamton v. Taft, 211 N.Y.S. 683, 125 Misc. 411 (1925).

(103) 204 Misc. 1031, 127 N.Y.S. 2d 24 (1953).

(104) See Note 88.

(105) Ibid.

(106) See e.g. Yoder v. Sarasota City, 81 S. 2d 219 (Flo. 1955); Rauck v. Cedar Rapids, 134 Iowa 563, 111 N.W. 1027 (1907); Hazard v. Combs, 229 Kent 222, 16 S.W. 2d 1022 (1929); City of Binghamton v. Taft, 211 N.Y.S. 683, 125 Misc. 411 (1925); Muskengrim Watershed Conserv. Dist. v. Kaufman, 44 N.E. 2d 723 (1942); Kistler v. Northern Colo. Water Conser. Dist., 246 P. 2d 616 (1953); Blankenship v. State, 160 Wash. 514, 295 Pac. 480 (1931).

November 22, 1961

A STUDY PERTAINING TO BENEFITS IN EMINENT DOMAIN PROCEEDINGS*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

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A STUDY PERTAINING TO BENEFITS IN EMINENT DOMAIN PROCEEDINGS

INTRODUCTION

This study concerns itself with an analysis and interpretation of Section 1248(3) of the Code of Civil Procedure and Article I, Section 14 of the California Constitution as they pertain to the problem and treatment of benefits in arriving at just compensation in condemnation actions.

Section 1248(3) which has been on the statute books for almost ninety years, reads as follows:[1]

> "§1248. Hearing: items to be ascertained and assessed
>
> . . .
>
> . . .
>
> 3. Benefits. Separately, how much the portion to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs; and if the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if

> the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value; . . . "

At approximately the same time that the Legislature enacted Section 1248, the people of the State adopted the constitutional provision of Article I, Section 14, which includes an important dictate as to the treatment of benefits in certain condemnation actions. That constitutional provision, part of which was discussed in detail in a prior study in this series, reads as follows:[2]

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, . . . "
>
> [Emphasis added]

In most instances the subject matter of this study and the question of benefits in general arise in partial taking or severance situations.[3] The problems and difficulties of ascertaining the proper measurement of just compensation when benefits are involved are, in reality, of the same nature as those involved in measuring just compensation when damages are present. In other words, the problems studied here are on the other side of the coin from those arising under Code of Civil Procedure §1248(2), pertaining to severance and consequential damages.

We have seen in prior studies that, despite the fact that the courts have often iterated that a condemnee should, insofar as possible and feasible, be left no worse off after the taking than he was before,[4] they have not rigidly adhered to this principle. Thus, to a great extent condemnees must bear, without remuneration, incidental losses, many consequential losses, and all types of general damages, to say nothing of acute hardships they must suffer when the interference with their property rights is designated as an exercise of the police power. But, by the same token, the courts do not always

abide by the principle of indemnity when dealing with the issue of benefits. As will be discussed at greater length in the course of this study, in the final analysis the courts are not only in disagreement among themselves as to the correct treatment of these factors but they are more often than not internally inconsistent in applying the rules of both damages and benefits.

As we have seen in prior studies dealing with various types of damages the condemnee suffers in the wake of modern public improvements, the entire concept of damages needs reappraisal since many of the precepts and rules which were formulated in the 19th Century are no longer applicable and are presently inequitable and unjust in modern society. Similarly, the concept of benefits, the importance of which was not recognized at the time of the formulation of condemnation procedure a century ago, may also be an outmoded one and incongruous with the modern scene. The tremendous acceleration in the tempo of takings today, moreover, has not only made it incumbent upon all concerned to re-evaluate the rules regarding damages, basically so as to protect the condemnee, but has likewise made it necessary to re-

examine the treatment of benefits so as to guard against the condemnor's being unduly burdened by excessive costs in condemnation actions.

Since World War II, probably more has been written about the topic of benefits than about any other single area of eminent domain.[5] And yet, there probably remains more controversy, a greater deal of inconsistency, and a wider variation in the treatment of this subject among the various jurisdictions in this country than exists in any other particular aspect of condemnation law.

One fairly exhaustive review of the treatment given the problem of benefits by the courts may be found in a 300-page annotation published in 145 A.L.R. 1-299 (1943).[6] Since that review as well as a number of other major articles have set forth a detailed account of the courts' treatment of the subject, this study will try to summarize the writings in the field, to focus upon the primary issues involved, and to resolve the conflict insofar as possible. No attempt will be made to embark upon a rehashing of the detailed research that has already been done on the general problem.

I. PRELIMINARY FACTORS IN THE TREATMENT OF BENEFITS

In order to appreciate the difficulties involved in resolving the plethora of problems connected with this subject, two factors must initially be noted. First, the different methods or formulas adopted by the courts for ascertaining just compensation in severance cases are an integral part of and are to some extent determinative of the extent and treatment of benefits. Second, the definition or definitions utilized for distinguishing between special and general benefits are of critical importance, particularly from a practical point of view.

A. The Various Formulas For Determining Just Compensation in Severance Cases

It appears that in practice the different formulas that are utilized for determining just compensation in the various jurisdictions do not demonstrably reflect a significant variation in the amount of the awards that each jurisdiction finally arrives at. The formulas, nonetheless, are of appreciable importance in any discussion of benefits. Indeed, in theory, when

benefits are involved, the different formulas should bring about appreciably divergent awards. The courts, however, apparently have not been governed by the strictures of the particular theory of compensation that they purportedly are adopting.[7] As a result, a logical approach to the problem is often lacking. But, in order properly to understand the possible alternative solutions available to the broad problem of benefits, it is first necessary to look to the formulas adopted, at least in theory, by the courts in determining just compensation in these instances.

Succinctly, there are three basic tests for measuring just compensation in severance cases. The third of these tests is an involved and complex one which has been adopted in the State of Louisiana but nowhere else;[8] and it will not be further discussed. The two major formulas utilized in the United States are:

(1) The value of the entire property before the condemnation less the value of the remainder after the condemnation measures just compensation; this test is generally referred to as the "before and after" test.

(2) The second formula, apparently adopted in the majority of the states, makes just compensation equal to the value of the part taken plus damages to the remainder. It may be referred to simply as the "value plus damages" method.

Theoretically, in the vast bulk of severance actions, assuming the complete absence of benefits, each of these three formulas should produce the same result. While the authorities seem to prefer the "before and after" test (because of its simplicity),[9] a proper application of any of these methods should not produce any divergent results -again, save for the consideration of benefits. The treatment of benefits, however, is radically affected by the adoption of one formula in lieu of another -at least from a theoretical standpoint.

The "before and after" test, logically applied, requires (both <u>special and general</u>)[10] benefits to the remainder to be deducted from the <u>award</u> -in other words, these benefits may diminish not only the amount of the damages to the part of the parcel that remains but may likewise diminish the amount of compensation

for the part taken, i.e., "value". As the West Virginia court in Guyandot Valley Ry. Co. v. Buskirk[11] stated:

> "Literally enforced, this rule would plainly charge the land owners with all benefits, general as well as special and peculiar . . . "

The "value plus damages" method, on the other hand, logically should bring about different results. Under this theory, the compensation for the part taken, being separately assessed, reasonably and inferentially may be immune to any deduction because of any benefit accruing to the remainder due to the improvement. Indeed, this latter method, in the absence of qualifying statutory language, may not even necessitate that benefits be set off from the damages to the remainder.

But, as will be seen shortly, the courts have not literally followed the dictates of the theories they are purportedly propounding. And the rules are hardly even guideposts.

The California position regarding the two formulas -the value plus damages method, and the before

and after test- is now at least in theory fairly clear. Based upon CCP 1248, California adheres to the majority formula: value plus damages. Prior to the 1872 statute, however, California seemingly had adopted the "before and after" test.[12]

B. The "Distinction" Between Special and General Damages

While the differentiation between the jurisdictions regarding the method for determining compensation in severance cases is largely theoretical, the variation in treatment between special and general damages has very practical significance. Indeed, the manner in which a jurisdiction approaches this problem is quite often decisive of the primary question as to whether and to what extent benefits should be offset. Some jurisdictions so restrictively interpret special benefits that the rule they follow permitting only special benefits to be offset against damages has little meaning. Contrariwise, other jurisdictions broadly interpret special benefits, resulting consequently in the deduction from the award of what other courts would describe as general benefits.[13] Clearly,

therefore, the formulas for distinguishing between general and special benefits are crucial.

Unfortunately, acceptable statutory definitions of these terms defy human endeavor. Each particular taking is peculiar and unique and escapes a neat pigeonhole. Most authorities, therefore, resign themselves to loosely worded standards.[14] As Justice Holmes once stated:[15]

> "It may be that the line between special and general benefits is fixed by a somewhat rough estimate of differences. But all legal lines are more or less arbitrary as to the precise place of their incidence, although the distinctions of which they are the inevitable outcome are plain and undeniable."

But even the vague definitions adopted are often in conflict with each other, so much so that the broad question of benefits, already described as a "bewildering complexity",[16] is further aggravated.

Among the numerous definitions propounded by the courts and the authorities are the following:

NICHOLS states:[17]

> "General benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the

peculiar relation of the land in question to the public improvement."

ORGEL writes that:[18]

"The courts draw a distinction between special benefits and general benefits, placing in the former group those benefits that result in increases in value of particular properties directly affected by the taking and classifying under the latter heading, those benefits that accrue generally to the public at large."

The Alabama court expressed the distinction as follows:[19]

"There is a well-recognized distinction between general and special benefits. The former is that which is enjoyed by the general public of the community, through which the highway passes, whether it touches their property or not. An improved system of highways generally enhances all property which is fairly accessible to it. But that which borders it, or through which it extends, has benefits by reason of that circumstance which is not shared by those which are not so situated."

The authors of a recent law review Note add:[20]

"Special benefits are defined as those that accrue directly to the particular tract in question because of its peculiar relation to the public improvement. General benefits are termed as those that accrue to lands generally in the vicinity because of the improvement."

An Illinois court, however, refused to so limit special benefits. It stated:[21]

> "Special benefits do not become general benefits because the benefits are common to other property in the vicinity. The fact that other property in the vicinity of the proposed railroad will also be increased in value by reason of the construction and operation thereof furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged and, if it has, the depreciation in value."

The California courts, following Beveridge v. Lewis,[22] a 1902 case, appear (at least, until very recently) to have adopted a broader scope of general benefits. In that case, the California Supreme Court stated:

> "Benefits are said to be of two kinds, general and special. General benefits consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement. (Lewis on Eminent Domain, sec. 471). They are conjectural and incapable of estimation. They may never be realized, and in such case the property-owner has not been compensated save by the sanguine promise of the promoter.
>
> "Special benefits are such as result from the mere construction of the improvement, and are peculiar to the land in question . . . "

The above statements are but a few of the multitudinous definitions and distinctions adopted by the courts and authorities. They are sufficient to show, however, that the vagaries surrounding this problem cannot easily be ignored or rectified.

Upon further analysis, it seems that almost all courts hold that a public improvement which affects and is common to the entire community and which is enjoyed by the public at large may yield only a general benefit. Thus, a benefit which might attract and increase population or increase prosperity or which might improve business activity throughout the community is almost always designated as a general benefit.[23] This type of community benefit causes little difficulty. Furthermore, at the other end of the spectrum, all courts would agree that a benefit which is peculiar to the particular property owner or has a direct and unique effect upon the particular land is a special benefit.[24]

Again, however, numerous benefits resulting from public improvements may not be easily placed in either of these two categories. Thus, in addition to

the "community" and "peculiar" standards, many courts often resort to a third standard: Whether or not a particular benefit affects a neighborhood. And it is the latter test that causes the most difficulty. On the surface, this is a geographical measuring device and those courts that follow it usually label such neighborhood benefits as general benefits. However, numerous courts refuse to hold a neighborhood benefit as a general one, merely on that basis alone.[25]

And so, in the final analysis, the problem remains as nebulous as ever, even when it is broken down as the courts sometimes try to do. The myriad of situations that do not easily lend themselves to labels virtually requires that the interpretation of these vague standards be left to the courts to be delineated on a case-by-case basis. Statutory provisions can hardly provide relief in this particular aspect of the problem.

Thus, while an understanding of both the theoretical formulas for arriving at just compensation in severance cases and the elusive distinctions between general and special damages adopted by the

courts is vital in order to appreciate the overall problem of benefits, neither consideration is conducive to resolution of that problem. Consequently, we shall turn our attention to other factors involved, based upon the presumption that the courts will continue to follow the general pattern of distinguishing between special and general damages as they have in the past. We also assume that the theoretical formulas for ascertaining just compensation in severance cases, will also continue to have little effect one way or the other upon the proper treatment of the problem of offsetting benefits.

II. THE TREATMENT OF BENEFITS: AN HISTORICAL BACKGROUND

In prior studies we have seen how the law of condemnation was molded and shaped in the Nineteenth Century. It is now apparent that many of the doctrines and formulas propounded a century ago are today atavistic. Indeed, in some areas of condemnation law, for example, the denial of incidental losses,[26] the restrictions imposed can no longer be

rationally defended or at least cannot be supported by the rationale set forth at the time of their adoption. Similarly, it is clear that the treatment of benefits in arriving at compensation were evolved at the time that the railroad had a marked effect upon the economy in general, and upon the law of eminent domain in particular; and though the railroad is of less importance in today's economy, and has even less direct practical effect upon the modern condemnation scene, its imprinter remains as indelible as ever on the law of condemnation.

Early in this nation's history, takings were few and those which did occur generally involved unclaimed and unimproved property or land governmentally owned. Since the primary object of condemnation was the construction of roads, and since such roads were of considerable benefit to the landowner, usually no compensation was asked by him for the taking of his property for this purpose.[27] Until the latter part of the Nineteenth Century in the United States, as a result of these factors, the question of offsetting benefits hardly ever arose and its implications seldom

were realized.

Prior to any significant condemnation activity in the United States, England began to witness a necessity for extensive takings, ushered in by railroad development. Since "compulsory acquisition" in that country was used primarily for the benefit of profit making railroads, both the courts and the public became sympathetic in their view of the treatment to be afforded the condemnee.[28] Not only did the condemnation law in that country grant liberal compensation allowance to the condemnee,[29] but it also made a significant distinction in the amount of compensation available to the condemnee depending upon the nature of the condemning entity. For example, the law at that time in England prohibited the special adaptability of the condemned property to be taken into consideration in arriving at compensation if the taking was for a purpose which could be accomplished only by resort to statutory powers. This restriction on compensation, however, only applied to condemnations by governmental agencies; privately owned corporations with the power of condemnation had to pay

for this "special value".[30]

When railroad development was at its height in the United States in the latter part of the last century, many courts refused to set off general benefits and, in some instances, both general and special benefits, from the compensation award, "influenced by the circumstances that the condemning corporations were usually privately owned enterprises."[31] The great bulk of takings at that time, it appears, were made by railroads. A North Carolina court summed up the differentiation accorded between private and public condemnors thus:[32]

> "The distinction seems to be that where the improvement is for private emolument, as a railroad or water power, or the like, being only a quasi-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but where the property is taken solely for a public purpose to pay only the actual damages, after deducting all benefits, either special or general."

