#34 1/8/64

Memorandum 64-4

Subject: Study No. 34(L) - Uniform Rules of Evidence (Valuation of Property)

At its November 1963 meeting, the Commission determined to reconsider the evidence in eminent domain bill. Attached are two copies of a Tentative Recommendation on this subject. Please mark your suggested changes on one copy and turn it in to the staff at the January meeting.

BACKGROUND

The evidence in eminent domain bill was originally introduced in 1961 upon recommendation of the Commission. (See attached pamphlet containing the recommendation and study of the Commission. If you were not a member of the Commission when the 1961 bill was considered, you may want to read the research study to supplement the material in the attached tentative recommendation.) The 1961 bill in an amended form passed the Legislature but was pocket vetoed by the Governor. In 1963, Senator Cobey introduced basically the same bill; it passed the Legislature, with some significant amendments, but again it was pocket vetoed by the Governor.

The Department of Public Works did not strongly object to the 1963 bill; but the office of the Attorney General advised the Governor to pocket veto the bill. We have not obtained a copy of the report made by the office of the Attorney General on the 1963 bill. However, we anticipate we will receive comments from the office of the Attorney General on the tentative recommendation on this subject. When these are considered, we will be able to determine the position of the office of the Attorney General and whether that position is sound.

The 1963 bill as introduced reflected changes approved by the Commission in the 1961 bill. Exhibit I (pink pages) is an extract of the Minutes of the August 1961 meeting of the Commission. The decisions made at this meeting were reflected in the 1963 bill (as introduced). The significant decisions made at the August 1961 meeting were:

(1) By a 4-3 vote, the Commission approved the capitalization of the reasonable net rental from hypothetical improvements as one means of determining market value. Commissioners Cobey, Edwards, Sato, and Spencer voted for permitting such capitalization. Commissioners Bradley, McDonough, and Stanton voted against the provision permitting such capitalization. [As indicated below, the 1963 bill was amended by Senator Cobey (after its introduction) to insert a compromise provision on this matter.]

(2) The Commission unanimously agreed to delete the provision in the 1961 bill that permitted an expert witness to consider offers to purchase the subject property in forming his opinion. The 1961 bill contained a provision that permitted this. The provision was added by the Senate Judiciary Committee after the 1961 bill was introduced; but the 1963 Legislature approved the bill without this provision.

(3) A provision permitting cross-examination of a witness upon whose opinion or statement a witness for an adverse party had based his opinion was approved by the Commission. No similar provision was included in the 1961 bill. The 1963 bill was approved by the Legislature with this provision included.

After the 1963 bill was introduced, the following significant changes were made:

(1) A provision was added to Section 1248.1 stating:

(c) In order to avoid unnecessary delay in the determination of the issues at the trial, the court, in the exercise of its sound discretion, may prescribe reasonable limitations (1) on the number of comparable sales or contracts, as defined in subdivision (b) of Section 1248.2, to which a witness may testify on direct examination and (2) on the extent to which a witness may state on direct examination the other facts and data upon which his opinion is based. The court may limit the extent or scope of cross-examination as it does in other cases.

This provision was designed to meet the objections that the bill would add to the length of trial and that the bill, by stating that the expert could state certain facts and data, would prevent the court from exercising its discretion to prescribe reasonable limitations on such testimony. The provision states the practice presently being followed by some trial courts.

(2) A provision was added to indicate that the witness is to be granted considerable freedom in determining which property is comparable. The provision states:

Subject to subdivision (c) of Section 1248.1 [the provision set out above], in determining whether property is comparable, the court shall permit the witness a wide discretion in testifying to his opinion as to which property the witness believes is comparable. In determining whether property is comparable, all factors affecting comparability shall be taken into consideration, including but not limited to whether such property is of the same or similar size to the property interest to be taken, damaged or benefited.

If the witness reasonably believes property is comparable, this provision indicates that the court should permit him to base his opinion on a sale of such property, subject, of course, to the power of the court to limit the number of comparable sales that may be stated on direct examination. The second sentence of the provision set out above was intended to make it clear that the size of the property claimed to be comparable, as compared to the size of the subject property, is a pertinent consideration in determining whether the property is comparable. Some cases listing the factors that determine whether property is comparable have not specifically included size as one of the factors.

(3) The right of a witness to base his opinion on a capitalization of income from a hypothetical improvement was restricted to cases where the party calling the witness did not believe that there were any comparable sales. The pertinent language of the 1963 bill reads:

> A witness may not base his calculation on an assumed rental of hypothetical improvements on the property or property interest to be taken, damaged or benefited, nor shall any evidence of income from hypothetical improvements be admissible for any purpose, if the party on whose behalf the witness is called has, or intends to have, any witness testify regarding any comparable sales or contracts, as defined in subdivision (b). This paragraph does not apply where the sole purpose of basing the capitalization of hypothetical improvements is to rebut a capitalization of hypothetical improvements used by an opposing party.

(4) The following section was added:

> 1248.5. Sections 1248.1 to 1248.4, inclusive, are intended to provide special rules of evidence applicable only to eminent domain proceedings and inverse condemnation actions, but are not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting "just compensation" as used in Section 14 of Article I of the State Constitution or the terms value, damage or benefits as used in Section 1248.

