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3/19/69

Memorandum 69-50

Subject: Study 65 - Inverse Condemnation (Water Damage)

At the direction of the Commission, the staff has prepared and attached as Exhibit I (pink sheets) a working draft of a statute which attempts to codify certain principles applicable in this area. The draft departs from our usual format in that the Comments to each section are written not as though the statute were enacted but instead attempt simply to provide relevant background and highlight matters for the Commission's consideration. It is our hope that we can at the April meeting establish the desired principles and then work towards the language needed to set forth these principles.

Respectfully submitted,

Jack I. Horton
Associate Counsel

Memorandum 69-50 3/24/69

EXHIBIT I - WORKING DRAFT

CHAPTER I. WATER DAMAGE

Section 869. Exclusive basis of liability

869. This Chapter is the exclusive basis of liability of a public entity under Article I, Section 14 of the California Constitution for damage to property proximately caused by:

(a) The disturbance of the natural flow of surface waters;

(b) The diversion of the natural flow of stream waters;

(c) The obstruction of the natural flow of stream waters;

(d) The acceleration of the natural rate of flow of stream waters;

(e) The augmentation of the natural flow of stream waters;

(f) Stream waters caused to escape from a watercourse;

by an improvement as designed and constructed by the public entity.

Comment. Section 869 is provided to insure that, for the areas of liability covered by this chapter, that henceforth this chapter will provide the sole source of inverse liability. The wording of the chapter is awkward perhaps, but we must be careful in the end that this section has the exact same scope as Section 870 (the source of liability).

Section 870. Conditions of liability

870. Except as provided by this chapter, a public entity is liable for damage to property proximately caused by:

(a) The disturbance of the natural flow of surface waters;

(b) The diversion of the natural flow of stream waters;

(c) The obstruction of the natural flow of stream waters;

(d) The acceleration of the natural rate of flow of stream waters;

(e) The augmentation of the natural flow of stream waters;

(f) Stream waters caused to escape from a watercourse;

by an improvement as designed and constructed by the public entity.

Comment. For purposes of convenience, Section 870 separately states the various categories of interference with waters and provides for liability in each instance. It seems apparent that, if the general principle set forth in this section were retained, subdivisions (a) through (f) could be combined in a simpler phrase, e.g., "by the disturbance of the natural flow of water." For the time being, however, the separate statement may aid our analysis of existing law and consideration of any changes in this law.

Section 870 states the basic rule of liability. Several limitations on this rule are separately stated in the succeeding sections; however, some significant limitations are contained in the statement of the rule itself. The first of these, in order of appearance, is the limitation of "damage to property" which, of course, precludes liability under this

section for personal injury. In an earlier draft, we used the even narrower term--"physical damage to property." The staff, however, believes that this term is too restrictive and its use could preclude recovery for all consequential damage. The term presently used is basically that contained in Article I, Section 14 and would presumably receive a similar interpretaion with regard to whether an item of damage is compensable or not. In this connection, it might be noted that the use of the narrower term, insofar as it limits recovery to something less than is constitutionally required, could cause the entire statute to be held unconstitutional or at least compel a conclusion that the statute is not all-inclusive.

The second limitation is that of proximate causation. However, the major limitations generally subsumed under this doctrine now receive detailed treatment in the sections following.

The third limitation is that of causation by an improvement "as designed and constructed by the public entity." This limitation may no longer be a significant limitation on liability, but it does delineate one of the distinguishing features of "inverse condemnation." That is, liability is predicated upon a taking or damaging for a public use. Our concern then is with generally purposeful, or at least deliberate conduct. Thus, excluded here and remaining within the ambit of the existing sections of the Government Liability Act is liability for damage resulting from negligent maintenance of an improvement.

Subdivision (a). With respect to surface water, subdivision (a) basically restates existing law. See Burrows v. State, 260 Adv. Cal. App. 29, ____ Cal. Rptr. ____ (1968). See also Keys v. Romley, 64 Cal.2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966); Pagliotti v. Acquistapace, 64 Cal.2d 873, 50 Cal. Rptr. 282, 412 P.2d 538 (1966).

The term "surface waters" as used here has been defined as those waters "falling upon, arising from, and naturally spreading over lands and produced by rainfall, melting snow, or springs. They continue to be surface waters until, in obedience to the laws of gravity, they percolate through the ground or flow vagrantly over the surface of the land into well defined water courses or streams." Everett v. Davis, 18 Cal.2d 389, 393, ____ P.2d _____, ____ (194_). If, in the final analysis, surface waters are treated separately from stream waters and flood waters, a statutory definition would be required. As suggested above, however, it may be possible to treat "waters" generally and simply focus on the conduct of the public entity and the impact on the private property owner without regard to a categorization of the water involved.

We indicate that subdivision (a) basically restates existing law. Under the Keys rule, an entity is liable for its disturbance of the natural conditions regardless of whether it acts reasonably or not, so long as the property owner acts reasonably. Subsequently in Burrows, the district court of appeal stated that, "Whenever in this opinion we speak of the lower owner's conduct as being reasonable or unreasonable, we refer only to a failure to take the protective measures mentioned by the Supreme Court." 260 Adv. Cal. App. 29, 32-33 n.2. In short, it seems quite possible that the limitation of reasonableness is simply an application of the doctrine of avoidable consequences. If this is true, the apparently broader rule of liability set forth in this section, as qualified by Section 870.8, is precisely that existing under the present case law. If on the other hand, Keys requires something more of the private property owner in acting "reasonably," what this may be remains undefined. Moreover, in the present context, assuming that we have a taking or damaging for a public use, it would seem that imposition of a duty of mitigation greater than that required by Section 870.8 could violate the constitutional mandate.

Subdivision (b). With respect to stream waters diverted by an improvement thereby causing damage to private property, this subdivision similarly appears to continue existing law. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603, 15 Cal. Rptr. 904, 364 P.2d 840 (1961).