Concurrently with the position taken by the courts in discriminating as between private and public condemnors, many state legislatures adopted statutes

and many other states adopted constitutional provisions prohibiting the offsetting of benefits when property was being condemned by other than governmental units.[33] During this period, which reached its height in the 1870's, California also enacted a constitutional provision, similar to that being adopted in other states, which stated that private condemnors had to pay full compensation "irrespective of any benefits from any improvement proposed by such corporation".[34] The reason for this constitutional provision was enunciated by the court in the Beveridge case. There, the court said it was:[35]

> "satisfied that in a proceeding to condemn a right of way, at least by a corporation other than municipal or by a natural person, such benefits cannot be set off against damages to lands not taken under our present constitution. Prior to the adoption of the present constitution the supreme court had decided, in a case where it was found that there were no special benefits, but only general benefits, as I have defined them, that such benefits could be set off against damages and that by this rule the owner was fully compensated. (California Pac. R. R. Co. v. Armstrong, 46 Cal. 85.) By section 14, involved here, I believe the people intended to overrule this case and other like decisions, so far as applicable to private railroad corporations."

During the same time, many states, including those that were adopting constitutional provisions, also enacted statutory provisions regarding benefits; and influenced by the fact that the great bulk of takings were by railroads, most of these statutory enactments sought to limit the power of the condemnor to offset benefits.[36] From out of this welter of constitutional and statutory "reform" the law of benefits was propounded. Oftentimes, the primary purpose of the enactment of this legislation -to restrict private condemnors- was ignored. In other instances, both the statutory and constitutional provisions were given little, if any, effect.

We shall examine more closely the evolution of these statutory and constitutional provisions in California. But before turning to both that aspect of the problem, as well as the divergent positions taken by the various jurisdictions, it is important to conclude this section of the discussion by noting that regardless whether the law of benefits resulted from court made law, from constitutional enactment or from statutory revision, from all quarters almost everyone

seemed to be influenced by the fact that most takings were for the benefit of railroads and other private condemnors.

III. THE PRESENT TREATMENT OF BENEFITS THROUGHOUT THE UNITED STATES AND THE STATED POLICY JUSTIFICATIONS FOR THE DIVERSE COURSES

A. "The Law" In The Various Jurisdictions

A number of commentators and studies have sought to classify the various jurisdictions in the United States as falling under one or another of the many categories that exist regarding the offset of benefits.[37] Repeatedly, however, such classifications have proven misleading and inaccurate. Part of the reason for these failings has been that quite often the courts themselves are far from clear as to the rule in their own jurisdictions and their opinions are hardly edifying. Still another reason is that statutory provisions are often interpreted quite differently than one would imagine from a careful reading. Lastly, many of the prior decisions and original

statutes are no longer given much effect and, indeed, are even today being altered.

For example, the State of Wisconsin has been classified by some recent commentators[38] as falling within that class of jurisdictions that permits the offsetting of both general and special benefits not only from the remainder but from the part taken as well. Whether that determination was ever accurate or not, a 1960 Wisconsin statute clearly states that only special benefits are to be offset, and then only as against the remainder.[39] In West Virginia, the statute states that all benefits may be deducted from the amount of the damages to the remainder;[40] yet, the courts in that State appear to have permitted only special benefits to be offset against damages.[41] And another illustration of the inherent difficulty of categorizing in this area of condemnation law is the fact that both recent and older authorities have indicated the State of Alabama permits the offsetting of both general and special benefits against both value and damages.[42] The courts in that State have pointed out that that classification was incorrect.[43]

Based on the foregoing, it is understandable why still another authority has indicated that it is impossible to classify almost one-half the States of the country in regard to their positions on this question.[44]

It is, therefore, with reservation that we present even a rough classification of the position of the States regarding the offsetting of benefits. The reader should recognize that the following categories and the number of States that belong under each are somewhat indefinite.

In general, it may be said that there are five notable but different routes followed by the various jurisdictions in the country in the matter of offsetting benefits:

1. Benefits -both special and general- cannot be offset either against damages to the remainder or against the value of the part taken.

Only a few states appear to follow this rule, Mississippi being the chief among these.[45]

2. Special but not general benefits may be offset against damages to the remaining part but

not against the value of the part taken.

Approximately one-half the states appear to abide by this formula, including California.

3. Both special and general benefits may be offset against damages to the remainder but may not be offset against the value of the part taken.

This procedure appears to be followed in the State of New York alone.[46] West Virginia seemingly adopted it in a 1933 statute but the courts of that State have limited its application.[47]

4. Special but not general benefits may be offset against both damages to the remainder and against the value of the part taken.

Some authorities have indicated that this is the majority position but, upon close analysis, approximately 14 jurisdictions, including the Federal Government, adhere to it.[48]

5. Both general and special benefits may be offset against both damages to the remaining part and the part taken.

It is doubtful that more than two or three states adhere to this rule.[49] Like its counterpart

--the policy of prohibiting any offset of benefits--on the opposite side of the spectrum, few courts are prone to enforce it.

The above, as indicated, are the major classifications; a few other states have adopted hybrid rules depending on the nature of condemnor, or upon whether the damage is of a severance or consequential type.[50]

B. The Conflict In Policy Between The Divergent Rules

In the final analysis, despite the variegated paths followed by each of the states, the conflict between them may be summed up as follows: Should benefits be offset? And, if so, to what extent? And what kind, if any, benefits should be so offset?

The few jurisdictions that by statute or court decision refuse to allow any offsetting of any benefits do so primarily based upon their interpretation of the Constitutional mandates in those states that just compensation be made, coupled with the lack of any constitutional directive to deduct for benefits.[51] At times, they appear to buttress this posi-

tion by asserting that the various constitutions must be interpreted so as to compensate the condemnee in money; that benefits may not be utilized in lieu of money. This argument was advanced almost one hundred years ago in the Minnesota case, where one dissenting justice stated:[52]

> "If the legislature has the right under our Constitution to say that a party may be compensated for his land taken for public use, in 'benefits', it may also say that he may be compensated in oxen, sheep, provisions, or tobacco, or in any other useful or useless thing. Either they have no power, or unlimited power, to designate the currency or commodity in which payment may be made. To my mind it seems clear that the Constitution properly interpreted gives them no power in the premises. When the public or a corporation takes the property of an individual, it becomes indebted to him for its value, and should pay that debt in that which by the law of the land would be deemed a lawful tender in payment of any other debt."

And as the Chief Justice of the Supreme Court of Michigan, a little later, stated:[53]

> "I cannot believe that the framers of our Constitutions, either state or national, which provide that private property shall not be taken for public use without just compensation therefor, and that 'private property shall not be taken for public improvements in

> cities and villages . . . unless the compensation therefor shall first be paid,' ever anticipated that such compensation could be made up of benefits to the owner entirely speculative in character, the value of which should be estimated by persons whose pecuniary interests would induce them to place the lowest possible value upon the property to be taken, and the highest appraisal on the benefits claimed. The compensation intended by these provisions of our Constitutions is the fair cash market value of the property to be taken, and the payment intended is required to be in the legal currency of the country, and it should make no difference what incidental benefits the owner may be thought to derive."

As will be pointed out later, whatever merit there is in this argument is really only applicable to offsetting benefits against the value of the land taken; it would not appear to have any proper application to offsetting benefits as against damages insofar as it is difficult, if not impossible, to ascertain the value of the remainder without assessing benefits.

More cogent, however, is the general argument sustaining the position of these jurisdictions: A condemnee is not to be put in the position after the taking any worse off than his neighbor who has

sustained no injury. Under this latter line of thinking, the offsetting of any benefits, whether general or special, would relegate the condemnee to a less desirable position than his neighbor, for if the condemnee must "pay" for benefits and his neighbor is able to receive those benefits for free, the condemnee is put in a worse position. Quite frequently, neighboring land owners are able to receive special as well as general benefits for a public improvement and yet these benefited land owners need not pay any special assessment and need only contribute to the benefit as general taxpayers.

The crux of the above rationale is that a condemnee should be accorded compensation in relation to the benefit attained and injury sustained by his neighbor. Thus is created what has been termed an "island of equity".[54] It can be seen upon reflection that this principle, while not necessarily in conflict, is somewhat inconsistent with the principle of indemnity which heretofore has been considered the goal of just compensation. The principle of indemnity connotes that the condemnee, after the taking, shall be put in the

position pecuniarily as good as he would have been had there been no taking at all. The "island of equity" theory, however, broadens the indemnity principle by superimposing upon it not only that the condemnee will be left in no worse position than he otherwise would have been but for the taking but, also, that he will be left in a position no worse than his neighbors.

We shall later return to a further examination of this dichotomy but before doing so it is well to point out what one writer, critical of this addendum to the indemnity principle states:[55]

> "Our system of justice embodies the idea that when one unit, whether it be human, corporate, or political, is in litigation with another, the tribunal can do no more than create justice between the parties to the proceeding; where the condemnee has received, he should pay his benefactor (in the form of a deduction), and should not be heard to complain that some third person received but was not required to pay."

Similarly, in 1855, Georgia court stated:[56]

> "What matters it if others have been benefited? They are taking no issue with those who construct the public work. But he whose land has been taken is making such issue, and the duty has been devolved

> on his fellow citizens of ascertaining whether or not he has been injured, and if so, how much. And can they say he has been injured and is justly entitled to compensation, if they find he has been benefited?"

The main battlefield in the war of offsetting benefits is between those jurisdictions that permit or prohibit benefits to be offset against the value of the land taken. In this instance, of course, the reasoning of the minority courts that refuse to offset <u>any</u> benefits is somewhat more applicable. Indeed, while few jurisdictions accept this rationale insofar as it applies to prohibiting the offsetting of benefits against damages, apparently a majority of the states are willing to adopt such reasoning in regard to offsetting benefits against the value of the land taken. The conclusion of most courts in such instance is, as expressed by an Alabama court:[57]

> "The party whose land is taken should certainly be paid in full for the land actually taken, without regard to any benefits accruing to the remaining lands; but, when the party seeks to recover for the injury or damage to the remaining lands, it is difficult to see how it can be said that any damage has been suffered by reason of the change

> of grade and making of the sidewalk, if the net result of that work has been that the land has been benefited, and not deteriorated, in value."

But a number of jurisdictions, both adhering to a strict indemnity concept and recognizing a purported theoretical inconsistency between allowing an offset against the remainder but not against the value of the part taken, permit benefits, of one sort or another, to be offset against the entire award.[58] The leading case permitting the offset of special benefits against the entire award is Bauman v. Ross,[59] decided by the United States Supreme Court. This case, enunciating the federal rule, states:

> "'The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.
>
> Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the

> owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. * * * The constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken or for any injury to the rest, shall take into consideration by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken.'"

In answer to the argument that offsetting benefits against the part taken would put the condemnee in a worse position than his neighbors, a later Federal court, in Aronson v. United States,[60] pointed out that a failure to offset such benefits

would destroy the balance and equality of the rule that the owner is entitled to receive the value of what he has lost but no more. "It is not easy," said the Aronson court, "to perceive any other mode of arriving at a just compensation than by considering all the consequences of the act complained-of; whether they enhance or mitigate the injury." Still another court in a more summary fashion dismissed the "island of equity" principle. In a very early Indiana decision the court stated:[61]

> " . . . if others, whose property the public exigency does not injure are equally benefited, it must be set down as one of those chances by which fortune distributes her favors -a distribution which no legislature or other earthly power can render equal among men."

Thus, the federal courts and an appreciable minority of states adhere to an indemnity principle which takes into consideration only the equities that exist as between the condemnor and condemnee. The relative position that the condemnee may have vis-a-vis his neighbor is apparently dehors the scope of consideration. Yet, upon even closer analysis, the

federal government and most of the states in this category do not fully adhere to their interpretation of the indemnity principle. For most of these jurisdictions do take into consideration the status of the condemnee in relation to his neighbors insofar as general benefits are concerned. The great bulk of these states prohibit the offsetting of general benefits from either the part taken or the remainder.

That most of those states that profess to adhere to the indemnity or restitution principle by permitting benefits to be offset against the part taken are inconsistent in their rationale is exemplified by their refusal to follow this theory in regard to offsetting general benefits. For example, one court has set forth a hypothetical case justifying its position for refusing to deduct for general benefits. The court stated:[62]

> "Perhaps a simple illustration will serve to show why only special benefits peculiar to that property should be deducted from the damage caused, and not those benefits which are common to all properties similarly situated. Suppose a series of lots abutting on a common street, only one of which is injured by the grading and paving of that

> street. The one lot has suffered damage to the extent of $500, but has been specially benefited to the extent of $100 by the removal of a deep and malodorous mudhold immediately in front of it, while every lot abutting on that highway, including plaintiff's has been enhanced in value $250 by reason of the better grading and paving. Clearly the city has the right to deduct the $100 special benefit from the total claim, leaving $400 as the amount necessary to restore plaintiff's lot to the same relative value it bore to other lots on that street before the improvement. But what of the $250 benefit common to every lot due to a general enhancement of values because of the improvement? Should it also be deducted? Clearly not. For if it is, plaintiff is the only property owner on the street to lose the general enhancement of values common to all properties, and to which he is entitled as taxpayer. Every other owner retains his additional $250, and so should plaintiff, for the $400 restores his lot to the same relative value it possessed immediately before the improvement, thus placing it on a plane of equality with the other lots similarly situated, and ready to share with them in the general enhancement of values."

While there is undoubtedly considerable merit in that position, and indeed we are in concurrence with it, it must be recognized that it is not consistent with the same court's position of offsetting special benefits against the remainder.

Indeed, approximately 90% of the jurisdictions adhere to the principle as set forth by a Utah court:[63]

> "If such benefits are not excluded, then the property injured is not placed on an equality with property on the same street affected by the same public improvements but not injured thereby. If compensation for injuries is to be reduced by general benefits, then property not injured gains by whatever such benefits add to the property, while injured property is taxed with them in the very attempt of making compensation. To deduct these general benefits, therefore, would result in not making full compensation at all, because something would be withheld from the injured property which would be enjoyed by property not injured."

The minority position on this point, permitting the deduction of general benefits, is likewise similar to the rationale set forth by those cases that allow special benefits to be offset against the part taken. These cases assert that the property owner is not damaged merely because his neighbor may be benefited to a greater extent, or that the owner cannot demand a premium but only just compensation or, lastly, that if there is a hardship, it is for the legislature to rectify the situation. As an early Kentucky court put it:[64]

> "The advantages which the owner may derive from the construction of the road are not in the least diminished by the fact that they will be enjoyed by others, nor does it furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from the establishment of the road. Other persons, it is true, may enjoy the same advantages, without being subjected to the same inconvenience, but this results from the nature of the improvement itself, and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes."

This minority position, permitting general benefits to be offset, is in effect a strict "before and after" test. Most courts, at least insofar as general benefits are concerned, believe that a greater injustice results by applying this principle strictly and, therefore, in this context adopt the position which compares one property owner with another as the proper approach, rather than the approach which would put the property owner on one side and the taxpayer on the other.