This section was added to make it clear that the bill did not provide a ground for expanding the concept of just compensation to include items that previously had been held not to be compensable in an eminent domain proceeding.

(5) The words "in the open market" were added to the introductory portion of Section 1248.2, which states the test for an open market sale.

(6) A provision was added to Section 1248.1(b) to indicate that evidence of the character of the improvement proposed to be constructed by the plaintiff is not subject to impeachment or rebuttal. This states existing law. It would not be practical to permit the property owner to contest the plans for the improvement. If the improvement is not constructed in the manner proposed by the plaintiff, the property owner has an action for inverse condemnation.

(7) The bill was amended to permit sales and leases of the subject property made after the date of valuation to be considered in determining the value of the property. The bill, as introduced, restricted sales and leases to those made before the date of valuation. Where, for example, a lease is made in good faith after the date of valuation of the part remaining, such lease is certainly some evidence of the value of the part remaining.

POLICY QUESTIONS

An examination of the tentative recommendation will disclose that it follows the 1963 bill with only a few changes. The text of the 1963 bill with some, but not all, of the changes recommended by the staff is set out as Exhibit II (white pages).

The following policy matters are presented for Commission consideration:

Separate bill.

The staff suggests that the legislation relating to valuation of property be a separate bill (not included in the bill proposing the comprehensive evidence statute). Of course, the separate bill on valuation of property would be drafted so that it would fit into the comprehensive evidence statute if both are enacted.

We believe that this is a desirable course of action for two reasons: First, we would not want to prejudice the comprehensive evidence statute by including material that has twice been pocket vetoed by the Governor. Second, we believe that there is a good chance that the bill on valuation of property will be enacted on its own merits, and we would not want the bill to be prejudiced because it is included in a comprehensive evidence statute.

Bill to cover all valuations of real property.

The staff suggests that the legislation on this subject cover all valuations of real property or an interest therein, unless otherwise specifically provided by statute. We believe that the bill should not cover valuation of personal property, primarily because many of the provisions of the bill would not apply in a personal property valuation case. Exhibit II (white sheets) indicates the revisions needed to make the 1963 bill apply to all valuations of real property, or an interest therein, unless otherwise provided by statute.

Substance of bill.

The staff recommends that the substance of the legislation on this subject be as set out in the attached tentative recommendation. This tentative recommendation is in the form of a new article that would be included in the comprehensive evidence statute if that statute and the valuation of property statute were enacted. The bill would have to include provisions to take effect if the comprehensive evidence legislation is not enacted. The following matters are noted for your attention in connection with the rules set out in the tentative recommendation. Note the comments under each rule; these indicate the change in existing law, if any, that would be made by the proposed rule.

Rule 61.1. See page 3 of the tentative recommendation for text of rule and explanatory comment. This rule was not in the 1961 and 1963 bill.

Rule 61.2. See pages 4-9 of the tentative recommendation for text of rule and explanatory comment. This rule is the same in substance as the 1963 bill. Note subdivision (c) which has not been considered by the Commission. In the tentative recommendation we have added "involving opinion testimony" at the end of subdivision (c).

Rule 61.3. See pages 10-26 of tentative recommendation for text of rule and explanatory comment. This rule is the same in substance as the 1963 bill except that we have substituted "For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in subdivision (e) or determining the value of a leasehold interest" for "Where a leasehold interest is the subject of valuation" in the introductory clause of subdivision (d).

In connection with subdivision (c)(1), it should be noted that existing case law permits consideration of whether a particular use would be profitable for the purpose of determining the highest and best use of the property. Does the language "nor shall any evidence of income from hypothetical improvements be admissible for any purpose" change existing law? Should the statute be revised or should a statement be inserted in the comment to make it clear that subdivision (c)(1) does not change the existing law on highest and best use.

Rule 61.4. See pages 27-33 of the tentative recommendation for the text of rule and explanatory comment.

The introductory clause of this rule has been revised to conform to Rule 56(3). See the first portion of the comment to Rule 61.4 for language of Rule 56(3). The introductory clause in the 1963 bill read in substance: "Notwithstanding the provisions of Rule 61.3, the opinion of a witness as to the value of property is inadmissible (or, if admitted, shall be stricken on motion) if it is based wholly or in part, upon . . ." The 1963 bill would have changed existing law, for under existing law the opinion of a witness ordinarily will not be stricken unless it is based entirely upon

incompetent matters. Certainly, the fact that an appraiser considered one of the matters listed in Rule 61.4, together with numerous other competent matters, would not be sufficient to have his opinion stricken under existing law. Actually, under existing law, only the incompetent portion of his testimony will be stricken, and the remainder of his testimony will stand for such weight as the trier of fact decides to give it.

Rule 61.5. See pages 34-36 of the tentative recommendation for the text of this rule and an explanatory comment. No similar provision was contained in the 1961 or 1963 bill.

Should the following be added to this rule:

> Nothing in this article shall be construed to repeal by implication any other statute relating to the valuation of property.

We want to make it very clear that we are not changing any rules for valuation of property that are now provided by statute. The provision suggested above is the same in substance as the one included in the hearsay evidence article and the privileges article.