Subdivision (c). Existing law may require pleading and proof of fault with respect to the obstruction of stream waters. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., supra; Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962). The distinction between diversion and obstruction is not, however, a sharply defined one, and may merely reflect the difference between a deliberate program (inverse) and negligent maintenance (tort). Compare Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955), with Hayashi v. Alameda County Flood Control and Water Conservation Dist., 167 Cal. App.2d 584, 334 P.2d 1048 (1959). In any event, we can think of no rational basis for the distinction.

Subdivisions (d) and (e). On the other hand, under existing law, there is no inverse liability for improvement of the natural channel--narrowing, deepening, preventing absorption by lining--even though it greatly increases the total volume or velocity resulting in downstream damage. See, e.g., Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941); San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 Pac. 554 (1920). There appears to be no persuasive reason supporting this inconsistent rule of nonliability, and Section 870 would change the law in this area to provide a uniform rule of liability in any case of alteration of the natural conditions. (A recent attempt to distinguish the cases supporting the latter rule was based on the

ground that these cases were predicated on the "right" of an upper riparian owner to discharge water into a natural channel. See Albers v. County of Los Angeles, 62 Cal.2d 250, 260-262, 42 Cal. Rptr. 89, ___, 398 P.2d 129, ___ (1965). This attempt seems, however, to merely restate the conclusion.)

Subdivision (f). With respect to flood waters, the so-called general rule is that flood waters are a "common enemy" against which an owner of land may defend himself with impunity for damage to other lands caused by the exclusion of flood waters from his land. See Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897 (1950); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625 (1887). However, this rule is qualified by a requirement of reasonableness. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944). See Jones v. California Development Co., 173 Cal. 565, 575 (1916). Further, the rule is subject to the condition that a permanent system of flood control that deliberately incorporates a known substantial risk of overflow of flood waters upon private property that in the absence of the improvements would not be harmed constitutes a compensable taking. Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962). In essence then, while Section 870 rejects the "common enemy" rule with respect to flood waters, it may do little more than focus proper attention on the proximate results of a deliberate, planned public improvement.

Section 870.2

870.2. A public entity is not liable under Section 870 for damage which would have resulted had the improvement not been constructed.

Comment. Section 870.2 may merely make explicit what is implicit in the requirement of proximate causation under Section 870. Nevertheless, the definite affirmative statement does have some value. The section should make clear that an entity is not liable merely because a project fails to protect all persons (see Week v. Los Angeles County Flood Control Dist., 80 Cal. App.2d 182, 181 P.2d 935 (1947)), and further that the entity is liable only for the damage caused by the improvement. Thus, property subject to inundation in its natural state may be damaged by a public improvement but it is only the incremental damage that is compensable.

Section 870.4

870.4. A public entity is not liable under Section 870 for damage brought about by the intervention of the unforeseeable operation of a force of nature.

Comment. The Commission has not previously considered this limitation but it is suggested by a similar limitation on the liability for ultrahazardous activities. See Sutliff v. Sweetwater Water Co., 182 Cal. 34 (1920) (Exhibit II attached), Restatement (Second), Torts § 522. Certainly by its very nature a flood control project is or should be designed to control predictable flood waters; Section 870.4 would, however, eliminate liability for damage brought about by the intervention of the extraordinary unforeseeable deluge. It is probably unnecessary to point out the obvious difficulty of distinguishing between the predictable and the unforeseeable force of nature. Earthquakes, 100-year, and 500-year floods are both "predictable" and foreseeable; however, are they such extraordinary forces that they should insulate the entity from liability? It should be noted that Section 870.2 eliminates liability for damage that would have occurred without the improvement, so this section would only apply if the improvement contributed to the damage caused. Should there be any distinction between existing but unforeseeable natural conditions and subsequent unforeseeable forces? If not, it is apparent that the rule stated here is inconsistent with that in Albers. Finally, it is at least possible that in an appropriate case, the court would incorporate the limitation expressed under the guise of "proximate cause." See Sutliff v. Sweetwater Water Co., supra.

Section 870.6

870.6. A public entity is not liable under Section 870 for damage to improvements to property which it establishes could reasonably have been foreseen to occur at the time the improvements were made.

Comment. Under Section 870.6, the owner of property cannot increase the entity's burden by making additional improvements that will foreseeably be damaged or destroyed. An analogous rule applies to improvements to property subsequent to the filing of a direct condemnation action. The underlying policy finds further expression in the doctrine of avoidable consequences and the defense of assumption of risk. On the other hand, it seems that the property owner should be compensated for his "lost opportunity." For example, prior to construction of a flood control improvement, land is capable of being subdivided and improved; thereafter it is subject to inundation and subdivision becomes impossible. The owner should be entitled to recover the resultant decrease in market value, but should not be permitted to subdivide and improve in the face of an obvious danger.

In theory, the rule seems sound. In practice, difficult problems are presented. Not the least of these will be the problems of proof. Assume private improvements are made and subsequently damaged. The entity is in an incredibly awkward position arguing that damage should have been foreseen, when it has done nothing to prevent the damage or exercise its power of eminent domain to secure a flowage easement. If improvements are not made, the owner is in an equally difficult position, having to show that because of the improvement he is no longer able to use

his property in the same manner as he was able to previously. This becomes especially difficult where the damage threatened is not annual but every five years, ten years, and so on.

Assuming arguendo that only the owner threatened with actual physical damage comes within the scope of this section, and, alternatively, that only he can recover for the "lost opportunity" under Section 870; how do we distinguish between his "blight" case and that of his neighbor who is not threatened by actual physical damage but whose property is reduced in value by virtue of the proximity of the improvement? (Of course, if on the other hand, we treat them both the same, permitting both to recover, we substantially extend the existing rules of liability.) Consider also the likelihood that, if improvements are made, the original owner will often be out of the picture. Again referring to the subdivision example, assuming houses are built and sold, does Section 870.6 deny recovery to innocent new owners, where the original owner may have foreseen the possibility of damage? (Are they restricted to a potential cause of action against the seller for fraud, deceit or misrepresentation, or perhaps products liability?)