In the final analysis, what the courts appear to be doing is trying to create a balance as between the property owner and the taxpayer. In doing so, they have, at least from a theoretical position, run into internal inconsistencies in reasoning. A considerable

proportion of the states have achieved this balance by adhering to the indemnity approach in permitting special benefits to be offset against both the part taken and the remainder while following an "island of equity" approach in prohibiting general benefits to be offset. Those states that permit special (but not general) benefits to be offset only against the remainder also fail to follow either principle completely. Only the two extreme categories are consistent: That which prohibits any offsetting of benefits ("island of equity" theory), and that which permits all benefits to be offset from the award (the indemnity theory).[65]

Those that advocate a complete indemnity position, i.e., call for both general and special benefits to be offset against both the part taken and the remainder, or the "before and after" test, frequently assert that the benefits -including general benefits- that a condemnee receives as a result of a public improvement should be treated in the same manner as damages; and that it is only proper to offset such benefits. Adhering to this line of

reasoning, two attorneys for public bodies have written:[66]

> "For example, a farmer on an unpaved county or private road may be served with an improved farm-to-market road for distributing his products following taking of a small part of his land. A retail businessman may see the number of cars passing his establishment every hour increase from 10 to 100. A home owner may have travel time from his residence to the center of town reduced one-half. The owner of former 'swamp land' may be favored and enhanced by the location of service roads and an interchange to a new limited-access highway in close proximity to or through his property where only a portion is taken. A landlocked timber or agricultural area may be enhanced following construction of a limited-access highway. Upon reflection, everyone will agree that a retail establishment may have a warehouse full of salable goods, but that merchandise will not move until the inventory is displayed for customer inspection. Land is largely influenced by the same rules of human behavior and experience. Following construction of a limited-access highway, previously landlocked timber and agricultural land will be opened, displayed and put on the market to thousands of people who otherwise would never have seen or been familiar with the particular areas involved, and the travel time between that property and the urban areas will be reduced to save many thousands of man hours. Prior to the construction of a new land service or limited-access highway, rural property may have been served

only by a narrow, inadequate county road. The property likely will become adaptable for a higher or better use -residential or subdivision- and frequently, such property will enjoy frontage on a highly desirable road. These and many other factual situations suggest and present the issue and extent of enhancement. The test of benefit is the same as the test of damage -the effect of the project on the subject property in the opinion of the valuation expert and the factual situation reflecting benefits or damage.

"Just compensation requires a full indemnity, but nothing more. It means a balancing of things against each other -a balancing of benefits against loss and damages. When a condemnor acquires a part of a parcel of property for a use that carries into the remaining tract a value equal to or in excess of the part acquired, then the owner has lost nothing, and he has received just compensation. The application of any contrary rule obviously would be unjust to the public."

There is, however, a serious and vital inconsistency in the foregoing logic. For in most of the examples given in the above-quoted statement, there appears to be a general benefit. Yet, as we have seen in prior studies, when the situation is reversed and because of the public improvement, the condemnee is injured by diversion of traffic from his land or by being forced to travel a more circuitous route to

reach it or by the similar exercise of police power, he is not awarded damages for such "inconveniences". In other words, his home may be further away from the main flow of traffic or all traffic may be diverted from his premises and yet he would, according to universal application of the law, not be recompensed for such a loss. It is damnum absque injuria. Thus, since the indemnification theory does not hold in instances where a condemnee may suffer general damages, it does not follow that general benefits should be offset.

IV. THE CALIFORNIA POSITION AND ITS EVOLUTION

The law of benefits in California, while not entirely clear (despite the fact there has been no significant statutory or Constitutional change in almost ninety years), appears to amount to the following: In actions instituted by public condemnors, this state follows the large bulk of jurisdictions that permit special benefits to be offset against damages to the remainder; benefits usually may not be offset against the value of the part taken. The refusal to

offset benefits against the part taken is justified based upon the language of §1248(3). It has been reaffirmed on a number of occasions by the California courts.[67] General benefits at least in right of way and reservoir takings may not be offset against either the value of the part taken nor damages to the remainder.[68] This latter position has been in California, as in almost all of the jurisdictions, judicially engrafted on the statute.

When a private corporation or individual is the condemnor, the rule is probably different and, indeed, less clear cut. It seems that private condemnors do not have the advantage of offsetting either general or special benefits under any circumstances. This prohibition, though not specific in case law, is supported by the interpretation of Article I, §14, of the California Constitution as enacted in 1879. In light of various court decisions, however, the effect of the rule is in doubt.

The history of the interpretation and treatment given to benefits in California is not only interesting in and of itself but also is helpful in

understanding the present rules. To begin with, prior to both the enactment of §1248(3) and the adoption of the Constitutional provision pertaining to benefits, the courts of this state had seemingly adopted a strict "before and after" test. In 1866, California Supreme Court in San Francisco, A&S R. Co. v. Caldwell[69] was presented with the question as to whether or not benefits may be offset against the value of the land taken. The California Supreme Court held that there could be such an offsetting. In so doing, it touched upon each of the numerous arguments usually presented by each side on this question. It stated:

> "But in ascertaining what is just compensation the question is presented, in the case before us, as to the power of the Legislature to declare and determine that benefits which may result to him whose property shall be taken, by the enhancement of the value of his remaining property, which is of the parcel of that taken, by reason of the construction of the railroad, shall be estimated and set off in satisfaction or in part satisfaction of the compensation to which he may be entitled for the particular property taken from him for the use of the public. The opinions or jurists on this subject are found,

on examination, to be widely diverse from each other. On the one side it has been maintained that compensation to the extent of the value of the land taken must be made in all cases, without any deduction on account of any benefit or advantage which may accrue to other property of the owner, by reason of the public improvement for which the property is taken . . .

"In support of this view it is argued that the enhancement of the value of other property of the owner of the land proposed to be condemned to public use, which may be of the parcel of that taken, is merely the measure of such owner's share in the general good produced by the public improvement; and why, it is asked, is not the owner in such case justly entitled to the increase in the value of the property thus fortuitously occasioned, without paying for it? His share in the benefits resulting may be larger than falls to the lot of others owning property in the same vicinity, and it may not be so large, and yet he alone is made to contribute to the improvement by a deduction from the compensation which is awarded him by sovereign behest as a pure matter of right, though others whose property may adjoin the public work are equally with himself benefited by it. On the other side it is maintained that the public is only dealing with those whose property is necessarily taken for public use, and that if the property of such persons immediately connected with that taken, but which remains unappropriated, is enhanced in value by reason of the improvement, then, thereby the owners receive a

just compensation for the lands taken to the extent of such enhancement, and if thereby fully compensated they cannot in justice ask for anything more . . .

"The weight of authority appears to be in favor of allowing benefits and advantages to be considered in ascertaining what is a just compensation to be awarded in such cases, and it seems to us that the reasons in support of this view of the subject are unanswerable.

"Just compensation requires a full indemnity and nothing more. When the value of the benefit is ascertained there can be no valid reason assigned against estimating it as a part of the compensation rendered for the particular property taken, as all the Constitution secures in such cases is a just compensation, which is all that the owner of property taken for public use can justly demand. The Constitution does not require the compensation in such cases to be rendered in money, though in the estimation of benefits their value must be measured by the money standard . . .

"Their duty [the Commissioners] is to ascertain what is a just compensation to the owner, and when the land of which he is deprived is a part only of a tract, such compensation may be ascertained by determining the value of the whole tract without the improvement and the portion remaining after the work is constructed. The difference is the true compensation to which the party is entitled."

"Corrective" action was not long in coming.

In 1872, as part of the enactment of the Code on Emi-

nent Domain, the Legislature adopted §1248(3) of the CCP. This provision discarded the strict "before and after" test and prohibited the court from offsetting benefits from the value of the part taken. It seems probable that the Legislature primarily had in mind the holding of the Caldwell case; and it should be noted, once again, that the condemnor in that action was a railroad. Thus, to a large extent, it appears that §1248(3) was motivated by a feeling that private condemnors should not be allowed this liberal offset advantage.[70]

Thereafter, in 1879, the Constitution provision was enacted. This provision in Article 1, §14, included a number of considerations. First, as indicated in a prior study,[71] the citizenry appeared to be primarily concerned with remuneration for consequential damages that often accompanied railroad takings and were, theretofore, noncompensable. Secondly, the section also concerned the guaranty of a jury trial coupled with a further protection to the condemnee that the property would not be taken without first insuring and granting just compensation. More-

over, the clause preventing the offsetting of benefits exempted municipal (and later almost all public) agencies. Once again, the discrimination against private condemnors, particularly railroads, was evident.[72]

There has been little difficulty in interpreting §1248(3). No condemnor, it seems, may offset benefits against the part taken. Moreover, only special benefits may be offset against the remainder. Probably special benefits may be offset only in favor of public condemnors.[73]

The Constitution provision clearly denies private condemnors this liberal exemption; however, it should be noted that the cases are still a bit ambiguous and not entirely settled to the effect that private condemnors are not afforded this privilege.[74] The Beveridge case, supra, discusses the question of special and general benefits and the distinction between them. If the case decided that private condemnors may not offset any benefits (as the Constitution reads), then there appears to be no reason why the court would have been concerned with

the distinction between general and special benefits. Indeed, there is language in that case which suggests that it is possible that special benefits may be offset against the remainder even though the condemnor be a private agency.[75]

V. CONCLUSIONS AND RECOMMENDATIONS

In the final analysis, we are confronted with two questions:

(1) Should benefits be offset against both the part taken and the remainder, against only the remainder, or not at all?

(2) If benefits may be offset to some extent, should this include general or only special benefits?

In an effort to arrive at a "balance" and to bring about just compensation which is just both to the condemnor and the condemnee, we are immediately concerned with the basic policy consideration. Shall we abide by a strict concept of indemnity (or restitution) theory or does just compensation connote

that a condemnee shall be left after the taking in as good a position as his neighbors; that is to say, shall we adhere rather to an "island of equity" theory. A resolution of this conflict is most difficult, primarily because each approach has considerable merit and neither approach is wholly satisfactory. It is, indeed, apparent that it is just because of this dilemma that most courts throughout the country have fashioned a combination of rules that negates either a full acceptance or a full rejection of either of these approaches.

To begin with, we find it unreasonable to accept either of the extremes. To allow no benefits to be offset under any conditions certainly would allow property owners to benefit at the direct expense of a public agency. A condemnee would be able to receive damages to his remainder, and yet at the same time profit by a benefit which could easily mitigate the entire measure of damages and would in reality frequently put him in a position not only superior to that that he would have had in the absence of condemnation but superior to that of his

neighbors. On the other hand, to allow all type benefits to be offset would certainly and clearly put him in a worse condition than his neighbor; but more crucial, as will be seen, it will not afford him a reasonable opportunity to be put in as good a pecuniary position after the taking as he was before. Thus, in the final analysis, the question is which of the two theories - the indemnity (restitution) or the "island of equity" - is to be given greater importance.

Should special benefits be offset against the value of the land taken? A strict interpretation of the indemnity principle would necessitate that this question be answered in the affirmative. While we may find some merit in the contravailing policy, there seems no sufficient justifiable reason why a condemnee should, as a result of a taking, be placed in a position after the taking more beneficial than that which he would have had if there had been no taking at all, at least insofar as special benefits are concerned. A simple example will underscore this conclusion. If a strip of land, but a

small proportion of the condemnee's property, is taken and has a value, say, of $10,000.00, but because of the improvement in the manner proposed the remainder is specially benefitted to the extent of $100,000.00, to allow the condemnee to be given $10,000.00 as "just" compensation for the part taken, while he retains the entire benefit, does not strike us as equitable. The argument that the condemnee must be paid in money for the part taken should not prohibit a liberal offsetting policy. It is to be noted that such argument loses some of its force when it is recognized that special benefits may be offset against damages to the remainder - thus not all damages are paid for in money.

Of course, it may be that in certain instances an acceptance of the indemnity principle in this context may put a condemnee in a position somewhat inferior to that of his neighbors who also may have been specially benefitted but who are usually not taxed and assessed for their gain. But as indicated before:[76]

> ". . . . if others, whose property the public exigency does not injure are equally benefitted, it must be set down as one of those chances by which fortune distributes its favors - a distribution which no legislature or other earthly power can render equal among men."

Moreover, the adoption of the "island of equity" principle in regard to offsetting special benefits against the part taken leads to very impractical results. For example, some neighbors may be specially benefitted more than others. Some neighbors may be benefitted to a greater or lesser degree than the condemnee. With whom shall the condemnee be compared? And shall he receive, offset-free, the amount of special benefits of a neighbor on his left or a neighbor on his right? And are we to open up to the courts the question of ascertaining the amount and extent and the differences of benefits realized throughout the neighborhood? These questions have not been broached by any court, to our knowledge, but a strict adherence to the "island of equity" concept would certainly make them relevant. As a result of these inequities we

would consider that the better rule in these circumstances would be that adopted in the federal jurisdictions and throughout a number of states to the effect that special benefits may be offset against the award, and not just the remainder. It is a rule which is more practical and certainly not less equitable to all concerned. It is also in harmony with previous recommendations made in other studies in this series.

Thus, we are brought to the second main consideration: should the indemnity principle be strictly interpreted so as to offset general as well as special benefits. As indicated above, this is essentially an extreme position, taken by no more than three jurisdictions in the country. We, too, must emphatically reject it. To begin with, there is some merit in the "island of equity" concept and the adoption of this extreme position would completely disregard that principle. In People v. Thompson,[77] a 1954 case, the California Supreme Court approved the trial court instruction, which stated:

> "You are instructed that the chance that land will increase in value as population increases and new facilites for transportation and new markets are created is an element of value quite generally taken into consideration in the purchase of land in estimating its present market value. If a part of one's property is taken for the construction of a highway, he stands in reference to the other property not taken like similar property owners in the neighborhood. His neighbors are not required to surrender this prospective enhancement in value in order to secure the increased facilities which the highway will afford. If he is compelled to contribute all that he could possibly gain by the improvement while others in all respects similarly affected by it are not required to do so he does not receive the equal protection of the law. The work is not being done for his benefit. The law will not imply a promise on his part to pay anything toward it.
>
> "To compel him to give up or pay full value for his share of the common or general benefit while others are allowed to retain it is to deny him equal protection of the law."

But if this factor, in light of what has been said before, cannot itself support the position that general benefits should not be offset, certainly two other factors necessitate such a conclusion. First, general benefits are of a nebulous and uncertain nature, so much so that to offset them would be

to diminish a condemnee's award based upon enhancements which are, by their very nature, speculative and conjectural. The California Supreme Court recognized this in the Beveridge case, supra. There the court stated:

> "In the first place, such benefits are uncertain, incapable of estimation, and future. Compensation must be made in money and in advance. The property-owner, therefore, cannot be compelled to receive his compensation in such vague speculations as to future advantages, in which a jury may be induced to indulge."

Such an elusive concept, inherently vague, would not be a proper instrument for reducing a condemnee's award; it could easily tend to deny just compensation.

And, lastly, connected with the above reasoning, is the fact that allowing these general benefits to be offset would be entirely inconsistent with the established policy and rule that a condemnee is not to be afforded general damages. Since a condemnee may not receive compensation for injury suffered in common with his neighbors in the community resulting from such things as diversion of

traffic or circuity of travel, because they are general, it would be exceedingly improper to penalize him for an improved travel pattern or other similar general benefit.