Rule 61.6. See page 37 of the tentative recommendation for the text of this rule and an explanatory comment. A similar provision was contained in the 1963 bill. The Commission has never considered this provision.

Amendments and Repeals. See page 38 of the tentative recommendation. Section 1845.5 also was to be repealed by the 1961 bill and the 1963 bill.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 64-4 EXHIBIT I

Minutes - Regular Meeting
August 18-19, 1961

Senate Bill No. 205

The Commission considered Memorandum No. 26(1961) concerning Senate Bill No. 205, the bill relating to evidence in eminent domain cases. The Commission took the following actions.

(1) Opinion of property owner. The Commission approved the amendment made to Section 1248.1 of the Code of Civil Procedure which (a) deleted the provision in the original bill that the owner of the property being condemned is "presumed to be qualified" to express opinions as to the value of the property and (b) added language to state that an opinion as to the value of the property may be expressed by the owner.

(2) Relevance. The Commission approved the revision of Section 1248.2 that inserted a requirement that the data relied upon by an appraiser be relevant to the item of value, damage or benefit concerning which the appraiser expresses his opinion.

(3) Noncompensable factors. The Commission approved Section 1248.3(f) which makes it clear that an opinion of value, damage or injury may not be based on noncompensable factors.

(4) Gross receipts leases. The Commission approved the provisions of the bill which permit an appraiser to consider a lease based on a percentage of gross receipts in determining the reasonable net rental value of the subject property (Subdivisions (c), (d) and (e) of Section 1248.2).

Under the amended bill (a) a gross receipts lease on the subject property may be considered by the appraiser in forming his opinion and (b)

in determining the reasonable rental value of the subject property where gross receipts leases are customarily used for that type of property, the appraiser may consider gross receipts leases on comparable property.

It is becoming the practice to prepare leases for commercial property on a gross receipts basis. If an appraiser is not permitted to consider gross receipts leases, his opinion will not reflect the practice in the market and as a result the owner will be deprived of evidence necessary to support his contentions as to the value of his property. Accordingly, the appraiser in these cases should not be restricted to leases that fix a flat rental fee but should be permitted to consider gross receipts leases as well.

The objection to the use of gross receipts leases is that such leases reflect to some extent the ability of the management of the tenant and are in effect profit sharing agreements. Nevertheless, the consultant pointed out that there is a trend in the law (California included) to permit an appraiser to consider gross receipts leases. In addition, appraisers who have analyzed this problem are in agreement that this evidence is necessary in order to form an accurate opinion of value and that any approach that excludes gross receipts leases would be unsatisfactory. Not only are gross receipts leases considered in valuing property in the market place but buyers and sellers in the market recognize that any good management can reach the anticipated volume of business at a particular location. Commissioner McDonough objected to the provision that limits the use of gross receipts leases to cases where rentals are customarily so fixed. He expressed the opinion that the appraiser should be permitted to consider

a gross receipts lease, whether or not gross receipts leases are customarily used for that type of property.

(5) Capitalization of hypothetical improvements. The Commission approved the provisions of the bill which permit an appraiser to consider (for the purpose of determining the value of the subject property by capitalizing its reasonable net rental value) both (1) the reasonable net rental value of the land and the existing improvements thereon and (2) the reasonable net rental value of the property if the land were improved by improvements that would enhance the value of the property for its highest and best use (Subdivision (e) of Section 1248.2). Commissioners Cobey, Edwards, Sato and Spencer voted for and Commissioners Bradley, McDonough and Stanton voted against the provision relating to the capitalization of hypothetical improvements.

Capitalization of the reasonable net rental value of the property (based on the assumption that the land is improved by improvements that would enhance the value of the property for its highest and best use) would be useful in any case where the land is unimproved or where existing improvements do not enhance the value of the property for its highest and best use. In these cases a capitalization of the reasonable net rental value of the land as unimproved or as improved with its uneconomical improvement would not be as useful as a capitalization study that also took into consideration the capitalization of the reasonable net rental value attributable to the land if it were improved by improvements that would enhance the value of the land for its highest and best use.

The consultant stated that this is one of the most important provisions in the bill if we are to keep up with the times. He made a statement which is summarized below:

> In a number of trials in which his firm has been engaged, this approach has been used and it will be used much more. For example, it is necessary to use this approach in a case where the existing structure is old or run down and the property is a perfect location for a motel. It is frequent to find a piece of property that is underimproved or that has an obsolete improvement. In these cases, a buyer and seller in the market place consider the use to which the property can be put. The buyer will determine that he wants the property because he assumes that if he puts up a motel on the property he will have so many units and, based on managerial and other costs, his investment will yield a certain amount. Subdivision land is often sold the same way: how many units can be put on the land and what income and costs will result?
>
> Most of the developments, at least in Southern California, use this kind of approach. Sometimes the approach is more refined, sometimes it is rather crude. But this approach does ascertain the amount that the property--not in its present condition but as improved for its highest and best use--will produce.
>
> It is true that this approach involves the capitalization of a hypothetical improvement but this is characteristic of a rapid growing area. It is the way property is bought and sold. Admittedly, this approach would offer a jury the greatest chance for speculation. Nevertheless, it is not only a prime consideration but perhaps the prime consideration taken into account by buyers and sellers in the market. Purchasers buy property on what it will bring in--based on its highest and best use. This anticipated income is computed using a capitalization approach. Use of this approach is a necessary corollary to the valuation of property on the basis of its highest and best use.
>
> Some trial courts in California now permit the use of this approach. There are no appellate decisions in California. Most of the appellate decisions in other states do not permit this approach to be used.
>
> The question may be asked: why not use comparable sales rather than capitalizing hypothetical improvements? The difficulty of using the comparable sales approach is that it is difficult to find really comparable sales of commercial