If Section 870.6 is retained, how should the statute of limitations be applied? The Pierpont case suggests that the owner be permitted but not required to sue at the time the improvement is started or to defer action until "actual" damage is caused or in the words of the United States Supreme Court in United States v. Dickinson, 331 U.S. 745, that nebulous point "when the fact of taking could no longer be in controversy." The risk of the owner is that, if his action is premature, the uncertainty of his damage and the risk of res judicata may deprive him of just compensation. On the other hand, the public entity could in theory institute a condemnation action to fix the date of taking, if it desired the early determination of the controversy.

Section 870.8

870.8. (a) A public entity is not liable under Section 870 for damage which the public entity establishes could have been avoided by reasonable steps available to the owner of private property to minimize his loss.

(b) A public entity is liable under Section 870 for all expenses which the owner establishes he reasonably and in good faith incurred in an effort to minimize damage to his property proximately caused or threatened by the improvement.

Comment. This section essentially states the existing duty to mitigate, or doctrine of avoidable consequences (see Albers v. County of Los Angeles, 62 Cal.2d 250, 269, 42 Cal. Rptr. 89, ___, 398 P.2d 129, ____ (1965), citing with approval 18 Am. Jur., Eminent Domain, § 262 at 903; 29 C.J.S., Eminent Domain, § 155 at 1015 n.69; 4 Nichols, Eminent Domain § 14.22 at 525 (3d ed. 1962)) especially if one considers the construction of the improvement as the "wrongful" act of the public entity. The comment to this section could state that the reasonableness of the owner's conduct might be affected by his willingness to accept a "physical solution" paid for by the entity (n.b. the entity would generally have the power of eminent domain to compel this result) and his giving notice to the entity of threatened danger where circumstances warranted and permitted it. (Alternatively rather than "legislate" by comment some express statutory provisions could perhaps be devised, but there is a danger it seems of making rules too inflexible for the myriad of situations that might arise. E.g., is notice ever mandatory, to whom must it be given, in what form, actual notice or constructive notice required, what is effect of notice, etc.)

The issue was raised at the March meeting concerning the accrual of a cause of action to recover the expenses of mitigation. Section 870 now provides simply for liability for "damage to property" rather than "actual physical damage," and it seems therefore that the owner might have a cause of action for loss of value as limited by the cost of cure under that section. It certainly seems that he should be encouraged or at least permitted to prevent any unnecessary loss even though this may entail a suit to require the entity to pay the mitigating expenses. Another question is whether he should ever be required to sue. It is difficult to imagine a situation where, if the entity is given notice of the situation, it could reasonably take the position that the owner was obliged to sue and compel it by judicial fiat to do that which was reasonable or risk denial of recovery for damages that could thereby have been avoided.

Section 871

871. In determining any damages recoverable under Section 870, the trier of fact shall [may where equitable] give consideration to the value of any special benefit conferred by the improvement upon the owner of the property which was damaged.

Comment. The discretionary rule stated is closely analogous to the general tort rule that in determining damages suffered as a result of a tortious act, consideration may be given where equitable to the value of any special benefit conferred by that act. See Maben v. Rankin, 55 Cal.2d 139, 10 Cal. Rptr. 353, 358 P.2d 681 (1961)(action for assault and battery and false imprisonment stemming from psychiatric care); Estate of de Laveaga, 50 Cal.2d 480, 326 P.2d 129 (19)(interest beneficiary received benefit of interest paid on interest erroneously held as principal); Hicks v. Drew, 117 Cal. 305, 314-315, 49 Pac. 189 (1897)(flooding case); Restatement, Torts § 920. But cf. Green v. General Petroleum Corp., 205 Cal. 328, 336, 270 Pac. 952 (1928).

The mandatory rule is analogous to the set-off of special benefits against severance damage in a direct condemnation case. See Code of Civil Procedure § 1248(3); Sacramento & San Joaquin Drainage Dist. v. W.P. Roduner Cattle & Farming Co., 268 Adv. Cal. App. 215 (1968) (Exhibit III attached).

For example, consider an owner of property that formerly was entirely subject to intermittent flooding and could, therefore, be used only for grazing. Now as a result of a flood control project, a portion of the property is suitable for subdivision housing while another portion is subject to so much additional flooding that it is made worthless.

Present rules of inverse (and direct) condemnation would presumably require the owner to be compensated for the land lost even though the net value of the entire property is substantially increased. The example may suggest the desirability of a scheme that offsets the benefits derived from an improvement against a claim for damages. Presumably (though not necessarily) we would want to provide the same rule here as is eventually provided in the eminent domain area. Whether the present rule there will be retained or not is problematical.

Section 871.2. Effect upon law governing use of water

871.2. Nothing in this chapter affects the law governing the right to the use of water.

Comment. It seems clear that Section 870 is broad enough to be invoked where the improvement interferes with the right to the use of water. The Commission should consider whether it wishes to exclude this area of liability, and if so, whether the simple statement above is adequate for the job. If this exclusion is not made, the staff believes that an additional study would be required to determine what effect this chapter would and should have on that body of law.

[182 Cal. 34 (1920)]

APPEAL from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge. Affirmed.

The facts are stated in the opinion of the court.

T. M. Robinson and Bordwell & Mathews for Appellant.

Hunsaker, Britt & Edwards and E. Swift Torrance for Respondent.

OLNEY, J.—This is an action to recover damages for injury done to the plaintiff's land by the breaking, in the winter of 1916, of the Sweetwater reservoir, owned by the defendant corporation. The individual defendants are officers of the corporation and for simplicity we will treat the action as one against it alone, since the other defendants are certainly not liable if it is not. The cause was tried without a jury and resulted in a judgment for the defendant, from which the plaintiff appeals upon the judgment-roll.