It should be additionally noted that this position regarding the prohibition against offsetting general benefits is one that is not entirely settled in this state. The Beveridge opinion seemed to establish that, under no circumstances, can general benefits be offset. However, a subsequent District Court of Appeals case, Crum v. Mt. Shasta Power,[78] cast some doubt as to whether or not this rule applies in all cases. For the court in the Crum case enigmatically stated:

> "The rule in California is well established in eminent domain cases, other than those which involve rights of way, to the effect that both general and special benefits which accrue to either the portion of property which is taken or that which remains, may be considered and set off against the damages which are assessed."

Accordingly, it is recommended that statutory language be adopted indicating that in all cases special benefits may be deducted from the entire

award and that in no instance may general benefits be deducted from any part of the award.

The above statutory "reform" may be brought about by the legislature. In all cases concerning public condemnors (municipalities, counties or the state) this policy may be "corrected" by simple statute, but because of the clear prohibition in the Constitution, it would take a Constitutional amendment to afford this liberal offset policy to private condemnors. As indicated throughout this study, much of the confusion and a good deal of the present distinctions regarding benefits may be traced to the fact that rules were propounded at the time when most of the takings were brought about by railroads and other private condemnors. And, as indicated, the legislature and the people considered that a discrimination was in order, particularly insofar as these private condemnors were exercising an extraordinary power and were gaining an advantage which was of dubious validity at best.

On closer analysis, we find it difficult

to sustain this discrimination today. If railroads or other private condemnors take private property under the eminent domain code, a discrimination against them will not necessarily redound to the public's advantage, as was formerly thought.[79] For a private corporation that has to pay an increased award will undoubtedly pass that additional cost on to the general public through rate increases.[80] The public, therefore, does not gain by such discrimination. Moreover, it does not appear to be logical to cause a differentiation as to the amount the condemnee will receive depending upon the nature of the condemnor, at least in that area of the law where the private condemnor is given no undue advantage. Accordingly, therefore, there seems no reason or grounds for sustaining this anachronism and the Constitution should eliminate this discrimination.

Before concluding, it may be recalled that in prior pages of this study we indicated that the California courts, generally, have adopted and adhered to a fairly sound definition and interpretation of general and special benefits. While recog-

nizing that a fine differentiation between these types of benefits is a difficult one, by and large the California courts have followed the majority position in most difficult fact situations and have, accordingly, adopted reasonable and just guide lines. However, in a very recent case, City of Haywood v. Unger,[81] an August 1961 District Court of Appeals decision, the California court appears to have veered in a dubious direction. In the Unger case the Court held that an improvement to an existing city street which resulted in an increase in traffic in the neighborhood was a special rather than a general benefit. Not only is such a holding contrary to the great weight of authority,[82] but it is also unreasonable and unfair; for it is quite clear, in California and elsewhere, that a change in traffic pattern on an existing street or highway is a general not a special damage. Thus, the consultants believe that the Unger court was in error and, though there does not appear to be a feasible way in which meaningful statutory language can be devised to insure against such rulings, it is hoped

that the Unger case does not mark a beginning of a trend in this direction.

It is well to make reference and consider one further aspect of the problem of benefits. While a subsequent study will devote itself entirely to the question of burden of proof in eminent domain actions, it is pertinent to recognize here that as a general rule the burden of proof regarding benefits is placed upon the condemnor. No cases in California, however, specifically indicate that this state follows the general rule in this regard. Statements are found in various texts and digests that this is the accepted rule and a number of cases in other jurisdictions state that the condemnor both must plead and bear the burden of proving the extent, if any, of benefits.[83]

Insofar as the condemnee usually must bear the burden of proof in regard to value and damages, it seems appropriate that anything which would go to offset compensation should be both pleaded and proven by the condemning body.[84] Accordingly, it is recommended that statutory provision be made

indicating that the burden in these instances is to be borne by the condemnor.

FOOTNOTES

(1) This section was originally enacted in 1872. Subsequent amendments (1889, 1911, 1913, 1915, 1953) did not in any way change the wording of subsection 3 herein discussed.

(2) This constitutional provision was enacted in the 1879 Constitution and its primary purpose apparently was to allow the condemnee the right to receive compensation for various types of damages theretofore held non-compensable. See Study "Taking Possession of Passing of Title In Eminent Domain Proceedings," pp. B-31-33 (Oct. 1960) (This series).

(3) The question of benefits, and whether or not they should be offset against the award, also arises in situations where there is no taking of the property but merely a consequential damage. However, since almost all jurisdictions treat the question of benefits in consequential damage-type cases in the same manner as in severance cases, the Study shall not

differentiate benefits as between consequential and severance instances. See 1 ORGEL on VALUATION under EMINENT DOMAIN, § 7 nn. 57, 59. (2d Ed. 1953) (hereinafter cited as "ORGEL"). See also Note, "Right to Set-off Benefits Against Damages to Property in Eminent Domain Proceedings", 46 W.VA. LAW Q. 320 (June 1940).

(4) See United States v. Miller, 317 U.S. 369 (1943) See, generally, Study "Taking in Eminent Domain Proceedings" and "The Treatment of Consequential and Severance Damages in Eminent Domain" (This series). See also, Phelps & Bishop "Enhancement in Condemnation Cases," 7 RIGHT OF WAY 8 (1960); 2 Kaltenbach, JUST COMPENSATION 25 (Apr. 58); Note, 43 IOWA L. REV. 304 (1958); Kaltenbach, JUST COMPENSATION, Special Bull. #10, (1959).

(6) ANNOT., "Deduction of Benefits in Determining Compensation or Damages in Eminent Domain", 145 A.L.R. 7 (1943).

(7) See, e.g., 1 ORGEL §7.

(8) See La. Society v. Board of Levee Comm'rs., 143 La. 90, 78 S. 249 (1918).

(9) See 4 NICHOLS on EMINENT DOMAIN 336 (hereinafter cited as "NICHOLS"); Diamond, "Condemnation Law," 23 APPRAISAL JOUR. 564, 574 (1955); 1 ORGEL §65.

(10) See Note, Univ. of Ill. L.F. 313, 324-25 (1960). See generally cases collected in 1 ORGEL §7 n. 57.

(11) 57 W. Va. 417, 50 S.E. 521 (1905).

(12) See discussion at pp. , infra.

(13) Note, Univ. of Ill. L.F. 313, 330 (1960); Brand v. Union Elevated R.R., 258 Ill. 133, 101 N.E. 247 (1913).

(14) See, e.g., Kaltenbach, JUST COMPENSATION, "Benefits" Special Bull. #10 (1959).

(15) Lincoln v. Board of Street Comm'rs., 176 Mass. 210, 213, 57 N.E. 356 (1900).

(16) 1 ORGEL 40-41.

(17) 3 NICHOLS §8.6203.

(18) 1 ORGEL 41.

(19) McRea v. Marion County, 222 Ala. 511, 133 S. 278 (1931).

(20) Note, 43 IOWA L. REV. 303, 305 (1958).

(21) Peoria B&C Traction Co. v. Vance, 225 ILL. 270, 273, 80 N.E. 134 (1907)

(22) Beveridge v. Lewis, 137 C. 619, 623-24, 67 P. 1040 (1902).

(23) Annot., 145 A.L.R. 55-58 (1943). Similarly, an increase in market value, in itself, will not in most jurisdictions, justify a benefit as being classified as a special benefit. Id. at 84-85.

(24) Idem at 77, et seq.

(25) See, e.g., San Luis Valley Irrig. Dist. v. Nofsinger, 85 Col. 202, 274 P. 827 (1929); Forest Preserve Dist. v. Chicago Title & T. Co., 351 Ill. 48, 183 N.E. 819 (1932).

(26) See Study, "Incidental Losses in Eminent Domain" (this series).

(27) "Eminent Domain Valuations In an Age of Redevelopment: Incidental Losses," 67 YALE L. J. 61, 65 (1957).

(28) Ibid at 65-67.

(29) See nn. 26, 27, supra.

(30) See 9 & 10, Geo. 5, c. 57, §2(3)(1919);

McCORMICK, DAMAGES, 524, 526, n.24.

(31) 1 ORGEL 45.

(32) See Elks v. Board of Commissioners, 179 N.C. 241, 245, 102 S.E. 414 (1920). A rough estimate of the cases on the books prior to 1900 indicates that almost half of the condemnation actions involved railroads.

(33) See individual state constitutional provisions collected in Annot., 170 A.L.R. at 158-299.

(34) Cal. Const., art. 1, §14.

(35) 137 Cal. at 624.

(36) See n. 33, supra.

(37) See, e.g., Phelps and Bishop "Enhancement in Condemnation Cases," 7 RIGHT OF WAY 8, 11; 2 LEWIS EMINENT DOMAIN 1177 (3d Ed. 1909); Bauman v. Ross 167 U.S. 548 (1897) ANNOT. 145 A.L.R. 16 et seq.; Kaltenbach, JUST COMPENSATION, "Benefits", Spec. Bull. #10 (1959); Enfield and Mansfield "Special Benefits and Right of Way Acquisition"

25 APPRAISAL JOURNAL, 551, 555 (1957); Note, 46 W. VIR. L.Q. 320 (1940); McCORMICK, LAW OF DAMAGES 548; Note, 43 IOWA L. REV. 303, 305 (1958).

(38) Phelps and Bishop "Enhancement in Condemnation Cases" cited at note 37, supra.

(39) Wis. Laws, 1959, § 32.09(3).

(40) W. Va. Code, c.54 art.2 §9.

(41) See, e.g., State v. Jacobs, 5 S.E. 2d 617 (W.Va. 1939); See, generally, Note, 46 W. VA. L.Q. 320 (1940).

(42) Phelps and Bishop "Enhancement in Condemnation Cases" cited at note 37, supra; 2 LEWIS EMINENT DOMAIN §465.

(43) See Eutaw v. Botnick, 150 Ala. 429, 43 S. 739 (1907).

(44) Enfield and Mansfield, "Special Benefits and Right of Way Acquisition," 25 APPRAISAL JOURNAL 551, 555 (1957).

(45) Stoner v. Iowa State Hwy. Comm., 27 Iowa 115, 287 N.W. 269 (1939); Schoonover v. Fleming, 239 Iowa 539, 32 N.W. 2d 99 (1948);

Electric Cooperative Corp. v. Thurman, 275 S.W. 2d 780 (Ky.App.1955); Commonwealth v. Powell, 258 Ky. 131, 79 S.W.2d 411 (1935); In Re Bagley Ave., 248 Mich. 1, 226 N.W. 688 (1929); Finley v. Board of Commissioners, 291 P.2d 333 (Okla. 1955); Brown v. Beattey, 34 Miss. 227 (1957); but cf., Miss, State Hwy. Comm. v. Hillman, 189 Miss. 850, 198 So.565, 569 (1940). See also, Annot., 145 A.L.R. 22, et seq.

(46) See Becker v. Metropolitan El.Ry.Co. 131 N.Y. 509, 510, 30 N.E. 499 (1892).

(47) See Note 46, W.VA. L.Q. 320, et seq. (1940).

(48) Compare, Kaltenbach JUST COMPENSATION, "Benefits" at n.37 with Note, 43 IOWA L. REV. 303, 305 (1958) and Phelps and Bishop, "Enhancement in Condemnation Cases", 7 RIGHT OF WAY 8, 11; Bauman v. Ross, 167 U.S. 548 (1897); Collum v. Van Buren Co., 223 Ark. 525, 267 S.W.2d 14 (1954); State v. Powell, 226 S.W.2d 106 (Mo. App. 1950); Petition of Reeder, 110 Or.484, 222 Pac. 724

(1924); State v. Ward, 41 Wash.2d 794, 252 P.2d 279 (1953).

(49) Cf., 1 ORGEL 44, n.60; Phelps and Bishop "Enhancement in Condemnation Cases," 7 RIGHT OF WAY 8, 11 (1960); Board of Commissioners v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953); Gallimore v. State Hwy. & Public Works Comm. 241 N.C. 350, 85 S.E.2d 392 (1955).

(50) See, e.g., Broadway Coal Mining Co. v. Smith, 136 Ky. 725, 125 S.W. 157 (1910).

(51) See Annot., 145 A.L.R. 46 et seq.

(52) Wyona & St. Paul R. Co. v. Waldron Co., 11 Minn. 515 (1866) (Dissenting Opinion).

(53) Detroit v. Daly, 68 Mich. 503, 37 N.W. 11 (1888) (Dissenting Opinion).

(54) See, Enfield and Mansfield, "Special Benefits and Right of Way Acquisition", 25 APPRAISAL JOURNAL 551, 558-59, n.28 (1957).

(55) Ibid.

(56) Young v. Harrison, 17 Ga. 30 (1855).

(57) Eutaw v. Butnick, 150 Ala. 429, 43 S. 739 (1907).

(58) Compare the language in Broadway Coal Mining Company vs. Smith, 136 Ky. 725, 125 S.W. 157 (1910), where the court recognized the inconsistency and held that benefits may be neither set off against damages from the remainder nor against value from the part taken:

> "The person for whose benefit the land is taken should not be allowed to diminish this compensation by evidence of prospective benefits that the proposed improvement will confer upon the owner. The improvement is not made for the benefit of the owner of the land. He may, in fact be strongly opposed to it. In his opinion it may be of no advantage to him, and yet, according to the view of many courts, he must against his consent not only part with his land, but be paid for it in probable benefits. It is, too, a curious fact

that many courts, although holding to the view that benefits may be set off against direct injury to the remainder of the tract, refuse to permit these benefits to be set off against the damage caused by the loss of so much of the property as is actually taken for the improvement. Why this distinction should be made is not apparent. When it is conceded that the owner is entitled to compensation for the injury to the residue of his land - and upon this point there is entire unanimity of opinion - why should this injury be diminished by benefits, and yet benefits not be allowed to reduce the damage caused by the loss of the property actually taken? The injury to the owner, except in degree, is the same in both instances. The part taken is lost to him, and the

part remaining has been reduced in value. We therefore submit that there are only two positions that can be logically taken - one is that benefits may be set off against the injury whether it grow out of the loss of the land actually taken or the damage to the residue of the tract, and the other is that benefits should not be permitted in any state of case to diminish the actual loss sustained." (Emphasis added).

(59) 167 U.S. 548 (1897).

(60) 79 F.2d 139 (1935).

(61) McIntire v. State, 5 Ind. 384 (1840).

(62) Jones v. Clarksburg, 84 W.Va. 257, 99 S.E. 484 (1919).

(63) Hempstead v. Salt Lake City, 32 Utah 261, 90 Pac. 397 (1907).

(64) Henderson & N.R. Co. v. Dickerson, 17 Ky. 173 (1856).

(65) See n.58, supra.

(66) Phelps & Bishop "Enhancement in Condemnation Cases," 7 RIGHT OF WAY 8, 9 (1960).

(67) See, e.g., County of Ventura v. Thompson, 51 Cal. 577 (1877); People v. McReynolds 31 C.A. 2d 219, 87 P. 2d 734 (1939); L. A. County v. Marblehead Land Co. 95 Cal. App. 602, 273 Pac. 131 (1928).