property; property on one corner may be totally different from property in the same area on another corner. To find comparable sales it is necessary to go out on the periphery. Using sales that far from the subject property may make a substantial difference in the value of the property. We are not concerned with a case where there are 12 gas stations in a row and we are proposing to open the 13th. Instead, it may be the first gas station, the first motel or the first shopping center in the area.

It is not practical to limit the capitalization of hypothetical improvements approach to cases where there are no comparable sales. The difficulty is that one party will always come in with "comparable sales." For example, a sale of property across the street from the subject property will be presented as a comparable sale. But the area across the street may be one-half the area of the subject property and a motel could not be built on that property although a motel could be constructed on the subject property. Moreover, there may be one type of zoning on one half of the street and not on the other, or there may be a probability or rezoning or there may be a building existing on "comparable property" that may increase or decrease the value of the land. In the case of residential sales, comparable sales are something that can be discussed intelligently. But in the case of commerical property it is difficult and unrealistic to base valuations merely on sales of "comparable property."

A representative of the Highway Department made a statement. The substance of his statement may be summarized as follows:

Capitalization is only one of the three approaches to value: (1) comparable sales, (2) reproduction and replacement and (3) capitalization. The capitalization approach is, at best, very uncertain and unreliable. Changing the capitalization rate by one point may make a difference of thousands of dollars in the capitalized value.

Capitalization of rental property having existing improvements is speculative enough, but when the appraiser is permitted to construct a castle in the air--a structure not even built--and consider all the things that go into getting a net rental income to capitalize, you are getting into the worst type of speculation in the world. It is well enough to state that this is considered in the market. But here we are considering the trial of a case before the jury. We are trying to come out with a fair compensation for the property owner and it is going to be too confusing and misleading to the jury to try to determine that compensation if this type of evidence is used. It is hard enough as it is when other evidence, such as comparable

sales, is used. But when you speculate on nonexistent income from buildings not in existence, the jury will be confused, the trial will be lengthened, and the verdict is less likely to be a just verdict of compensation for the property owner and the condemning agency.

Moreover, this is not useful evidence; it is not reliable and probative evidence as to the value of the property or the compensation--it is the least reliable. There are so many other means of presenting and proving the fact of value without bringing in this incidental, speculative evidence that there is no justification for using evidence that is going to cause too much trouble for what you get out of it.

Limiting the capitalization of nonexisting improvements to cases where there are no comparable sales would not be of much help--you can never agree on what is comparable and what is not comparable. This type of provision would present the issue on whether these are comparable sales or not. Where there are several different contentions as to highest and best use, you may have comparable sales on one use but not on another. For example, there might be comparable sales if residential use is the highest and best use but none if commercial use is the highest and best use. A court could never determine whether or not there were comparable sales.

It was pointed out that (1) the opinion of the expert is the thing upon which the verdict is based and the other evidence is merely in support of his opinion and, accordingly, is taken into account only in weighing the opinion of the expert who is giving an opinion based on this theory and (2) the other party is free to question the expert on cross-examination and see if he can shake him on what he thinks the building will cost, rate of occupancy and capitalization, etc.

The Commission discussed whether permitting the use of this approach would extend trials. But it was noted, that this approach cannot be used in every case, for under Senate Bill No. 205 this approach can be used only if a well informed buyer and seller would consider it in determining whether to buy and sell the property in the market. It

was agreed that in some cases this approach would result in longer trials. But this is because the problem of property valuation is complex, not because this approach is not a valid one.

(6) Nature of improvements on and uses of property in the vicinity. The Commission approved subdivision (g) of Section 1248.2 which preserves the substance of the last sentence of existing Section 1845.5.

(7) Offers to purchase the condemned property. The Commission unanimously agreed to delete the provision of Section 1248.3 permitting an appraiser to consider offers to purchase the subject property in forming his opinion.

It was noted that the deleted provision was inserted in the bill by the Senate Judiciary Committee after extensive hearings on the bill. Attorneys who normally represent condemnees appeared before the Senate Judiciary Committee and advocated a much broader provision relating to offers. The provision inserted by the Committee was drafted by the Commission and is a provision that permits only a very limited number of offers to come in.

The staff expressed the opinion that the existing law permits an appraiser to consider an offer to buy the subject property in forming his opinion if the offer meets the conditions set out in Senate Bill No. 205.

The consultant suggested that the provision might be modified to exclude as a matter of law any offer made after the date of the resolution or the probability of the acquisition of the property by eminent domain. The consultant, however, still recommends that all offers be excluded for the reasons given in his research report.