It appears from the pleadings and findings that the reservoir in question is an artificial lake created by a dam across the Sweetwater River impounding the waters of that stream. On one side of the reservoir and at a little distance from the dam there is a depression in the high land or hills surrounding the reservoir and forming its rim, and the dam was built to a height greater than the altitude of this depression, so that if the reservoir were full its waters would run through the depression unless restrained. To prevent this a secondary dam, consisting of an earth dike, was built across the depression. The plaintiff's land is situate in the valley below the depression, that is, on the other side of it from the reservoir. In January of 1916 there came a flood in the Sweetwater River of extraordinary and unprecedented size, filling the reservoir until it overtopped the earth dike across the depression mentioned, washed it out and released a large volume of water from the reservoir, which flowed over the plaintiff's land and undoubtedly damaged it substantially. The complaint alleges that the overtopping and washing out of the dike were due to the negligence of the defendant in

the design of the reservoir, and in the manner of its maintenance and use. The trial court found, however, that there was no negligence on the part of the defendant and that the overtopping and washing out of the dike and consequent injury to the plaintiff's property were due to the extraordinary and unprecedented flood which the defendant could not reasonably have anticipated or foreseen. [1] Since the appeal is upon the judgment-roll alone, this finding is not attacked and must be taken as true.

The chief contention of the plaintiff is that, even though the defendant were not negligent in any respect, it is still liable for any damage caused by the breaking out of control of the waters collected by its works. The plaintiff's chief reliance in this connection is the authority of *Fletcher* v. *Rylands*, decided in Exchequer Chamber (L. R. 1 Ex. 265), and affirmed on appeal by the House of Lords (L. R. 3 Eng. & Ir. App. 330). The defendant there had constructed a reservoir, the waters of which broke through the bottom into some ancient underground workings whose existence was unknown, and thence escaped into and flooded the plaintiff's colliery. For this the defendant was held liable regardless of any negligence upon its part. The leading opinion in Exchequer Chamber was delivered by Lord Blackburn and it was referred to and quoted with approval in the House of Lords. The principle applied is thus stated by Lord Blackburn: "We think that the true rule of law is, that the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

This language, if taken literally and as applying universally, would seem to cover the present case, and plaintiff contends that it should govern it. To this contention there are two replies. In the first place, a subsequent English decision makes it plain that the rule so stated should be limited in its application to cases of the nature of the one then before the court, of which the present case is not one. In *Fletcher* v. *Rylands*, as was subsequently said in *Nichols* v. *Marsland*, L. R. 10 Ex. Cas. 255, "the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an

open channel which led to the mine without his knowing it." In other words, the very maintenance of the reservoir in the manner in which it was maintained itself involved an invasion of the plaintiff's property. For this invasion the plaintiff, of course, had a cause of action. The case was one coming directly within the maxim, "*Sic utere tuo ut alienum non laedas.*" Of this character, also, is *Parker* v. *Larsen*, 86 Cal. 236, [21 Am. St. Rep. 30, 24 Pac. 989], where the defendant permitted the water in a ditch which he had constructed on his land to percolate through the ground from the ditch on to his neighbor's land, saturating and injuring it. Of the same sort, also, are those cases where one has constructed works on his land which accumulate and discharge on his neighbor's land waters which would not otherwise go there, of which there are a number of instances in our reports, the leading one perhaps being *Ogburn* v. *Connor*, 46 Cal. 347, [13 Am. Rep. 213]. In all of these cases the very manner of the construction, maintenance, or use of the structure constitutes or works an invasion of the neighbor's property and rights, and, as was said in *Galbreath* v. *Hopkins*, 159 Cal. 207, 209, [113 Pac. 1741], in a nuisance *per se*.

But there is a sharp distinction between such cases and the present. The defendant's reservoir was a wholly proper and lawful thing and its existence, maintenance, and use worked no injury to the plaintiff's land, invaded no right of his, and could not for a moment be said to be a nuisance. The proximate and immediate cause of the flooding of the plaintiff's land and its consequent injury was not the existence of the defendant's reservoir or the manner of its maintenance or use, which were wholly lawful and innocuous, but the overwhelming of the reservoir by an agency beyond the defendant's control, in fact, in this case, beyond human control. [illegible] clearly pointed out in *Nichols* v. *Marsland* in the decision on appeal in Exchequer Chamber (L. R. 2 Ex. Div. 1). The facts were that a series of dams constructed by the defendant were washed out by an unprecedented flood and the volume of water so released damaged the plaintiff's property. In other words, the case is wholly similar to the one at bar. The plaintiff there, like the plaintiff here, relied for a recovery upon *Fletcher* v. *Rylands*, but it was held that the cases were not the same, that in the case before the court the proximate cause of the

damage to the plaintiff was the flood and that the defendant was not liable unless negligent. In the same case, in the decision in Exchequer (L. R. 10 Ex. Cas. 255), the question is asked, what is the difference in such a case between a reservoir and a stack of chimneys, and could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or earthquake? The same question might be asked concerning any innocuous and lawful structure on a man's land—his house, for example. Could it possibly be held that if a man's house were set on fire by lightning or any other cause for which he was not responsible and in turn set fire to his neighbor's house, he would be liable in damages? There is no difference between a house and a reservoir in this respect. There is, of course, a great difference in the amount of care reasonably required in the two cases. The construction, maintenance, and use of a reservoir, if it be of any size, of necessity demands a degree of care not reasonably required in the case of a house; but if this care is used, then the question of liability is the same in one case as in the other.

The second answer to the plaintiff's contention is that the question is not an open one in this state. There are a very considerable number of cases in our reports where a reservoir or ditch has been broken by flood and suit has been brought for injuries sustained thereby. Invariably a recovery has been allowed or refused according as the defendant is found to be negligent or not. *Hoffman* v. *Tuolumne Water Co.*, 10 Cal. 413, is a good illustration of these cases. There the court, in laying down the rule governing the case, said: "The general rule is, that every man may do as he chooses with his own property, provided he does not injure another's. But there is another rule as well established, which is, that a man must so use his own property as not to injure his neighbor's. This last rule, however, does not make a man responsible for every injury which may arise to another from the use which the first may make of his property. It would be an intolerable hardship to hold a man responsible for unavoidable accidents which may occur to his property by fires or casualties, or acts beyond his control, though others are likewise injured."