(68) People v. McReynolds, 31 C.A. 2d 219, 87 P. 2d 734 (1939). But cf., Crum v. Mt. Shasta Power Corp., 117 Cal. App. 586, 609, 4 P.2d 564 (1931).

(69) 31 Cal. 367 (1866). See also Cal. Pac. R.R.Co. v. Armstrong, 46 Cal. 85 (1873).

(70) See Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040 (1902).

(71) See Study "Taking Possession and Passage in Eminent Domain Proceedings" (This series).

(72) Beveridge case at n. 70.

(73) See text at n. 78.

(74) Beveridge v. Lewis, 137 Cal. 619, 624-626, 67 Pac. 1040 (1902). Cf., Collier v. Merced Irr. Dist., 213 Cal. 554, 571, 2 P.2d 790 (1931); People v. McReynolds, 31 C.A. 2d 219, 87 P. 2d 734 (1939).

(75) See Beveridge opinion at 626, stating:

> "Often special benefits, which afford protection to the land, or will at once render it more productive, are taken into consideration in determining how much land not taken will be damaged. Only the arbitrary rule of the statute which requires separate findings of benefit and damage will prevent this. These are matters, however, which need not be determined in this case."

(76) See n. 61, supra.

(77) 43 C. 2d 13, 271 P. 2d 507 (1954).

(78) 117 Cal. App. 584, 609, 4 P. 2d 564 (1931).

(79) See Gilmore v. Central Maine Power Co., 127 Me. 522, 145 Atl. 137 (1929) where this argument apparently was raised; 1 ORGEL §93. See also, Note, 65 YALE L. J. 96, 103 (1955). Cf., McCORMICK, DAMAGES 524, 526 & n. 24.

(80) Ibid.

(81) 194 A.C.A. 536 (Aug. 1961).

(82) 145 A.L.R. at 103.

A STUDY RELATING TO THE "LARGER PARCEL" IN EMINENT DOMAIN*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

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A STUDY RELATING TO THE "LARGER PARCEL" IN EMINENT DOMAIN

I. INTRODUCTION

A commentator has noted that there is a strange coincidence in the arrangement of subjects in Law Encyclopedias:[1.] Eminent Domain lies between "Embezzlement" and "Equity." This commentator goes on to point out that the Supreme Court has indirectly emphasized this paradox; Justice Brandeis once wrote:[2.]

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. ... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding."

Justice Holmes, however, in Pennsylvania Coal Co. v. Mahon, admonished:[3.]

> "We are in danger of forgetting that a strong public desire to improve the public conditions is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

This dilemma, as we have seen in prior studies, has been especially encountered in severance cases. And it reflects itself in the subject of this study--the larger parcel--in a unique way. For the "larger parcel" concept is a "buckle" between the treatment of damages on the one end, and the treatment of benefits on the other. A liberal interpretation of the

larger parcel will tend to increase the condemnee's award insofar as he will likely receive a greater amount in damages. But it can just as easily decrease the condemnee's award by offsetting benefits that a restrictive definition of the larger parcel would prevent.[4] The question throughout this study, therefore, is what constitutes the larger parcel. That question, like many others related to severance cases, defies a definite and clear-cut answer.

Section 1248 of the Code of Civil Procedure, on the books now in virtually the same form for 90 years, the court, jury or referee to ascertain and assess:[5]

> "2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned...
>
> "3. Separately, how much the portion not sought to be condemend and each estate or interest therein, will be benefitted..."

We are initially met, therefore, with the question as to what is meant by the word "parcel." On first impression, it is likely that the average individual would consider a parcel of land to be a unified piece of land measured by known metes and bounds and usually owned by the same person or persons. Such lay view, however, is not necessarily the accurate one, either in law or the market place, particularly in modern society.

The courts are divided on the determination of the "larger parcel" concept. Some would restrict the word "parcel"

to its "ordinary"meaning. For example, a 1915 California case rejected the liberal definition of the word and concluded that an examination of the above-quoted terminology of Section 1248 necessitates a restricted application of the "larger parcel" concept:[6].

> "This very language limits in terms the award of damages to the property taken and the resultant damages to contiguous property injured by severance of the property taken" [Emphasis added.]

On the other hand, a Massachusetts court, a number of years later, examined the word "parcel" as it exists in the condemnation statutes of that state and concluded as follows:[7].

> "St. 1926, c.365, under which the extension of Bay State road was undertaken, is silent as to the measure of damages. Reference must be had to G.L. c.92, §80, and chapter 79, §12. The section last cited provides that 'in case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made.' ...
>
> "The statutory word parcel, like the cognate words tract and lot, has no invariable meaning. In different connections these words may vary in scope." [Emphasis added.]

In both the California and the Massachusetts cases the condemnee sought damages to the "remainder" when the part of the "parcel" taken was separated by land owned by third persons. It is probably not surprising to learn that the California court denied, and the Massachusetts court approved damages in the

case before each of them. The approach to the "parcel" is the crux of this study.

II. THE TRINITY APPROACH TO THE LARGER PARCEL.

Virtually all courts in determining whether and to what extent there exist severance damages or benefits view three factors. The larger parcel is all that land which (1) has a unity of use; (2) is contiguous (or has physical unity); (3) has common ownership (or title). Whether a particular court adheres to a liberal or restrictive view of the larger parcel, it usually concerns itself with all three of these factors; however, those following a restrictive interpretation of "parcel" almost invariably demand all three of these factors be present. The liberal position, on the other hand, generally gives primary and paramount consideration to the unity of use factor. One California Court, stating the restrictive view has said:[8].

> "To recover severance damages there must be unity of title ... contiguity ... and unity of use. ..."

This brief and rigid position, though not necessarily reflected in the cases cited by the same court, may be compared to the less definitive but more liberal position as expressed in a recent North Carolina case.[9]. There the court denied the existence of the rigid trinity and stated:

> "There is no single rule or principle established for determining the unity of

> lands for the purpose of awarding damages or offsetting benefits in eminent domain cases. The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential. The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis."

It seems that the rigid position--that which requires the existence of physical unity as well as unity of use and which also necessitates that the entire "parcel" be owned in fee by the same person or persons--was formulated and enunciated in the mid-Nineteenth Century. The social, industrial and economic setting to some extent justified such a rigid position. Commercial, industrial and agricultural development usually was confined to local self-sufficient units. The modern freeway, the diversification and specialization that is the hallmark of today's economy and the present communications system in general were almost nonexistent a hundred years ago.

Today agricultural units, commercial establishments and industries are spread over wide areas encompassing within their geographical purview lands owned by others or properties in which the owners have various types of interest, not simply the fee ownership. A parking lot on one side of the street is often an integral, and indeed an indispensable, part of a department store on the other side of the street. The taking of the parking lot can easily and often cause severe, if not

total, damages to the "remainder" across the street. But in these cases, as in similar types of instances, many courts refuse to recognize that the two pieces of property are one "parcel". The word "parcel" to a number of courts is still limited to its Nineteenth Century definition.

But many courts, some more directly than others, have recognized that the modern economic picture necessitates a "restatement" of the concept of a "parcel". For example, in a 1959 Kansas case, Ives v. Kansas Turnpike Authority,[10] the court allowed severance damages despite the fact that the "remainder" was a mile distant from the point of taking and was not contiguous with the part taken. The court in doing so had to overrule prior case law which it did by stating:

> "Be that as it may, the Wilkins case was decided in 1891, and the condemnation in the case before us was in 1955. Courts take judicial notice of the fact that in the intervening sixty-four years revolutionary changes in the economics and practices of farming have taken place. If the Wilkins case be construed as authority for the proposition that contiguity of tracts is essential in every case where the question now before us is involved--we are of the opinion that it is outmoded and not in harmony with the modern rule, and to that extent is hereby disapproved and overruled."

Throughout the remainder of this study, we shall constantly be discussing the unity of use factor. There are some particular problems connected with the unity of use where the courts are in disagreement. These shall be pointed out. But on the whole, virtually all courts are in agreement that,

for there to be a larger parcel, there must be unity of use. However, the courts are in strong disagreement on the other two factors: contiguity and title. We shall therefore examine these latter two aspects of the trinity separately to point out the sharp differences that exist and shall deal with the unity of use factor in a general, rather than in a specific manner.

A. Contiguity

1. The Restricted View

While most courts are willing to recognize that in applying the three criteria for determining the larger parcel paramount importance is to be given to unity of use, some courts insist that absolute contiguity is essential. As Nichols states:[11]

> "Actual contiguity between two separate parcels is ordinarily essential to merit consideration as a unified tract. Actual physical separation by an intervening space between two parcels belonging to the same owner is ordinarily ground for holding that the parcels are to be treated as independent of each other, but it is not necessarily a conclusive test. If the land is actually occupied or in use the unity of the use is the chief criterion. When two parcels are physically distinct there must be such a connection or relation of adaptation, convenience and actual and permanent use as to make the enjoyment of one reasonably necessary to the enjoyment of the other in the most advantageous manner in the business for which it is used, to constitute a single parcel within the meaning of the rule. Accordingly, a public highway actually wrought and travelled, a railroad, a canal, or a creek running through a large tract devoted to one purpose does not necessarily divide it into independent parcels, provided the owner has the

> legal right to cross the intervening strip of land or water. But a public highway will ordinarily divide the land of a single owner into separate parcels, even if both parcels are used for the same purpose, if the use upon each parcel is separate and independent of that upon the other.
>
> "Two distinct parcels separated by intervening private land but used together for the same purpose cannot be considered as one tract, even if they are connected by a private way over the intervening land, unless they are so inseparably connected in the use to which they are devoted that the injury or destruction of one must necessarily and permanently injure the other." (Emphasis added)

A number of courts that adhere to the strict requirement concede that property separated by intervening private land may be considered as an entire parcel providing the various parts are "inseparably connected"; however, no case has been found wherein a court, adhering to the rigid standard of contiguity has defined or set forth what constitutes an inseparable connection. Some courts that follow the strict construction of the concept of "parcel" make an exception in instances where an existing street or highway severs the "parcel"; in many instances, however, this exception is allowed only if the condemnee owns the underlying fee in the road.[12.] This type of distinction, as will be pointed out later, is highly questionable.

The position of many courts on these points is set forth by a very recent Rhode Island case where the court stated: [13.]

> "Quite a different situation is presented when, as here, the two parcels in question are unequivocally separated from each other by fixed and definite boundaries, such as a highway. In such a case it is generally held that the two tracts can be considered as one only when they are so inseparably connected in the use to which they are applied that the taking of one necessarily and permanently injures the other."

The restricted position - which now appears to be the minority one - is best exemplified by two fairly recent Illinois cases. In City of Chicago v. Equitable Life Assurance Society,[14] the condemnor took a portion of the Society's land for a free parking area. The land was used as a private parking lot of the Society's lessee, Wieboldt Stores, the store buildings standing across the street from the part condemned. Both the lessee and the Society claimed that the taking of the parking area greatly depreciated the value of the land across the street. The court refused to allow severance damages, taking the position that the parking area was distinct and independent from the property across the street. It stated:

> "The defendants contend that the court also erred in refusing to permit evidence in support of their cross petition. With this we cannot agree. In order to recover damages in an eminent domain proceeding for property not actually taken, it must appear that this and the condemned land are contiguous, that is, they are either physically joined as a single unit or so inseparably connected in use that the taking of one will necessarily and permanently injure the other."

The defendants admitted and recognized that the store and parking properties were not physically connected but went on

to argue that they were inseparably connected and, therefore, should be considered as contiguous. To this the court stated:

> "On at least two prior occasions we have had the opportunity to consider similar statements of fact. In White v. Metropolitan West Side Elevated Railroad Co., 154 Ill. 620, 39 N.E. 270, 272, the appellant owned property on both sides of Tilden Street in Chicago and, although only a portion south of the street was being condemned, he contended that since the tracts have been purchased for a common use, they were contiguous and should both be considered in the eminent domain proceedings. In refusing to accept this theory, we said: 'If by the construction and operation of the railroad on the lot south of Tilden street the property of appellants lying north of that street will be specially damaged, and the damages sustained by appellants are not common to the public, they have a complete remedy in an action at law to recover all damages sustained; but where proceedings are instituted under the eminent domain act to condemn one lot or tract of land, the owner cannot bring into that proceeding another tract of land, not contiguous and not connected with the land condemned, no portion of which has been taken, and recover such consequential damages as he may have sustained. But it is said the two tracts of land were purchased to be used for one purpose as one tract of land. Whatever may have been the intention or purpose in purchasing the two tracts of land can make no difference. The two tracts of land must be considered as they existed when the proceeding was instituted. At that time they were separated by a public street. They were in no manner connected, and never could be connected without the consent of the city, which may never be obtained."
>
> . . . . . .
>
> "A similar question arose in Metropolitan West Side Elevated Railroad Co. v. Johnson,

159 Ill. 434, 42 N.E. 871, where a strip was condemned for highway purposes through a residential subdivision. Again we held that, although recovery could be had for damages to contiguous property not taken, those parcels which were separated from the condemned area by public streets or alleys were not a proper subject of the eminent domain proceedings. We can see no reason why we should arrive at a different result in the present case."

It is difficult to envision a situation save actual physical contiguity wherein properties could be more inseparably connected and wherein one lot could more easily be considered but part of the larger "parcel". The dissenting opinion asserted that the properties were so interrelated as to warrant their consideration as a single unit:

"On this record, I consider the land not taken (the store property) so close in proximity, so integrally connected, and so unified in use with the land taken (the customer parking lot), as to permit evidence of damage to the land not taken.

"While it is often said that the tracts must be 'contiguous', it is generally recognized that physical touching or its lack is not conclusive. For the basic test is unity of use. See 6 A.L.R. 2d 1197-1237. To say here that the store property is used for retail merchandising while the parking property is not, strikes me as unrealistic. The lot is, of course, used for parking - but for store customers. In a crowded metropolitan area, this may be not only 'convenient and beneficial' but vital. It seems clear that the parking lot is an integral part of the Wieboldt retail operation, and if as a result of condemning the parking property the market value of the store property declines, there should, in justice be compensation for land damaged but not taken. Illinois Constitution, art. II, sec. 13, S.H.A."

The Illinois court reaffirmed its position in 1959 in City of Quincy v. V. E. Best Plumbing & Heat Supply Co.[15] There, in connection with the acquisition of an off street parking facility, the city condemned a lumber yard belonging to a lumber company. The company's mill property was located three blocks away from this lumber yard and it claimed severance damages to its mill property even though it was located three blocks away. The trial court permitted the introduction of evidence concerning such damages and, as a result, the lumber company received an award of $30,000 as damages to its mill property. The Supreme Court of Illinois reversed this award. In so doing, it stated:

> "We have previously determined that in order to recover damages in an eminent domain proceeding for property not actually taken it must appear that this and the condemned land are contiguous, that is, they are either physically joined as a single unit or so inseparably connected in use that the taking of one will necessarily and permanently injure the other. City of Chicago v. Equitable Life Assurance Society of the United States. 8 Ill. 2d 341, 134 N.E. 2d 296."
>
> . . . . . .
>
> "We fail to see how the mere facts that there was little or no duplication of use or facilities upon each property, that all sales were made from the lumber yard, that the office was only on the lumber yard property, and that the operations conducted on each property were an integral part of the one unified business, render one property necessarily and permanently damaged by the taking of the other. Such an assumption would presuppose that no area or site was available at all to re-establish

> the lumber yard operation and facilities. The owner has not met this burden and these properties are not proved to be contiguous within the requirements laid down by this court. The most that can be said is that these properties are convenient and beneficial to one another, as were the properties in the City of Chicago v. Equitable Life Assurance Society, 8 Ill. 2d 341, 134 N.E. 2d 296. They cannot, for the purpose of this proceeding, be considered as a single property."