A representative of the Department of Public Works objected to the provision permitting the property owner to introduce an offer to buy the subject property. He stated in substance:

> An offer is uncertain, unreliable, subject to fabrication and has very little probative effect compared to the damage it can do. An offer is the most inflammatory type of evidence; it can't be refuted and is almost impossible to deal with. Such evidence will confuse the jury.

(8) Reproduction or replacement approach. The Commission discussed Section 1248.2(f). It was noted that this provision permits the use of the reproduction or replacement approach when the improvements enhance the value of the property or property interest for its highest and best use.

The effect of this provision is to require that the land be valued for the use to which it is being put if the reproduction or replacement approach is used. For example, take a particular tract of land that is improved by a church and assume that the land itself would be worth $50,000 when used for church purposes but $100,000 when used for commercial purposes. Assume that the cost of replacement or reproduction of the church would be $250,000. If the reproduction or replacement approach is used, the land and improvement would be worth $50,000 plus $250,000 or $300,000. In other words, the land is valued for its highest and best use, which is--because the land is now improved by a church--use for church purposes. On the other hand, using the comparable sales approach, the appraiser could value the land at $100,000 (as bare land) and add thereto the salvage value of the church ($150,000 on the estimate that it would cost $100,000 to move the church to a new site) giving a total value of $250,000. Thus, the "highest and best use" provision is

intended to prevent the valuing of the land as bare land at its value for commercial purposes ($100,000) and then adding the replacement or reproduction value of the church ($250,000).

(9) Consideration of taxes in determining reasonable net rental value. The Commission approved the amendment to Section 1248.3(d) which makes it clear that taxes, as distinguished from assessed valuation, can be considered in determining reasonable net rental value.

(10) Apportioning sales price of comparable sale between land and improvements. The Commission disapproved the amendment made to subdivision (e) of Section 1248.3 which provides that an appraiser can apportion the price of a particular comparable sale between land and improvements for the purpose of comparison with the property to be taken, damaged or benefited. Subdivision (e) states the general rule that a witness may not testify to his opinion as to the value of comparable property. The justification for this provision is that the issue is the value of the subject property, not the value of other properties.

When there is allowed a break down of a comparable sale between land and improvements, it permits the appraiser to expresse an opinion as to either the value of the land or the value of the improvements. It would create problems in court. One witness would say the land is worth so much and the improvements so much; another witness would just reverse the figures. In effect, you are trying to prove the value, for example, of a piece of bare land by comparing it to a piece of improved property. It may take considerable time in court to break down the improved property between land and improvements and the estimates of the value of each would be based on speculation.

The Commission's report on Senate Bill No. 205 to the 1963 Legislature is to state that the elimination of this amendment will not prevent a witness, in discussing comparability, from stating whether or not the improvement is comparable and what the differences between the improvements on the subject and comparable properties are.

(11) Permitting cross-examination of a witness upon whose opinion a witness for an adverse party based his opinion. The Commission added the following new section to Senate Bill No. 205:

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

This new section would, for example, permit the plaintiff to call an oil expert and cross-examine him regarding oil deposits on the subject property where an appraiser for the defendant had based his opinion as to the value of the subject property upon the opinion of the oil expert.

RULE 61.1 DEFINITION OF "VALUE OF PROPERTY."

As used in Rules 61.2 to 61.5, inclusive, "value of property" means:

(a) In an eminent domain proceeding, the amounts to be ascertained under subdivisions 1, 2, 3, and 4 of Code of Civil Procedure Section 1248.

(b) In other actions and proceedings, the value of real property or an interest therein.

~~SENATE BILL~~ ~~No. 129~~

ARTICLE VII-A VALUATION OF REAL PROPERTY

~~Introduced by Senator Cobey~~

~~January 17, 1963~~

~~REFERRED TO COMMITTEE ON JUDICIARY~~

~~*An act to add Sections 1248.1, 1248.2, 1248.3, 1248.4, 1248.5 and 1248.6 to, and to repeal Section 1845.5 of, the Code of Civil Procedure, relating to eminent domain.*~~

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

RULE 61.2. OPINIONS OF WITNESSES AS TO VALUE OF PROPERTY

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

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

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

, in an eminent domain proceeding,

in an eminent domain proceeding

(c) In order to avoid unnecessary delay in the determination of the issues at the trial, the court, in the exercise of its sound discretion, may prescribe reasonable limitations (1) on

the number of comparable sales or contracts, as defined in subdivision (b) of ~~Section 1248.2,~~ to which a witness may testify on direct examination and (2) on the extent to which a witness may state on direct examination the other facts and data upon which his opinion is based. The court may limit the extent or scope of cross-examination as it does in other cases.