The court then reversed a judgment against the defendant because of an instruction by the trial court which imposed

too high a degree of care upon the defendant. Such reversal was, of course, wholly inconsistent with the contention of the plaintiff here that the defendant is liable no matter what care it used. To the same effect are: *Tenney* v. *Miners' Ditch Co.*, 7 Cal. 335; *Wolf* v. *St. Louis etc. Co.*, 10 Cal. 541; *Todd* v. *Cochell*, 17 Cal. 97; *Everett* v. *Hydraulic etc. Co.*, 23 Cal. 225; *Campbell* v. *Bear River etc. Co.*, 35 Cal. 679; *Weiderkind* v. *Tuolumne Water Co.*, 65 Cal. 431, [4 Pac. 415]; *Moore* v. *San Vicente Lumber Co.*, 175 Cal. 212, [165 Pac. 687]; *Bacon* v. *Kearney Vineyard Syndicate*, 1 Cal. App. 275, [82 Pac. 84].

It is true that in all of these cases, negligence on the part of the defendant was relied upon by the plaintiff and that the question of absolute liability on the part of the defendant was not presented to the court or discussed. Nevertheless, it is repeatedly laid down that the governing rule of law is that the defendant is not liable unless he has been negligent, and the actual decisions of the cases are consistent with this rule only. [2] Under such circumstances the rule so declared and followed must be taken to be the law, and the fact that the propriety of the rule has not been questioned or discussed is not a sufficient justification for reopening the subject.

The plaintiff contends, also, that in spite of the finding of the trial court that there was no negligence on the part of the defendant, such negligence, nevertheless, appears because of the fact that the top of defendant's main dam—the one across the river—was higher than the top of the earthen dike across the depression, so that the waters of the reservoir, before raising to the top of the main dam and flowing over it, would flow over the earthen dam and wash it out. It is not at all certain that it appears from the findings that the top of the main dam was higher than the top of the earthen dike. Assuming, however, that it does appear, it does not by any means follow that there was any negligence in the design of the reservoir. It does not appear, for example, that the main dam itself was not an earthen dam so that water overflowing it would be much more dangerous than water overflowing the shallower earthen dike. Passing this and assuming that the main dam was a solid masonry or concrete structure so protected that it would not be displaced by a large volume of water flowing over it, the question of whether its maintenance at a height greater than the top of the earthen

dike was negligence would depend almost entirely upon the relation between the capacity of the spillway provided and the volume of flood reasonably to be foreseen and anticipated and, therefore, to be provided for. The complaint alleges that the spillway was not adequate. Upon this point the trial court found specifically that it was adequate to carry off all waters that prior to the time of the flood in question it might reasonably have been anticipated would flow into the reservoir after it was filled. This finding completely negatives the plaintiff's contention that there was negligence in the respect claimed.

[3] The plaintiff also contends that the findings are contradictory in that it is found, on the one hand, that the injuries to appellant's property were proximately caused by an extraordinary and unprecedented flood, and, on the other hand, that none, or only a part, of defendant's land would have been injured but for the erection and maintenance of the reservoir. Plaintiff's point is that the flood of 1916, extraordinary and unprecedented as it was, would yet not have injured his property if it had not been for the existence of the reservoir. This may be true, but it does not follow that the proximate cause of the injury was not the flood. This point is really nothing more than the contention that because the defendant was responsible for the existence of the reservoir and because the plaintiff's land would not have been injured except for its existence, the defendant is liable regardless of negligence on his part. This is simply the point first discussed in another form.

Judgment affirmed.

Lawlor, J., and Shaw, J., concurred.

[268 Adv. Cal. App. 215 (Dec. 1968)]

APPEAL from a judgment of the Superior Court of Madera County. Thomas Coakley, Judge.* Affirmed.

Proceeding in eminent domain to condemn land for construction of an irrigation channel. Judgment awarding allegedly excessive benefit affirmed.

Thomas C. Lynch, Attorney General, and N. Eugene Hill, Deputy Attorney General, for Plaintiff and Appellant.

Griswold & Barrett and Stephen P. Galvin for Defendant and Respondent.

GARGANO, J.—This action was brought by the Sacramento and San Joaquin Drainage District to condemn approximately 400 acres of land belonging to respondent, W. P. Roduner Cattle & Farming Co., for use in the construction of a channel known as the Eastside By-Pass. After jury trial on the issue of damages the jury awarded respondent the sum of $136,337 for the acreage taken and $79,030.50 for the severance damage to respondent's remaining land. The jury also found that respondent's remaining land was benefited by the construction of the public improvement and fixed the value of the benefit at $2,000. Judgment was entered on the jury's verdict, and the district has appealed.

The remaining undisputed facts are substantially as follows: Prior to the construction of the Eastside By-Pass a substantial part of the overflows of the San Joaquin River and its tributaries flowed into Ash Slough, which crossed over respondent's land. The slough did not have sufficient capacity to hold the water at its heaviest and extensive flooding

*Assigned by the Chairman of the Judicial Council.

resulted. Thus, respondent's land, consisting of approximately 3,400 acres of agricultural and pasturage land, was subject to periodic inundation in varying degrees.

The Eastside By-Pass was constructed to contain the overflows of the San Joaquin River and its tributaries. It was paid for by the State of California from the state general fund. It also crosses over respondent's land, absorbing approximately 400 acres. It is this acreage that the district condemned in this proceeding.

Appellant does not challenge the amount fixed by the jury for the acreage taken or for the severance damages awarded. Appellant appeals only from that part of the judgment relating to the special benefit. Its main contention is that the jury correctly found that respondent's remaining land was benefited by the Eastside By-Pass but that the amount which the jury fixed as the value of this benefit is not supported by the only evidence offered on the issue. On the other hand, respondent stoutly maintains that there is sufficient evidence to support the judgment. It also vigorously asserts that any benefit its land received from the construction of the public improvement is a general benefit as a matter of law, and the court erred when it submitted the benefit issue to the jury.