Throughout these cases adopting the restricted view of the larger parcel, there is often an implicit and at times an explicit feeling that to allow severance damages for property not contiguous with that taken would, in effect, accord the condemnee business losses. There are times when the liberal position produces this result, but in the vast bulk of these cases, the liberal position affords the condemnee not business damages but an actual and recognized depreciation in the market value of the "integrated"property. A department store or other retail establishment, particularly today, is greatly dependent upon parking facilities. A willing buyer would seldom purchase such an establishment without adequate parking space. Merely because the parking facility is across the street does not change this economic fact of life. The taking of the parking area manifestly may depreciate the market value of the retail establishment. Similarly, industrial firms, like lumber companies, often maintain warehouses and other storage areas in the general vicinity of the principal plant. These nearby facilities are usually an integrated part of the whole

operation. A willing purchaser would seldom buy one part of the operation without buying the other. The storage area appreciates the value of the plant; the taking of the storage area depreciates the "remainder". Moreover, mining properties are usually located in close proximity to their manufacturing and processing plants. For example, rock and gravel enterprises usually locate and build their processing plants in the same vicinity as are the mineral deposits. At times the plant is separated from the deposit area by highways or intervening privately owned lands. But all the lands owned and operated by the rock and gravel companies are inseparably connected. The taking of the lands containing the mineral deposits directly causes depreciation in the value of the nearby plant. A buyer would not purchase one without the other. In all the above type of cases, adherence to the restrictive view of the larger parcel, is not realistic.

2. The Liberal View

The liberal position regarding contiguity recognizes that, as a general rule, physical contiguity is necessary in order to establish the larger parcel. It is, however, a requisite that is readily discarded when the facts of the particular case realistically call for a recognition that contiguity is of less importance to the manner in which property interests are bought and sold on the market than is the property's location, relation to the other land, and

integration and use with other proximately located property. Unity of use, therefore, is the paramount consideration - and if such unity exists, contiguity is ignored.

This position is well set forth in a leading federal case involving the question of the larger parcel. In Baetjer v. United States[16]. the Court of Appeals for the First Circuit was faced with the following facts: The condemnee, a trust association, owned some 30,000 acres of land, two-thirds of which was located on the island of Puerto Rico and the remainder on a smaller island located ten miles off the coast of Puerto Rico. On both of these islands, the condemnee owned and operated sugar mills, docks, warehouses and railways which it argued were all devoted into an integrated whole to the business of growing and refining sugar. The main processing plant was in Puerto Rico but many of the other facilities connected with the business operation were located on the smaller island. The federal government condemned a significant portion of the condemnee's property located on the smaller island. The appellate court, overruling the trial court, held that the condemnee's property on the island of Puerto Rico had been severed in a legal sense, when the government condemned the lands belonging to the condemnee on the smaller island. The court said:[17].

> "Integrated use, not physical contiguity, therefore, is the test. Physical contiguity is important, however, in that it frequently

> has great bearing on the question of unity of use. Tracts physically separated from one another frequently, but we cannot say always, are not and cannot be operated as a unit, and the greater the distance between them the less is the possibility of unitary operation, but separation still remains an evidentiary, not an operative fact, that is, a subsidiary fact bearing upon but not necessarily determinative of the ultimate fact upon the answer to which the question at issue hinges."

The court went on to note that the condemnee should be allowed only the depreciation in the market value of the remainder and that business losses, as such, remain non-compensable.

One of the early state court cases in this country adhering to the liberal position is a Vermont case, Essex Storage Electric Co. v. Victory Lumber Co.[18]. In that action, the condemnor condemned a piece of land adjoining the Victory Lumber Company's mill. The lumber company sought damages to the "remainder" which was a tract of land separated from the mill by a parcel of land owned by a third person. Despite the fact that the intervening property was owned by a private party, the Vermont Supreme Court held for the condemnee. It stated:

> "The argument is that it is only contiguous lands that can be considered as one piece in the assessment of damages in condemnation cases, and, inasmuch as the hardwood does not stand on land contiguous to the land taken, nothing can be allowed for its depreciation. While there are cases apparently supporting this claim, and expressions are to be found in our own cases consistent with it, contiguity is not always the controlling question. Generally speaking, the rule contended for by the plaintiff affords a correct basis for the

> assessment of damages, but it does not in all cases. Where two or more pieces of real estate, though separated even by an intervening fee, are used as one enterprise, and constitute fairly necessary and mutually dependent elements thereof, they are in the eye of the law a single parcel, and the taking of one necessitates payment for the injury to the others. To state the proposition in its usual form, the damages in such cases are to be assessed by comparing the value of the whole enterprise before the taking with the value of what remains of it after the taking."

Another New England case, often cited by commentators, took a similar position. In Trustees of Boston University v. Commonwealth.[19] the Supreme Judicial Court permitted the condemnee to recover for severance damages to the remainder despite the fact that the remainder was not contiguous with that part of the property taken but was diagonally across a public street. Adhering to a liberal view of the word "parcel", the court held it is proper to allow for the diminished value of such property since all the University land involved was adopted for the use of a site for university purposes and was not so fit after the condemnation action. In taking this position, the court noted that the English cases tended to favor the condemnee's position:[20]

> "The English cases tend in favor of the petitioner. Holditch v. Canadian Northern Ontario Railway, [1916] 1 A.C. 536, affirming Canadian Northern Ontario Railway v. Holditch, 50 Canada S.C. 265, arose under a statute which provided for "full compensation * * * to all persons interested, for all damage by them sustained by reason of the exercise of such powers." The Privy Council held that this

> language did not permit an award of damages for injury to other lands of the petitioner, divided from the lands taken by public ways, unless 'the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance' (Horton v. Colwyn Bay & Colwyn Urban District Council, [1908] 1 K.B. 327), but that the question, whether the lands are so connected or related as to constitute a single holding, depends on the circumstances. The same principle was applied in Sisters of Charity of Rockingham v. The King [1922] 2 A.C. 315."

It is interesting to note that the liberal English position on this matter is consistent with the positions taken by the courts in that country on related damage and benefit questions. Because of the highly developed industrial and commercial economy in that country, England for many years has taken a realistic view of the market and of the factors that shape market value. As other studies in this series have indicated, American courts apparently have only recently begun a reappraisal of the many rigid rules that formerly were laid down in an era quite different from the modern one.[21.]

A 1959 Kansas case, Ives v. Kansas Turnpike Authority,[22.] appears to have adopted a vanguard position. In that case, the condemnee owned two tracts: One 80 acres and the other 160 acres were located one mile distant from each other at their nearest points. The condemnor took some 45 acres of the 80 acre tract but nothing from the 160 acre tract. For over 17 years the two tracts had been farmed as one unit. The court

nonetheless, held that the two tracts could be considered as one unit and the condemnee should be allowed severance damages to the 160 acre tract. The court went on to point out that the rule that it was adopting "is founded on logic and every-day justice" but, added the court, the decision in that case was not to be

> "construed as 'opening the doors' to far-fetched and unfounded claims on the part of condemnees in all cases where they happen to own other nearby tracts which it may be said are incidentally or remotely affected by the taking -- rather it is confined to the facts before us which conclusively establish the integrated use of the two tracts to be such that in the eyes of the law they are considered as 'one 240-acre farm unit' for the purpose of assessment of damages."

Before leaving this section and discussing the California position, it is well to emphasize again that the liberal rule regarding the larger parcel not only affects the scope of damages but also the scope of benefits. An example of this is a very recent North Carolina case[23]. where the condemnor sought to include a non-contiguous tract of land as part of the larger parcel when another tract of land across a public street was being condemned. As the court expressed it:

> "It must be assumed that the respondent desired the inclusion of tract No. 3 because it proposed to offer evidence that this portion was benefitted by the Expressway. It is evident that petitioners desired it excluded for the reason that, in their opinion, they could show no substantial damage to this area by construction of the Expressway."

Despite the fact that the "remainder" was not presently being used, the court concluded that it was nonetheless part of the larger parcel and permitted its inclusion for the purpose of offsetting special benefits assumedly resulting from the construction of the improvement. In so ruling, the court said that:

> "The law will not permit a condemnor or a condemnee to 'pick and choose' segments of a tract of land, logically to be considered as a unit, so as to include parts favorable to his claim or exclude parts unfavorable."

As indicated throughout this study, the courts adhering to the liberal position are in tune with the realistic operations of the market place. Whether and to what extent the California courts are in step with the modern rule is the subject of our next inquiry.

3. The California View

Until a few years ago, it was quite clear that California adhered to the restrictive view of the larger parcel; indeed, California was the leading exponent of this position and its cases were often cited by other courts. Now, however, there is some room for doubt as to how stringently California abides by its former position. Recent cases in this state seem to indicate that California still adheres to the rigid rule, though with some judicial qualms resulting in some judicially created jerry-built distinctions.

The strict contiguity requirement was set forth by the California Supreme Court in Oakland v. Pacific Coast Lumber & Mill Co.[24] in 1915. In that case, the city condemned a warehouse in which the defendant had a leasehold interest. The latter argued that because the warehouse and a mill several blocks away were used as a unit, it was entitled to severance damages for the reduction in the value of the land on which the mill stood. In essence, the defendant sought the adoption of the unity of use criterion to the exclusion of others in ascertaining the larger parcel. The trial court rejected the defendant's position. On appeal the Supreme Court of California strictly construed §1248 of the Code of Civil Procedure and stated:

> "And we are satisfied that the ruling was correct. Certainly it was correct in that it could not be said, within the physical terms and definitions of a 'parcel', that noncontiguous upland, separated by hundreds of feet of other private property from tide and submerged lands, could with the latter form a single parcel. Nor, indeed, is this contention very seriously argued. It is insisted, however, that a liberal definition should be given to 'parcel', and that unity of use should be regarded as the controlling and determinative factor in the solution of this question whenever it arises. But if unity of use is the controlling consideration, it can matter not how far in fact the pieces of land are separated. A factory may be in one country, its warehouse in another, its principal sales agency in a third; any interference with any of the three properties would of necessity be an interference with the unity of use of them all, and if appellant's position is sound, damages to the other two

> may be recovered for a taking of or an injury to the third. Indeed, this is but another way of phrasing the real contention of appellant, as quoted above from its brief, that business is property, and when the taking by the state or its agencies interferes with, impairs, damages, or destroys a business, compensation may be recovered therefor. We are not to be understood as saying that this should not be the law when we do say that it is not our law."

Though the defendant argued in the alternative that it should be accorded business losses, it did not rely solely on that line of reasoning but emphasized that the taking of the warehouse depreciated the market value of the mill. The court, however, interpreted the claim as one for business damages. While at times these items may be difficult to distinguish, it does not necessarily follow that business losses and market depreciation are inseparable in these type of situations. When the "remainder" of a larger parcel is damaged because of the taking of a part of the parcel, resultant damages can be directly attributable to depreciation in the market value of the realty and improvements thereon and need not be attributed to, and rightly should not be attributed to, the business located thereon.

The rigid position regarding contiguity as set forth in the Oakland case has been repeated by California courts on numerous occasions. For example, in Atchison, Topeka & Santa Fe R. Co. v. Southern Pacific Company[25] the court emphasized that actual physical contiguity is essential. Without

analyzing the problem any further other California courts have apparently approved the Oakland rule. See:

City of Stockton v. Marengo;[26].

East Bay Municipal Utilities Dist. v. Kieffer;[27].

City of Menlo Park v. Artino;[28].

County of San Mateo v. Christen.[29].

The first possible breach in this rigid position is found in a 1948 case decided by the Supreme Court of California, People v. Ocean Shore Railroad, Inc.[30]. In that case the court found neither actual contiguity nor unity of use. The property involved was a strip of land which had formerly been the roadbed of defendant's railroad, and the strip served to link areas of land otherwise separated. However, the railroad, after discontinuing its operations, was found to have abandoned its easement over the strip. The court, therefore, held that there was no physical contiguity in addition to unity of use, and denied severance damages to the remaining land. The court, however, stated:

> "It is next urged that the whole roadbed is susceptible to a common use which is inherent in its nature, that the parcels north and south of Sharp Park were inseparable in use, that there was a unity of use and that the whole roadbed, although not physically contiguous, would be considered in the nature of a single parcel for purposes of severance damages. Under section 1248 of the Code of Civil Procedure, however, contiguity is ordinarily essential, and the owner is not entitled to severance damages for injury to other separate and

> independent parcels. See City of Oakland v. Pacific Coast Lumber & Mill Co. 171 Cal 392, 398, 153 P 705; Atchison T. & S. F. Ry. Co. v. Southern Pac. Co. 13 Cal App 2d 505, 520, 57 P 2d 575; City of Stockton v. Ellingwood, 96 Cal App 708, 745, 746, 275 P 228. There may be a right to an award of severance damages in some cases where the property, though not physically contiguous, is being devoted to an existing unity of use. See Southern California Edison Co. v. Railroad Comm. 6 Cal 2d 737, 59 P 2d 808; Monongahela Navigation Co. v. United States, 148 US 312, 13 S Ct 622, 37 L Ed 463." (emphasis added)

The cases cited by the court, indicating that physical contiguity is not necessarily involved, the taking of public utility facilities and, in these instances, courts generally are willing to ignore the contiguity requirement.[31.]

The assertion in the Ocean Shore case that contiguity is "ordinarily" essential is dictum and, in addition, was not further explained. This phraseology was quoted, however, by a subsequent case that is of considerable importance. In People v. Thompson,[32.] the state was condemning a strip of a farm and slough in an effort to replace an existing highway with a modern freeway. The highway, Route 101, bisected the defendant's land. The part west of the highway was vacant beach property bordering the Pacific Ocean and the part east of the highway was part farm land and part swamp. The state condemned the 12 acre strip paralleling the highway on the east. The road was to be constructed on this strip for northbound traffic and the old road was to be retained for southbound traffic.

The principal question in the case was whether the defendant was entitled to severance damages for the reduction in value of the remaining land. The state admitted that the defendant was entitled to severance damages but only for the decrease in the value of the landward property rather than the seaward property.

Although the case involved a number of technical and tangential points, the court apparently reaffirmed the Oakland position regarding the larger parcel and the necessity for contiguity. It assumed that contiguity had to exist in order to accord the defendant severance damages. But the court was able to find contiguity by holding that the existing highway was not owned in fee by the state but rather that the state merely had an easement and that the underlying fee was owned by the adjacent property owner. Thus, contiguity, the court indicated, existed.[33]

The court also seemed to suggest that the right of the property owner to cross back and forth between the parts of his property was impaired and that for this loss of access, the property owner should be compensated. In adopting this second line of reasoning, the court apparently ignored its prior decisions that circuity of travel and diversion of traffic, as such, were non-compensable. The result of this holding suggests that an owner whose land is crossed by a highway easement has greater protection against the police power than the usual abutting land owner.[34]

While the result of the case is one that is approved by the consultants, the rationale employed is somewhat questionable. It does not seem sound or realistic to distinguish these types of cases based upon the factor as to whether the property owner owns the underlying fee in a public street. The court, of course, faced with the Oakland rule, considered it more appropriate to "find" contiguity in order to distinguish rather than overrule the holding in the Oakland case. It is true that some courts in other juriadictions have made similar distinctions[35]. but such fine lines are hardly ever taken into consideration by buyers and sellers on the market and, indeed, few of them would ever be cognizant of this legal distinction.