~~Sec. 2. Section 1248.3 is added to the Code of Civil Procedure, to read:~~

RULE 61.3. FACTS AND DATA UPON WHICH OPINION MAY BE BASED

~~1248.3.~~ The opinion of a witness as to the ~~amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248~~ is admissible only if the court finds that the opinion is based upon facts and data that a willing purchaser and a willing seller, dealing with each other 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 purchase and sell the property or property interest ~~to be taken, damaged or benefited,~~ which facts and data must be relevant to the ~~amount~~ to be so ascertained and may include but are not limited to:

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

(b) The price and other terms and circumstances of any sale of or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. Subject to subdivision (c) of ~~Section 1248.1,~~ in determining whether property is comparable, the court shall permit the witness a wide discretion in testifying to his opinion as to which property the witness believes is comparable. In determining whether property is comparable, all factors affecting comparability shall be taken into consideration, including but not limited to whether such property is of the same or similar size to the property or property interest ~~to be taken, damaged or benefited.~~

(c) The rent reserved and other terms and circumstances of any lease which included the property or property interest ~~to be taken, damaged or benefited~~ or any part thereof which was in effect within a reasonable time before or after the date of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property.

(d) Where a leasehold interest is the subject of valuation, the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of

gross sales or gross income from a business conducted on such property in cases where the rental is customarily so fixed.

(c) The capitalized value of the reasonable net rental value attributable to the property or property interest ~~to be taken, damaged or benefited~~ being valued, as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon, which may be based on a consideration of (1) the reasonable net rental value of the land and the existing improvements thereon and (2) the reasonable net rental value of the property or property interest if the land were improved by improvements that would enhance the value of the property or property interest for its highest and best use. In determining reasonable net rental value for the purposes of this subdivision:

(1) A witness may not base his calculation on an assumed rental of hypothetical improvements on the property or property interest ~~to be taken, damaged or benefited~~ being valued, nor shall any evidence of income from hypothetical improvements be admissible for any purpose, if the party on whose behalf the witness is called has, or intends to have, any witness testify regarding any comparable sales or contracts, as defined in subdivision (b). This paragraph does not apply where the sole purpose of basing the capitalization on hypothetical improvements is to rebut a capitalization of hypothetical improvements used by an opposing party.

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

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

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

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

RULE 61.3. FACTS AND DATA UPON WHICH OPINION MAY NOT BE BASED

~~1248.2.~~ Notwithstanding the provisions of ~~Section 1248.2~~ Rule 61.3, the opinion of a witness as to the ~~amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248~~ the value of property is inadmissible (or, if admitted, shall be stricken on motion) if it is based, wholly or in part, upon:

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

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

(c) The price at which an offer or option to purchase or lease the property or property interest ~~to be taken, damaged or benefited~~ or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease, unless such option, offer or listing is introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under ~~Section 1248.3~~. being valued Rule 61.2.

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

(e) An opinion as to the value of any property or property interest other than that ~~to be taken, damaged or benefited~~. being valued.

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

(g) The capitalized value of the income or rental from any property other than ~~the property to be taken, damaged or benefited~~. that being valued.

or property interest

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

Section 1248.4 deleted—covered by Rule 56(3)

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

~~SEC. 5. Section 1248.5 is added to said code, to read:~~

~~1248.5. Sections 1248.1 to 1248.4, inclusive, are intended to provide special rules of evidence applicable only to eminent domain proceedings and inverse condemnation actions, but are not intended to alter or change the existing substantive~~

RULE 61.5. CONCEPT OF JUST COMPENSATION NOT AFFECTED.

Rules 61.1 to 61.5, inclusive

law, whether statutory or decisional, interpreting "just compensation" as used in Section 14 of Article I of the State Constitution or the terms value, damage or benefits as used in Section 1248.

~~SEC. 6. Section 1248.6 is added to the Code of Civil Procedure, to read:~~

Section 1248.6 deleted—s covered by Rule 57.5

~~1248.6. If a witness testifies to his opinion of the value of the property or property interest to be taken, damaged or benefited and testifies that such opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called as a witness by the adverse party~~

RULE 61.5. APPLICATION OF RULES 56-61.5.

Except as otherwise specifically provided by statute, Rules 56 to 61.5 apply to the determination of the value of property in any action or proceeding.

~~and examined as if under cross-examination concerning the subject matter of his opinion or statement. Nothing in this section makes admissible an opinion which is inadmissible under subdivision (a) of Section 1248.~~

~~SEC. 7.~~ Section 1845.5 of the Code of Civil Procedure is repealed.

REPEALER

~~SEC. 8. This act does not apply to any action or proceeding that has been brought to trial prior to the effective date of this act.~~

TO BE REPEAIED

1845.5. In an eminent domain proceeding a witness, otherwise qualified, may testify with respect to the value of the real property including the improvements situated thereon or the value of any interest in real property to be taken, and may testify on direct examination as to his knowledge of the amount paid for comparable property or property interests. In rendering his opinion as to highest and best use and market value of the property sought to be condemned the witness shall be permitted to consider and give evidence as to the nature and value of the improvements and the character of the existing uses being made of the properties in the general vacinity of the property sought to be condemned.

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STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

A TENTATIVE RECOMMENDATION

relating to

The Uniform Rules of Evidence

Article VII-A. Opinion Evidence on Value of Real Property

May 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Draft: January 10, 1964

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning proposed Article VII-A (Opinion Evidence on Value of Real Property). The Uniform Rules of Evidence do not contain an article on this subject. This report is one in a series of reports being prepared by the Commission, each report covering a different article of the Uniform Rules of Evidence.