[1] The statutory authority for offsetting benefits against severance damages is contained in section 1248 of the Code of Civil Procedure. Under the plain language of this section, when property taken by the condemnor is part of a larger parcel of property owned by the condemnee, the court or jury must offset against the severance damages to the remaining parcel, any value it may have received from the construction of the public improvement.[1] However, a logical, albeit somewhat clouded, distinction has been drawn between special and

[1]Section 1248 provides in pertinent part as follows:

"The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess: 3. Separately, how much the portion not sought 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. . . . 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. . . . 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. If the benefit shall be greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but the benefit shall in no event be deducted from the value of the portion taken; . . ."

general benefits, and by judicial fiat only special benefits may be offset (*Beveridge* v. *Lewis*, 137 Cal. 619 [67 P 1040, 70 P. 1083, 92 Am.St.Rep. 188, 59 L.R.A. 581]; *County of Los Angeles* v. *Marblehead Land Co.*, 95 Cal.App. 602 [273 P. 131]. **[2]** As the California Supreme Court stated in the early *Beveridge* decision:

"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 trend of decision is very decidedly to the conclusion that general benefits shall not be allowed as a set-off to damages, even when no statute prescribes a contrary rule.

". . . .

"Special benefits, as I have said, are such as are peculiar to the property which it is alleged has been damaged, such as are reasonably certain to result from the construction of the work. Illustrations are afforded where a marsh will be drained or levee built which will protect the land from floods." (*Beveridge* v. *Lewis*, 137 Cal. 619, 623-624, 626 [67 P. 1040, 70 P. 1083, 92 Am.St.Rep. 188, 59 L.R.A. 581].)[2]

[2]See also 3 Nichols on Eminent Domain (3d ed.), Compensation, section 8.6203, pages 66-68, wherein it is stated: "The most satisfactory distinction between general and special benefits is that 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. The distinction was expressed in one case as follows: 'There is a well-recognized distinction between general and special benefits. The former is what 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 are not shared by those which are not so situated.'

"Ordinarily, the foregoing test is a satisfactory one, though sometimes difficult to apply. In other words, the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object, or in various other ways."

[3] Manifestly, it would appear that if respondent's land (the portion not taken by appellant) was benefited at all by the Eastside By-Pass, the benefit was a special benefit, not a general benefit as a matter of law. The benefit was incidental to the main purpose of the project and arose because of the land's peculiar relation to the public improvement. In short, if the fair market value of respondent's remaining 3,000 acres was increased at all by the construction of the Eastside By-Pass, the increase arose from a discernible change in the potential land use since it was no longer subject to periodic inundation, and this is one of the main characteristics of a special benefit.

[4] Respondent alleges, however, that its land is located within the boundaries of the Sacramento and San Joaquin Drainage District and that the district was formed to protect its landowners (Stats. 1955, ch. 1075, p. 2047; Stats. 1961, ch. 11, p. 539). Respondent therefore argues that its land is only one of many parcels of land the Eastside By-Pass was constructed to protect and that any benefit it may have received was in common to the "community" under the rule articulated in *Beveridge* v. *Lewis*, *supra*, 137 Cal. 619.

Respondent's argument is not persuasive. The Eastside By-Pass was not constructed with money raised by the Sacramento and San Joaquin Drainage District nor was repondent's land assessed for the cost of this improvement. On the contrary, the project was paid for by the State of California with money taken from the state general fund. We must therefore assume that when the Legislature appropriated state money for a local public project, it believed the overall benefit to be derived by the people of the State of California from the reclamation of flood lands, the protection of state and public highways against flooding, and the elimination of health hazards justified the statewide expenditure; otherwise, the state donated its public funds to a small segment of private landowners contrary to the prohibition of article IV, section 31 of the California Constitution. Thus, we must also assume that if any increase in the market value of respondent's land resulted from the construction of the public project, it was not in common with the people of the State of California and was incidental to its main purpose.

The cases cited by respondent are distinguishable. In *Dunbar* v. *Humboldt Bay Municipal Water Dist.*, 254 Cal.App.2d 480, [62 Cal.Rptr. 358], the alleged special benefit, if any, was

essentially speculative, and the court merely held that the condemnor failed to sustain its burden of proof. Moreover, the court did not hold that a benefit is general as a matter of law merely because it is in common with other lands. The court simply suggested that this was one of the most common characteristics of a general benefit. Significantly, the court at page 486 stated: "'. . . If an attempt should be made to define affirmatively what constitutes the deductible special benefit, the only general observation that can be safely made is that a benefit is more likely to classified as a special or peculiar benefit the smaller the number of other estates upon which a like or similar benefit is conferred. . . .''

In *Podesta* v. *Linden Irr. Dist.*, 141 Cal.App.2d 38 [296 P.2d 401], the court held that if the condemnor was permitted to offset the alleged special benefit, the offset would have resulted in a double charge. The court at page 54 said: "Also, for the service of water through that channel, a charge could be made upon all lands receiving water. If that were done, and if plaintiffs were presently charged with the full value of the benefit, the result would be a double charge. This cannot be done."

We shall now direct our attention to appellant's contention that there is no substantial evidence to support the jury's verdict fixing the value of the special benefit, since this verdict is not within the range of the opinions expressed by appellant's two expert witnesses, both real estate appraisers. The first witness, Walter F. Willmette, testified that respondent's remaining land was benefited by the construction of the East-side By-Pass because respondent could not use the land for agricultural purposes without danger of periodic inundation and boldly opined that the amount of this benefit was $90,000. However, the witness did not describe, with particularity, what parts or to what extent respondent's remaining land was subject to inundation prior to the construction of the public improvement nor did he testify as to what extent the potential agricultural use had increased. Moreover, the witness did not relate his opinion on the value of the special benefit to the difference between the market value of the land in its "before" and "after" condition. On the contrary, Mr. Willmette stated that the value of the benefit was $90,000 because two engineers told him that this is what it would have cost respondent (including land and improvements) to construct its own private channel.