Another important facet of the Thompson case is the fact that there was not a present, existing unity of use between the severed portions of the property. We shall later return to this point but note it now to point out that because of this fact, the court probably needed to find contiguity in order to hold for the condemnee. Paradoxically, a straightforward renunciation of the Oakland rule, coupled with a finding that there was no contiguity, would probably have denied the condemnee severance damages in question, based upon the fact that there was no present existing unity of use.

In a 1960 District Court of Appeals case, People v. Chastain,[36]. the court reaffirmed the Thompson case insofar as that case held that the loss of the right of access of a

property owner to go back and forth across the highway between the two portions of his property is a compensable damage. Since in the Chastain case there existed a prior unity of use, it was not necessary for the court to determine the question of contiguity; indeed, it is possible that the property owner did not own the underlying fee and that there was not contiguity.

The California position regarding contiguity, therefore, is far from crystal clear. But a careful analysis of the cases strongly suggests that the courts still adhere to the Oakland position which makes actual physical contiguity necessary to the existence of the larger parcel. In limited situations they may try to circumvent this imposed restriction. The Thompson case, as reinforced by the Chastain decision, is an indication that the California courts may attempt, if at all possible, to award condemnees for severance damages via an indirect route. Yet, even in these limited areas, such judicial legerdemain not only is confusing but is also somewhat inconsistent with holdings in similar types of cases that deny abutting property owners damages resulting from the proper exercise of the police power. The California approach, therefore, is both outdated and internally inconsistent. Moreover, in a great many instances it is likely to lead to an inequitable result.

4. Recommendations

The restricted approach to the larger parcel, as exemplified by the Oakland case and the many cases both in California and elsewhere that follow that rationale, can no longer be justified. It is not in tune with the market place nor, indeed, with many modern courts that recognize that streets or intervening properties are quite often factors which in no way impair the value of the total properties or the practice of selling or buying them as a unit; indeed, a street, rather than dividing the property, often is a factor which unites property and enhances its value.

Modern commercial and industrial establishments, as indicated throughout this study, tend at an increasing rate to operate as integrated parts throughout a general area and are tending less to operate upon one site measured by rectangular metes and bounds. The method of buying and selling cannot be reduced into neat square packages for the sake of simplicity. Condemnation law must accept the law of the market. To do less is to deny just compensation.

The Oakland case, however, is undoubtedly correct when it states that by completely discarding the contiguity rule, courts will be "opening the doors" to farfetched and unfounded claims on the part of condemnees. This fear, however, may be alleviated by imposing two restrictions on the liberal rule. First, a statute rectifying and overturning the

present rigid rule could indicate that only property in the proximate vicinity of the part taken could be considered in ascertaining the larger parcel. While, at times, this restriction may block an otherwise justified claim, it is believed that in the vast bulk of cases the "remainder" will be in the general neighborhood. Accordingly, if such a rule and such a limitation is adopted, there is no great threat that the courts and condemnors would be subject to speculative and imaginary claims for compensation based upon the larger parcel concept.

The second limitation that should rightfully be imposed upon a liberal view involves the interpretation of unity of use. There is language in the Ocean Shore case which might possibly suggest that in order to establish the larger parcel, there must be a present unity of use.[37] However, that case can also be read as holding that a present unity of use is only necessary when properties are not contiguous.[38] Indeed, the Thompson case states that it is not necessary for there to be a present unity of use, providing the property is contiguous. The Thompson court indicated that if the property is contiguous, as was found in that case, then there need only be no disunity of use, i.e., the use of one part of the parcel in a way that is inconsistent and not in conformity with the use of the other part. The question, therefore, is whether there need be a present unity of use in order to establish the larger parcel

when the properties in question are not contiguous.

In the Baetjer case discussed above and in one or two other cases, it is suggested that a present unity of use is not necessary even though the properties are not contiguous.[39] Most courts adhering to the liberal position, however, apply the restriction that when properties are noncontiguous, there must be a present existing unity of use in order to claim damages to the larger parcel.[40] This limitation upon the liberal position, though it does not and should not exist when the properties are actually contiguous, appears to be a sound one. In addition to the first restriction to the liberal rule (as suggested above), this second limitation should completely dispel the fears as expressed in the Oakland case that the adoption of the liberal concept of parcel will "open the doors" to unfounded claims. Since the property claimed to be part of a larger parcel must be in the proximate vicinity of the part taken and since both portions of the property must be presently devoted to an existing unified use, it is doubtful that unfounded claims for damages would be successful.

B. TITLE

1. The Restricted View

In addition to unity of use and contiguity, there is one further element "needed" to establish the larger parcel - unity of title. This third criterion is generally accepted by the majority of courts and is undoubtedly a proper one, at

least to the extent that it requires the condemnee, in defining his larger parcel, to establish an interest both in the part taken and an interest in the remainder he claims to have been damaged. To do otherwise would patently permit an individual to obtain compensation for the taking or damaging of property in which he has no interest whatsoever.

But to hold that the condemnee must have some interest in both the property taken and in the property damaged is not to say he must necessarily have title in both pieces of property. We are, therefore, confronted with the problem as to whether or not title per se - and not simply an ownership of a property interest - is to be a sine qua non in establishing the larger parcel. The general rule in the United States, with some notable exceptions, is that in order to establish the larger parcel, unity of title is necessary. The leading case setting forth this requirement is United States v. Honolulu Plantation Co.[41] In that case, the federal government sought to condemn some 740 acres which the defendant held under long-term leases. A third party owned fee title to the leased property. The defendant owned some amounts of land in fee which were not being condemned. Each of the leases contained a condemnation clause. The question was whether the defendant should be allowed severance damages due to injury to the larger parcel. The court said:

> "As to these individual parcels of land, fee title was vested, respectively, in other estates and individuals. Plantation had long

> leases on each parcel, and a clause of each lease divested any interest or estate of Plantation upon condemnation. This condition subsequent destroyed any property interest of Plantation therein. The landowner received all compensation for the property. Therefore, this situation falls squarely upon the principle followed by the Trial Court as to the Oahu Sugar Company lease, and upon this ground alone this award must be reversed."

The court, therefore, decided this case based upon the simple fact that there was a termination clause in the lease and, consequently, the lessee had no interest in the condemnation award. The court, however, went on to state:

> "Although, disposition has thus been made of errors, claims and theories of the experts, it behooves us to consider whether Plantation is entitled to compensation, without regard to the clauses of the respective leases . . . It is the estates in the separate parcels which must be connected. If, therefore, the fee owner of one tract holds lesser tenure in the tract taken, there can be no additional compensation for this reason. <u>The explanation is that the fee is the integer</u>. The condemnor takes the particular ground. The whole structure of rights imposed upon this ground are destroyed. Compensation is paid by the parcel. Of course, a lease upon one parcel of land cannot be a part of the fee simple estate of another parcel." (emphasis added)

While the position above, as expressed by Judge Fee, is dictum, it does represent the prevailing rule. This rule has also been expressed in the various texts as follows:[42]

> "Tracts held by different titles vested in different persons cannot be considered as a whole where it is claimed that one is incidentally injured by the taking of the other for public use. This is the rule although the owner of the tract taken holds an interest in the property claimed to be damaged and although the two tracts are used as one."

A number of cases, mostly in other jurisdictions, have rigidly and strictly adhered to the title requirement. For example, in a Tennessee case, Tillman v. Lewisburg & N.R. Co.[43], a railroad condemned a right of way through land owned by a husband and wife as tenants by the entirety. The wife was unable to recover damages to a tract of land owned by her, individually, lying across the turnpike from the other tract and used in connection with it based upon the fact that there was no unity of title.

Similarly in an Indiana case, Glendenning v. Stahley,[44] the defendant owned a tract of land lying north of the proposed road and he and his wife owned a tract lying south of it as tenants by the entirety. The taking was on one of the two tracts. There the court ruled that in determining the amount of special damages sustained, severance damages could not be granted one fee owner for the taking of the property owned by different proprietors. On virtually the same facts, an Iowa court also denied severance damages.[45]

In McIntyre v. Board of County Commissioners,[46] the defendant T. W. McIntyre owned the westerly 80 acres and his wife, Ruby, owned the easterly 80 acres of property which was operated as a single farm by their son. In an acquisition for highway purposes across both the east and west 80 acre tracts, the defendants contended that the farm was to be considered as one entire unit for the purpose of

ascertaining severance damages. The trial court held that each 80-acre tract was a separate unit, and this ruling was upheld on appeal when the court held:

> "It is true that in a great majority of the adjudicated cases the taking was from only one of the tracts used in conjunction with another tract or tracts owned by another but used together as one unit, while in the case before us we not only have a diversity of ownership of the two tracts used and operated as one farm unit, but we also have a taking from each tract in question. However, the same general principle must apply, i.e., the pieces of land alleged to be a single tract must be owned by the same party, and one owner is not entitled to recover compensation for land taken from him because of alleged damages resulting to that portion of his land remaining on account of the taking of land belonging to another even though, as under the facts of this case, the two tracts had been farmed and operated as a unit."

And in State v. Superior Court,[47] the Washington Supreme Court denied severance damages since there did not exist a unity of title regarding the parcels in question. Parcel "A" was in the name of Harry A. Morrison, part of which was being taken in the condemnation action. Jeannette Wirt and Irene Morrison owned adjacent tracts ("B" and "C"). The latter parties sought to receive damages for the taking of Harry A. Morrison's tract, basing their case upon the fact that there was an oral agreement that legal title to all three tracts was to be held jointly by the three parties. The court first concluded that, due to the parol evidence rule, the defendants could not claim an interest in that tract which was being taken. It further said:

> "The fact that the three tracts are used as one farm, inasmuch as the ownership is divided, does not entitle the owners (relators) of adjacent tracts (tracts "B" and "C") to damages. If Harry A. Morrison has, in addition to his ownership of Tract "A", an interest short of actual ownership in tracts "B" and "C" owned by the relators, and vice versa, each relator, owners of tracts "B" and "C", have an interest in tract "A" to which Harry A. Morrison has title, that would not entitle relators to recovery of damages to any tract except the one over which the private way of necessity was condemned, which in the case at bar is over the tract owned by Harry A. Morrison . . . the damages for taking a right of way are based on ownership of land actually taken and are limited to lands held under the same title."

In property law and in the law of security transactions, the concept of title has undergone a major re-evaluation thus far in the 20th Century. The courts are more prone today to view the concept of title in its realistic context and to recognize that interests in property are matters of substance, not matters of form. The market place, too, views property by its utility and its relationship with other properties, not by bare naked "title". In view of this transformation both in the legal approach and in the economic approach to property, it is questionable whether the rigid position, as exemplified by the above cases, is a proper one.

2. The Liberal View.

Not all courts, however, rigidly apply the title per se criterion. Given unity of use, many courts are willing to include within the larger parcel tracts of land

wherein there is no unity of title but there is a realistic unity of ownership. In many instances, particularly in the modern economy, individuals may own in fee one parcel and have a long-term leasehold in an adjacent parcel; and both parcels may be, and often are, put to a common unified use. In numerous instances, commercial, industrial and agricultural operations are based upon long-term lease arrangements wherein the "owner" conducts the business by acquiring contiguous leaseholds. The use of leases has become increasingly widespread because of favorable tax considerations, e.g., the sale lease-back arrangement. The formation of shopping centers and other similar commercial ventures is often accomplished by the making of a group of long-term leases, to avoid large capital outlays for land. To the buyer in the market a parcel unified by leases is of no less economic importance and, perhaps even more beneficial, than a parcel unified by fee ownership.

Some courts have recognized this fact of life. For example, in Arizona, where the applicable condemnation statute is exactly the same as in California,[48] the high court of that state in a unanimous decision granted severance damages to the larger parcel despite the fact that all segments of that parcel were not owned in fee by the condemnee. In State v. Carrow,[49] the Highway Commission commenced to take the property in question in 1933 but the trial did not come about until 1939. The defendants operated a cattle business

over the following lands, parts of which were taken by the condemnation:

(a) Patented lands owned by the defendants;

(b) Lands owned by railroad company but leased to defendants on a year to year basis;

(c) State lands leased to the defendants for 5 years; and

(d) Land belonging to the United States (in which the defendants had a permit at the time of the trial but did not have one prior thereto).

The defendants claimed damages to all the interests listed above due to the construction of embankments, barbed wire fences, etc. on some of the property. While there were numerous types of interest involved in this damage action, the trial court failed to differentiate between these various interests and allowed defendants to receive full damages subject only to an apportionment among the various interest-holders (Arizona at that time had an apportionment statute). In upholding the right of the defendants to receive severance damages for injury to the "larger parcel", despite the fact that some of these parcels were not owned in fee by the defendants, the court said:

> "There are cases which held that non-contiguous pieces of land are not included in statutes of this nature as being portions of a 'larger parcel', damaged though not taken by condemnation, when the intervening pieces of land are

> in different ownership. State v. Bradshaw L. & L. Co., 99 Mont. 95, 43 P. 2d 674. While we know of no cases precisely in point, we think the more equitable rule is that when the 'larger parcel' at the time of the condemnation is held and used by one party for a common purpose, even though his title thereto varies both in quality and quantity, that it is fairly within the terms of the subdivision." [Ariz. statute §27-915 (1) (2) which is the exact language of §1248 (1)(2)]. (emphasis supplied)
>
> In Corpus Juris Secondum, it is stated:[50]
>
> ". . . . the fact that several tracts are owned by different persons does not preclude them as being regarded as one where they are contiguous and are used in common by the owners under a contract or other arrangement and the tract is more valuable by reason of that use than if used separately."

Under the liberal rule as thus stated, it is quite clear that unity of title is not essential where a common lessee uses contiguous property owned by others. Thus a party holding two separate leases on contiguous pieces of property owned by different persons is allowed severance damages if the taking of part of one leasehold damages the adjoining leasehold interest.