In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

JOHN R. MCDONOUGH, JR.
Chairman

March 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article VII-A. Opinion Evidence on Value of Real Property

BACKGROUND

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

A tentative recommendation of the Commission on Proposed Article VII-A (Opinion Evidence on Value of Real Property), consisting of Rules 61.1 through 61.6, is set forth herein. This article is not contained in the Uniform Rules of Evidence, but it supplements Revised Article VII (Expert and Other Opinion Testimony) of the Uniform Rules. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Mimeographed draft dated December 31, 1963).

Proposed Article VII-A deals with opinion testimony as to the value of real property or an interest therein. In brief, the proposed article provides that the only direct evidence of value of real property is the opinions of expert witnesses and that such opinions may be based only on

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[1] A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is thirty cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

factors that buyers and sellers in the market place take into consideration to determine value. To give some certainty to this basic standard, the proposed article lists certain factors that may be considered by an expert witness when relevant and lists certain other factors upon which an opinion cannot be based.

The proposed article is based, to a large extent, on a 1960 recommendation and study made by the Commission. See Recommendation and Study relating to Evidence in Eminent Domain Proceedings, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-1--A-65 (1961). Senate Bill No. 205 was introduced in 1961 to effectuate the Commission's 1960 recommendation. The bill was passed by the Legislature in amended form but was pocket vetoed by the Governor. In 1963, Senator James A. Cobey introduced Senate Bill No. 129 which was based on the 1960 recommendation of the Commission. Senate Bill No. 129 passed the Legislature in amended form but was pocket vetoed by the Governor.

The Commission has considered the objections made to its 1960 recommendation and has prepared Proposed Article VII-A with these objections in mind. Unlike the 1960 recommendation, the proposed article is not limited to valuation of property in eminent domain proceedings; it applies to all proceedings for the valuation of real property or an interest therein except where another valuation procedure is provided by statute.

The Commission tentatively recommends that Proposed Rules 61.1-61.6 be enacted as the law in California.[2] In the material which follows, the text of each proposed rule is set forth and is followed by a comment setting forth the major considerations that influenced the recommendation of the Commission.

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[2] The final recommendation of the Commission will indicate the appropriate Code Section numbers to be assigned to the proposed rules.

RULE 61.1. DEFINITION OF "VALUE OF PROPERTY"

As used in Rules 61.2 to 61.5, inclusive, "value of property" means

(a) In an eminent domain and inverse condemnation proceeding, the amounts to be ascertained under subdivisions 1, 2, 3, and 4 of Section 1248 of the Code of Civil Procedure.

(b) In other actions and proceedings, the value of real property or an interest therein.

COMMENT

This definition makes Rules 61.1 to 61.5 applicable to the valuation of real property, whether such valuation is made in an eminent domain proceeding or in some other action or proceeding. Rules 61.1 to 61.5 do not apply to the valuation of personal property, nor do they apply to the valuation of real property where some other statute contains specific provisions governing the valuation of such property which are inconsistent with Rules 61.1-61.5. See Rule 61.5.

It is important to note that Rules 61.1-61.6 apply only to proceedings conducted by a court. See Revised Rule 1(14) and Revised Rule 2.

RULE 61.2. OPINIONS OF WITNESSES AS TO VALUE OF PROPERTY

(a) The value of property may be shown only by the opinions of witnesses qualified to express such opinions and the owner of the property or property interest being valued. Such a witness may state the facts and data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion; and his statement of such facts and data is subject to impeachment and rebuttal.

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

(c) In order to avoid unnecessary delay in the determination of the issues at the trial, the court, in the exercise of its sound discretion, may prescribe reasonable limitations (1) on the number of comparable sales or contracts, as defined in subdivision (b) of Rule 61.3, to which a witness may testify on direct examination and (2) on the extent to which a witness may state on direct examination the other facts and data upon which his opinion is based. The court may limit the extent or scope of cross-examination as it does in other cases involving opinion testimony.

COMMENT

Subdivisions (a) and (b). Under subdivisions (a) and (b), a verdict as to the value of property must be based on the opinions of qualified valuation witnesses, that is, it must be within the range of the opinions as to value. The facts and data stated by a witness as the reasons for his opinion do not become evidence in the sense that they have independent probative value upon the issue of market value. Instead, they go only to the weight to be accorded his opinion. This is existing law. E.g., City of Gilroy v. Filice, ___ Cal. App.2d ___, ___, 34 Cal. Rptr. 368, 376 (1963); People v. Hayward Building Materials Co., ___ Cal. App.2d ___, 28 Cal. Rptr. 782 (1963); So. San Francisco Unified School Dist. v. Scopesi, 187 Cal. App.2d 45, 51, 9 Cal. Rptr. 459, 464 (1960); People v. Rice, 185 Cal. App.2d 207, 213, 8 Cal. Rptr. 76, 79 (1960); Redevelopment Agency v. Modell, 177 Cal. App.2d 321, 326-327, 2 Cal. Rptr. 245, 248-249 (1960) (jury view of subject property not proper basis for verdict lower than that shown by testimony of witnesses); People v. Nahabedian, 171 Cal. App.2d 302, 310, 340 P.2d 1053 (1959). See also People v. LaMacchia, 41 Cal.2d 738, 264 P.2d 15 (1953); People v. McCullough, 100 Cal. App.2d 101, 105-106, 223 P.2d 37 (1950)(jury may not render verdict in excess of that shown by testimony of witnesses). Cf. Los Angeles County Flood Control Dist. v. McNulty, 59 Cal.2d ___, 379 P.2d 493, 29 Cal. Rptr. 13 (1963).