Appellant's second witness, Mr. William A. Murray, testified that respondent's remaining land was benefited to the extent of $57,800. He attributed $10,000 to the eight miles of all-weather graveled levee road and the remaining $47,800 to the restoration of lands located in the old channel and the increased potential use of lands no longer subject to inundation. However, this witness spoke mainly in generalities; he did not precisely identify, either in quantity or location, the old channel acreage that was restored. Moreover, he did not precisely base his opinion on the value of the special benefit to the difference between the market value of the land in its "before" and its "after" condition.

[5] There is of course a clear distinction between the essential characteristics of a special benefit and the measure of its value once the benefit has been found to exist. [6] As we have tried to demonstrate, a special benefit arises from the mere construction of the project, is peculiar to the land in question and is characterized by physical changes in the land and various other factors. [7] Moreover, whether land has been benefited by a public improvement, and if so to what extent, are questions of fact to be determined by the trier of fact.[3] [8] On the other hand, once a special benefit has been shown to exist the only relevant evidence of its value is the resulting increase, if any, in the fair market value of the property affected (*Sacramento etc. R.R. Co.* v. *Heilbron*, 156 Cal. 408 [404 P. 979]). And, it is this value which may be established only through the opinions of witnesses qualified to express such opinions (Evid. Code, § 813, subd. (a)). In other words, it is on the issue of value that the criteria used (highest and best land use, comparable sales, market data and similar factors) by the expert witness to support his opinion have no independent probative value (*People* ex rel. *Dept. of Public Works* v. *McCullough*, 100 Cal.App.2d 101 [223 P.2d 37]; *Redevelopment Agency* v. *Modell*, 177 Cal.App.2d 321 [2 Cal. Rptr. 245].[4]

[3] In the instant case the court, after defining a special benefit, instructed the jury that it was up to the jury to determine whether defendant's land was specially benefited by the public improvement and if so the extent of the benefit. The court gave BAJI Jury Instructions 508, 508-A and 509.

[4] See *Los Angeles County Flood etc. Dist.* v. *McNulty*, 59 Cal.2d 333 [29 Cal.Rptr. 13, 379 P.2d 493], for the contrary view. However, Evidence Code section 813(a) arguably adopts the view expressed in *People* ex rel. *Dept. of Public Works* v. *McCullough*, *supra*, 100 Cal.App.2d 101.

[9] With this distinction in mind, it is manifest that the testimony of appellant's witnesses does not have the convincing force required to induce a jury finding in appellant's favor on the issue of special benefits. The reasons given by one witness to support his opinion of the value of the special benefit were incompetent to establish its value. The other witness spoke mainly in generalities and did not precisely relate his opinion of value to market value. Thus, (as appellant's counsel conceded at oral argument) the jury was entitled to reject both opinions, and had it done so, with nothing more, appellant probably would not have appealed from the verdict. [10] The thrust of appellant's argument, therefore, is that the amount fixed by the jury as the value of the benefit is not supported by any other competent evidence.

We do not agree with appellant's contention. Respondent called its vice president, Lloyd Roduner, to rebut Mr. Willmette's opinion that it would have cost $90,000 (including land and improvements) to build its own channel to protect its land against periodic flooding; Mr. Roduner testified that respondent could have built a suitable levee to protect its land against inundation at a cost of approximately $1,680. The jury apparently believed this testimony and fixed the value of the special benefit accordingly.[6] Thus, if respondent's evidence is incompetent to establish the value of the special benefit, it was invited by appellant who cannot now complain on appeal. In other words, Mr. Willmette not only told the jury that respondent's remaining land was benefited by the Eastside By-Pass because it was no longer subject to periodic inundation, but he also said that the value of the benefit amounted to what it would have cost respondent to build a hypothetical private channel. Respondent rebutted this testimony with evidence that it would have cost only about $2,000 to build a suitable levee to protect its land against extensive flooding. Consequently, if the jury did not distinguish between the characteristic of a special benefit and how to measure its value, its failure to do so was invited by appellant's own witnesses. In short, if the jury was misled into believing that the cost of a suitable levee to protect respondent's land against inundation was the measure of value of the

[6]Lloyd Roduner testified that respondent could have built a levee by using its own employees and equipment. He estimated the number of hours required to build the levee. The jury obviously believed his testimony but rounded out the cost at $2,000.

special benefit it derived from the construction of the Eastside By-Pass, the misconception was engendered in the case by appellant, and it cannot complain under the doctrine of invited error (*Bondulich* v. *O. E. Anderson Co.*, 210 Cal.App. 2d 12, 17 [26 Cal.Rptr. 147]).[6]

[11] In any event, as we have repeatedly stated, appellant's witnesses did not precisely relate their opinions of the value of the special benefit to market value. On the contrary, it is crystal clear that at least one witness (Mr. Willmette) did not use market value as the criterion. Appellant merely suggests that when the witness stated that the value of the special benefit to defendant's land was $90,000, he meant that this was the increase in the market value. Thus, appellant argues that the reasons which he gave, albeit incompetent to establish market value, went to the weight, not the validity, of his opinion. By the same token then, it is arguable that when Mr. Roduner stated it would have cost respondent around $2,000 to build a levee to protect its land against inundation, he meant that this was the only increase in the land's market value, and his reasons went to the weight, not the validity, of the opinion. If this is true, the jury's verdict was well within the range of the expert testimony.[7]

[12] Appellant's second contention for reversal is that the court erred when it rejected appellant's photographs depicting the condition of respondent's land as of the time of trial; respondent's objection to the photographs was apparently sustained by the court on the ground that appellant was attempting to show an "after" condition of the property contrary to Code of Civil Procedure section 1248. However, appellant argues that the photographs were relevant on the issue of the special benefit to show the increased adaptability of respondent's land for agricultural purposes, which appellant claimed had resulted from the construction of the public improvement.