In an 1884 Illinois case, the condemnee owned ten lots and had a lease on four others. He operated them all in common. The court held that a taking by a railroad company of a right of way across the leased lots severed the property and entitled the condemnee to recover the depreciation done to the remainder of the property during

the balance of the term of the lease.[51] Similarly, in County of Smith v. Labore,[52] an 1887 Kansas case, a father and two sons each owned a quarter section of land. These three tracts adjoined each other and were used as grazing land by the three members of the family who were partners in the cattle business they conducted upon all three properties. The water was on the land of the father. A highway was laid across the land separating the water from the grazing land of the sons. In holding that the separation of the grazing land from the water injured the value of the land as a whole the court said:

> "We suppose it will be admitted that any one of the Labores would have a right to an award of damages for all the loss which he might sustain by reason of having his own grazing land separated from his own stock water. But that is not precisely the case. In this case the grazing lands of Lewis W. Labore and Arthur C. Labore were separated from the stock water on the land of C. C. Labore. But still the right of Lewis W. Labore and Arthur C. Labore, under the written contract with C. C. Labore, to use the stock water on C. C. Labore's land, made their lands more valuable than they otherwise would be, while the rights of C. C. Labore, under the contract, to use the land of the other two Labores, for pasturing his cattle thereon, made his land more valuable than it otherwise would be. This right made his stock water immensely more valuable to him, because he could use so much more of it at a profit. Now, may the Labores be deprived of all these benefits and profits and the enhanced value of their lands resulting therefrom, without their having any remedy? May not each be awarded damages for the loss of value as to his own land: May not each be awarded damages for the difference in value of his own land with the

> road, and without the road, where he suffers loss, although a portion of this enhanced value may be the result of his having the right to use the lands of others?"

Two very recent South Dakota cases indicate that the courts in that state are also not in accord with the title per se doctrine.[53]

3. The California View.

California, at the present time, appears to ally itself with the prevailing rule that unity of title is a necessary requisite in establishing the larger parcel. While there has been no case where the facts as presented to the California court have definitely established the rigid requirement, in a number of cases the courts in this state have indicated that "title" is a prerequisite. For example, in City of Menlo Park v. Artino,[54] the court stated in passing:

> "To recover severance damages there must be unity of title, San Benito County v. Copper Mountain Min. Co., 7 Cal. App. 2d 82, 45 Pac. 2d 428; City of Stockton v. Ellingwood, 96 Cal. App. 708, 275 p. 228, ..."

Neither the Copper Mountain Min. Co. nor the Ellingwood cases strictly support the proposition stated in the Artino case.

There is a possible indication in County of San Benito v. Copper Mountain Mining Company,[55] that a legal right rather than fee interest in a contiguous piece of property used in common with the property taken will

enable the condemnee to receive severance damages. There the appellant claimed that it should have been given an instruction in accordance with Section 1248(2) regarding severance damages. The land that was being condemned was entirely surrounded by land owned by the United States. Its claim for severance damages was based upon the fact that the defendant mining company had mining claims in the vicinity of the land sought to be condemned and that for operating its said mines it was necessary to have use of water that flowed across the land that was being condemned. The court denied severance damages, saying:

> "There is no showing that the said Copper Mountain Mining Company is the owner of, or has acquired any right to the use of this water. The property for which severance damages are claimed is owned by other than the one whose land was sought to be condemned. Appellants cite no authorities to the effect that severance damages may be awarded to one who is not the owner of the land sought to be condemned and we have found none that uphold this doctrine." (Emphasis supplied.)

Clearly the court concluded that had the appellant had a "right" this would have been sufficient to allow for severance damages. A "right", obviously exists in a leasehold.

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In the Ellingwood case , two brothers owned contiguous tracts of land, each in their separate names. The plaintiff argued that, since the tracts were in the names of different defendants, there is no unity of ownership and, consequently, severance damages under the larger parcel concept cannot be granted. The court first held that, since California

law did not allow partnerships to hold property in their own names but that the law required that the individual partners hold the property, in reality there was common ownership and, therefore, there was the necessary unity permitting severance damages. The court said:

> "In view of equity, it is immaterial in whose name the legal title to the property stands, whether in the name of one partner or the names of all."

The court then discussed the Oakland v. Pacific Coast Lumber Company case which stated that unity of use should not be regarded as the controlling factor. This the court admitted but said further that unity of use should, nevertheless, be considered. It added that unity of use itself, is not sufficient; that there must be contiguity. Lastly, the Ellingwood court said:

> "The question of ownership also enters into consideration. The partnership being the owner, the different governmental subdivisions all being contiguous and there being unity of use, we conclude the trial court did not err in considering the whole tract as one parcel."

Clearly, the case would seem to suggest three fundamental points:

(1) That the court will view the question of severance damages in light of equitable principles;

(2) That it is not fee title ownership that is controlling but an interest recognized in

the law to be a legal interest; and

(3) If, as the Ellingwood case holds, a single parcel can be created by a partnership agreement, there seems to be no valid reason why a single parcel cannot be created by lease agreements.

The case of East Bay Municipal Utilities Dist. v. Kieffer,[57] has been cited for the proposition that California requires unity of title to exist in order to establish the larger parcel.[58] Careful examination of the case, however, does not sustain that view. In the Kieffer case the defendant owned two parcels of property and had an option on a third strip. In his answer, the defendant claimed damages by reason of a severance of lands under option from lands owned by him which were taken. The lower court struck out this answer as it related to such damages and, on this basis, the defendant appealed. The appellate court said that a single parcel was not created from the three parcels insofar as "an option is not a transfer of property. No title was conveyed thereby. It is a mere right of election . . . to accept or reject a present offer within the time therein fixed." The court went on, however, to say that:

> "Since the appellant had no interest in the lands under option, it is axiomatic that he was not entitled to damages by reason of their severance from the lands that were taken, if such taking may be termed a severance. Of course, if the lands under option had been held under a contract obligating the defendant to purchase them, a different rule would apply." (Emphasis supplied)

Clearly, the court looked for an "interest" in the adjacent land and found that an option was not such an interest. A lease, however, is an interest of the same type as a contract to purchase which the court said would produce a different result if it existed. Since a contract to sell does not create legal title in the buyer, it is not fee title which is necessary in order to receive severance damages to injury done to the larger parcel but rather it is a legal interest such as a lease or a contract which is needed.

And another case cited to uphold the position that this state clearly demands that all the property be owned in fee, People v. Emerson,[59] also fails to support that assertion. In that case, the state condemned a 3.4 acre strip of land through the center of certain range land. The only water available for cattle on the range was some two miles away from the land in question. Prior to the taking, the cattle reached the water by the use of a crossing leading to the spring on the other side of an old highway, but after the taking were prevented from doing so. Neither the crossing nor the water spring were on the property of the defendants. The court ruled against severance damages in this instance, on the basis that the condemnee had no ownership in the crossing or spring. The court did go on to indicate that had the defendant had a property interest on the land owned by another, the result would probably be different. The defendant tried to show in this case that he had an easement on the cattle crossing or a lease on it as well as a lease on the water spring.

Directing itself to this contention, the court said:

> "Defendants urge an easement existed through a cattle crossing and suggest a lease on it and the spring. The evidence is insufficient to support an easement and only vaguely hints at leases. If such easement or leases exist, they should be proven by competent evidence."

The Emerson case, in reality, strongly hints that the condemnee (and, by necessary inference, the condemnor for the purpose of showing special benefits) need only show an interest in adjacent land (plus, of course, unity of use) in order to establish the larger parcel.

In light of California authority, it appears that the courts in this state have indicated in dictum that fee title per se is necessary; but on a more thorough analysis of the cases, the courts seem to have left the door open for a contrary ruling.

4. Recommendations.

It would appear that a revision and/or clarification of the restriction imposed by many courts regarding unity of title is in order. The necessity for such a revision "is founded on logic and everyday justice".[60]

As indicated before, there are a multitude of instances where business operations are conducted by combining adjacent properties not only in fee but in fee-leasehold or a series of leasehold arrangements. From a realistic point of view, these latter combinations actually are considered on the market as supplying the unity of ownership that is a

requisite for establishing a larger parcel. Fee, in and of itself, has no greater effect on market operations than long-term leases combined together or combined with fee-owned property. To make an impractical distinction which is in direct conflict with the rules of the market place cannot be justified.

A simple example will illustrate the incongruous results that come from a rigid requirement that fee title, and fee title alone, is necessary. A well-known Los Angeles department store, Bullock's, actually is not owned in fee by a single owner. Instead, the department store, occupying a number of contiguous lots in the downtown area, is actually united by at least five leaseholds of a long-term duration. To say that the taking of one lot and one leasehold will not, in law, constitute damages to the "remainder" is to draw an arbitrary and unjust distinction that has support neither in logic nor in fact. Similar illustrations could be drawn but the point should be readily clear to all concerned.

Of course, it is recognized that to claim damages to a larger parcel, the condemnee must be able to show a legal interest in the remainder, but that interest need not be fee title; a leasehold or an easement is of equal economic and practical utility and value. Accordingly, as some commentators have suggested,[61] the unity of use should be the prime consideration; if the condemnee has a legal interest in the "remainder" and that remainder is in the proximate vicinity of the part taken and there is an existing unity of use (if

the parts are not contiguous), the entire property should be treated as one "parcel" - whether for the purposes of ascertaining damages or for determining special benefits.

FOOTNOTES

(1) Jahr, "Compensable Damages Due to Construction of Limited Access Highways," INSTITUTE ON EMINENT DOMAIN, 77, 92-93 (1960).

(2) Olmstead v. United States, 277 U.S. 438, 479 (1928).

(3) 260 U.S. 393, 415-16 (1922).

(4) See Barnes v. North Carolina State Hwy, Comm., 109 S.E. 219 (1959); Louisville & Nashville R. Co. v. Chenault, 214 Ky. 748, 284 S.W. 397 (1926); Enfield and Mansfield, "Special Benefits and Right of Way Acquisition", 25 APPRAISAL JOURNAL 551 (1957).

(5) The statute was originally enacted in 1872. Since that time it has been subject to minor changes, none of which affects the quoted text. It has been adopted in a number of western states since that time, and, it seems, that it was itself borrowed from similar statutory provisions in eastern states.

(6) Oakland v. Pacific Lumber and Milling Company, 171 Cal. 392, 153 P. 705 (1915).

(7) Trustees of Boston University v. Commonwealth, 286 Mass. 57, 190 N.E. 29 (1934).

(8) City of Menlo Park v. Artino, 151 C.A. 2d 261, 311 P. 2d 135 (1957).

(9) Barnes v. North Carolina State Hwy. Comm., 109 S.E. 2d 219 (1959).

(10) 184 Kan. 134, 334 P. 2d 399 (1959).

(11) 4 NICHOLS ON EMINENT DOMAIN §14.31 [1]. See also AM. JUR., "Eminent Domain" §270; Annot., 6 A.L.R. 2d 1197 (1949).

(12) Ibid.

(13) Sasso v. Housing Authority, 111 A. 2d 226 ( ).

(14) 8 Ill. 2d 341, 134 N.E. 2d 296 (1956).

(15) 17 Ill. 2d 570, 162 N.E. 2d 373 (1959).

(16) 143 F. 2d 391 (1st Cir. 1944), cert. den., 323 U.S. 772.

(17) Id, at 395.

(18) 93 Vt. 437, 108 Atl. 426 (1919).

(19) 286 Mass. 57, 190 N.E. 29 (1934).

(20) Id. at 190 N.E. 31.

(21) See, e.g., "The Reimbursement for Moving Expenses When Property is Acquired for Public Use", "Incidental Losses in Eminent Domain", "Evidence in Eminent Domain Proceedings." (this series)

(22) 184 Kan. 134, 334 P. 2d 399 (1959).

(23) Barnes v. North Carolina State Hwy. Comm., 109 S.E. 2d 219 (1959).

(24) 171 Cal. 392, 153 P. 705 (1915).

(25) 13 C.A. 2d 505, 57 P. 2d 575 (1936).

(26) 137 C.A. 760, 31 P. 2d 467 (1934).

(27) 99 C.A. 240, 278 P. 476 (1929).

(28) 151 C.A. 2d 261, 311 P. 2d 135 (1957).

(29) 22 C.A. 2d 375, 71 P. 2d 88 (1937).

(30) 32 C. 2d 406, 196 P. 2d 570 (1948).

(31) See Annot., 6 A.L.R. 2d 1179, 1234, et seq. (1949). In the California Edison Company case, the condemnee was allowed severance damages for the taking of part of its system; these damages extended over ten counties and the taking actually involved only a specific unit. See also Note 8 STAN. L. REV. 113 at n. 12.

(32) 43 C. 2d 13, 271 P. 2d 507 (1954).

(33) See Note, 8 STAN. L. REV. 113 (1955) at 119; Kaltenbach, JUST COMPENSATION (Cal. 1) §2-1.01.

(34) See Note, 8 STAN. L. REV. at 120, 121.

(35) Annot., 6 A.L.R. 2d 1179, 1210-1213.

(36) 180 C.A. 2d 805, 4 C.R. 785 (1960).

(37) 32 Cal. 2d at 424.

(38) See Del Guercio, "Severance Damages & Valuation of Easements" CALIFORNIA CONDEMNATION PRACTICE 61, 67, (Continuing Education of the Bar) (1960).

(39) 143 F. 2d at 394-395.

(40) See Annot., 6 A.L.R. 2d at 1203, 1227, 1234; City of Chicago v. Equitable Life Assurance Society, 8 Ill. 2d 341, 134 N.E. 2d 296 (1956): See, especially, Cole Investment Co. v. United States, 258 F. 2d 203 (9th Cir., 1958).

(41) 182 F. 2d 172 (9th Cir., 1950).

(42) 18 AM. JUR., "Eminent Domain" §271.

(43) 133 Tenn. 554, 182 S.W. 597 (1915).

(44) 173 Ind. 674, 91 N.E. 234 (1910).

(45) Duggan v. State, 214 Iowa 230, 242 N.W. 98 (1932).

(46) 168 Kan. 115, 211 P. 2d 59 (1949).

(47) 10 Wash. 2d 262, 116 P. 2d 752 (1941).

(48) Ariz. Statute §27-915 (1) (2).

(49) 57 Ariz. 429, 114 P. 2d 891 (1941).

(50) 29 CORPUS JURIS SECONDUM, "Eminent Domain" §140.

(51) Chicago & E. R. Co. v. Dresel, 110 Ill. 89 (1884).

(52) 37 Kan. 480, 15 Pac. 577 (1887).

(53) State Hwy. Comm. v. Fortune, 91 N.W. 2d 675 (S. Dak. 1958); State Hwy. Comm. v. Bloom, 93 N.W. 2d 572 (S. Dak. 1958).

(54) 151 C.A. 2d 261, 311 P. 2d 135 (1957).

(55) 7 C.A. 2d 82, 45 P. 2d 428 (1935).

(56) 96 C.A. 708, 275 Pac. 228 (1929).

(57) 99 C.A. 240, 278 Pac. 476 (1929).

(58) See, e.g., Del Guercio, "Severance Damages & Valuation of Easements", CALIFORNIA CONDEMNATION PRACTICE 61, 67 (Continuing Education of the Bar) (1960).

(59) 13 C.A. 2d 673, 57 P. 2d 955 (1936).

(60) See Ives v. Kan. Turnpike Authority, 184 Kan. 134, 334 P. 2d 399 (1959). See also Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910) where Justice Holmes stated that constitutions deal "with persons not tracts of land" and Miss. and Rum River Boom Co. v. Patterson, 98 U.S. 403, 407 (1879) where the Court said:

"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."

(61) Enfield & Mansfield, "Special Benefits and Right of Way Acquisition", 25 APPRAISAL JOURNAL 551, 553 (1957). Cf., Kaltenbach JUST COMPENSATION, "What Constitutes the Entire Parcel" (Spec. Bull. #9, 1959 Series.)