Appellant's argument on this point is persuasive. However, if error occurred, the error was harmless and does not require

[6] In the *Bondulich* case, a somewhat analogous situation, the trial court applied the wrong standard in determining appellant's liability. However, it was held that appellant could not complain on appeal because he had invited the error.

[7] Mr. Roduner was not only an officer of the corporation, but he had earlier qualified as an expert witness. He testified that he had special knowledge of the subject land and gave his opinion on the value of the land taken.

reversal of the judgment (Cal. Const. art. VI, § 13). The jurors saw a photograph of the "before" condition of the land. They also viewed the land during the trial and hence were able to make a comparison between its "before" and "after" condition. Moreover, the jurors heard all of the testimony of the expert witnesses on this issue. Thus, it is hardly likely that the jury would have reached a different verdict had the jurors seen the photographs to which appellant refers.

[13] Appellant's last contention is that the court erred when it denied appellant's offer to prove that respondent enjoyed a special benefit from the construction of certain ditches and a siphon which enabled respondent to irrigate its lands in a manner not previously possible. Specifically, appellant attempted to prove that respondent had drilled several wells on the one side of the by-pass and was able to irrigate its land on the other side by availing itself of the siphon which passed underneath the new channel. The court ruled, however, that these improvements were constructed pursuant to a special agreement in which respondent had given up certain riparian and other water rights in Ash Slough. In short, the court ruled that respondent paid for any benefit which it may have received from the construction of the ditches and the siphon by relinquishing certain valuable water rights under a separate agreement, and that the jury could not consider this benefit since defendant was not then claiming the loss of its water rights as a part of the severance damages.[8]

[8]The agreement to which the trial court referred reads in pertinent part as follows:

"NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

1. That District shall construct the following items in conjunction with the above mentioned Flood Control Project on the said hereinafter described real property of Corporation:

(a) Drain pipe through the proposed levee at the hereinafter Engineering Stations as said stations are shown on Department of Water Resources' maps entitled 'Lower San Joaquin River Flood Control Project, Interchange area to Avenue 18½', Sheets 1 through 37, Eastside Bypass Stations—Right Bank 388+50, 450+60, 468+60, 518+80 and 546+40—Left Bank Stations 460+00 (36" with riser unit).

(b) Levee road ramps as shown on the above referred to maps.

Ash Slough Stations right bank 21+10 (W.S. & L.S., plus channel crossing as shown on the sketch herein attached as Appendix B and entitled 'San Joaquin River Flood Control Project—Proposed Roduner Irrigation Facilities' dated May 15, 1963, and revised July 10, 1963), and made a part of this contract and 50+00 (L.S.) Ash Slough Stations Left Bank 25+00 (W.S. & L.S., and 1+70 (L.S. & W.S.)

Eastside Bypass Stations, right bank 587+70 (L.S. & W.S.), 561+80 (L.S. & W.S., plus channel crossing as shown on Appendix B and provide a 24" pipe under landside road ramp for drainage),

Appellant does not seriously contend that the court's interpretation of the special agreement between appellant and respondent is palpably erroneous. On the contrary, appellant is foreclosed from doing so for at its request the court instructed the jury as follows: "Now, in connection with severance, before the commencement of this trial the parties entered into an agreement relating to the rights of the Roduner corporation to use water from Ash Slough. As a result of the agreement, the question of the use of Ash Slough water by the Roduner corporation after the construction of the project is not before you. You asked a question about this yesterday, and we told you that the question of water rights and use is not in issue and not to be taken into account in assessing damages. In assessing severance damages, you are not to consider how the Roduner corporation will now use Ash Slough water." Manifestly, if any severance damage which resulted from respondent's loss of its riparian right in Ash Slough was not in issue because of the separate agreement which respondent made with appellant, as the instruction states, it would also necessarily follow that any benefit, *direct* or *indirect*, that respondent may have received from the construction of the improvements referred to in the agreement was also not in issue. In other words, even

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540+00 (L.S. & W.S.), 462+80 (L.S. & W.S.) 503+40 (L.S. & W.S.), Eastside Bypass Stations left bank 409+10 (L.S.), 421+60 (L.S. & W.S.), 461+70 (L.S. & W.S., plus channel cross as shown in Appendix B), 510+50 (L.S. & W.S.), and 532+00 (L.S. & W.S.).

(c) Structures for the conveyance of Ash Slough water as shown on the attached Appendix B, including extension of the existing 24" underground irrigation pipe as shown on said Appendix B, except syphon is to be located just down stream of Station 509+00 left bank Eastside Bypass Stations.

IT IS FURTHER AGREED the District shall pay the Corporation the sum of $1,500.00 and that the Corporation shall accept said sum as full and final payment as an in lieu payment and all claims for damages resulting from the District not constructing an irrigation ditch along the easterly levee of Ash Slough and the Eastside Bypass between the southerly end of the proposed ditch and the proposed syphon head structure as said ditch and syphon are shown on Appendix B.

IT IS FURTHER AGREED that in consideration of the District's construction of the said above structures, Corporation, its assigns and successors hereby and herewith waive any and all claims for damages which may arise from or connected with the construction of the Flood Control Project Structures on the herein described lands of Corporation (See Appendix A) including any claims for damages resulting from interference with any water rights, or access and drainage rights of Corporation, appurtenant to any part of Corporation's lands described in Appendix A, and any and all lands of Corporation contiguous thereto; . . ."

if it is assumed *arguendo* that the structures referred to in the agreement were constructed primarily for the purpose of taking care of appellant's riparian rights and that respondent's use of the siphon to irrigate its land with water taken out of water wells was incidental to this main purpose, as appellant asserts, the water well irrigation was nevertheless an incidental benefit which arose from the special contract and hence was part of the overall consideration of that contract.

The judgment is affirmed.

Conley, P. J., and Stone, J., concurred.