Subdivision (a) makes the owner of the subject property competent to give an opinion as to the value of his property, whether or not he is generally familiar with such values. This is existing law. E.g., Long Beach City H. S. Dist. v. Stewart, 30 Cal.2d 763, 773, 185 P.2d 585, 173 A.L.R. 249 (1947); Kitchell v. Acree, 216 Cal. App.2d ___, ___, 30 Cal. Rptr. 714 (1963);

Harold v. Pugh, 174 Cal. App.2d 603, 609, 345 P.2d 112 (1959); Kahn v. Lischner, 128 Cal. App.2d 480, 487, 275 P.2d 539 (1954); City of Fresno v. Hedstrom, 103 Cal. App.2d 453, 461, 229 P.2d 809 (1951). See also Holt v. Ravani, 221 Adv. Cal. App. 272 (1963)(personal property).

Subdivision (a) permits the witness to state the matters upon which his opinion is based, whether or not he has personal knowledge thereof. Under the existing practice in California, the hearsay rule does not prevent a property valuation expert from stating the matters upon which his opinion is based; but, when the hearsay is entirely unsupported and completely unreliable, the court has the inherent power to prevent its use. A good statement of the existing law is found in People v. Alexander, 212 Cal. App.2d 84, 95-96, 27 Cal. Rptr. 720, 725-726 (1963):

> The specific question involved is whether in describing comparable sales the witness may rely for the facts upon his own investigation of records in the recorder's office, and in the courts, the stamps upon deeds and the statements of those who personally participated in the sales. The important evidentiary point involved is whether or not the opinion of value which the witness has given is sustained by proper reasons. From a practical standpoint, if each person previously involved in effecting comparable sales should have to be called to the stand to establish the detailed facts of such sales, it would lengthen litigation of this kind out of all reason and would make it almost impossible for the state or defending landowners to make a proper showing as to valuation opinion within a reasonable time and at reasonable expense. Therefore, within proper limits, facts acquired by hearsay and used by a valuation expert in support of his conclusion that certain sales are comparable and therefore furnish support for his opinion concerning value have been customarily received in evidence in this state. In People ex rel. Dept. of Public Works v. Donovan, 57 Cal.2d 346, 352 [19 Cal. Rptr. 473, 369 P.2d 1], it is said:
>
> "An expert may detail the facts upon which his conclusions or opinions are based, even though his knowledge is gained from inadmissible or inaccurate sources. [Citations omitted.]" The evidence here complained of was within the permissible scope defined by the authorities. It will be noted that this rule does not permit hearsay evidence of the opinion of other persons as to valuation.

In connection with this portion of subdivision (a), it should be noted that Proposed Rule 57.5 is designed to provide protection to a party who is confronted with an expert witness who is relying upon the opinion or statement of some other person. Proposed Rule 57.5 will permit a party to extend his cross-examination into the underlying bases of the opinion testimony introduced against him by calling the authors of opinions and statements relied on by adverse witnesses and cross-examining them concerning the subject matter of their opinions and statements. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Draft of December 31, 1963), page 10.

Subdivision (a) also makes it clear that the statement of the matters upon which an opinion is based is subject to impeachment and rebuttal. Since the opinion of the expert is only as sound as the reasons upon which it is founded, reasonable cross-examination to impeach the expert and rebuttal evidence to show that the opinion is based on incorrect facts or data is essential. This is the existing practice in California. See C.C.P. § 1872, retained by Revised Rule 58.5: expert "may be fully cross-examined" on reasons for his opinion.

Subdivision (b). The trial court in its discretion usually permits the trier of fact to view the property being valued. C.C.P. § 610; Laguna Salada etc. Dist. v. Pacific Dev. Co., 119 Cal. App.2d 470, 477, 259 P.2d 498, 502 (1953). Subdivision (b) makes it clear that a view of the property is not precluded by subdivision (a), but such view does not become evidence in the sense that it has independent probative value upon the issue of market value. This is existing law. Redevelopment Agency v. Modell, 177

Cal. App.2d 321, 326-327, 2 Cal. Rptr. 245 (1960). See also State v. McCullough, 100 Cal. App.2d 101, 105, 223 P.2d 37, 40 (1950). Contra, County of San Diego v. Bank of America, 135 Cal. App.2d 143, 149, 286 P.2d 880, 883-884 (1955) (dictum).

Subdivision (b) also makes it clear that subdivision (a) does not affect the right to introduce evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain case and that the defendant in such a case is not permitted to impeach or rebut evidence as to the character of the improvement proposed to be contructed. See People v. Ayon, 54 Cal.2d 217, 5 Cal. Rptr. 151 (1960). Under existing law, if the condemner makes structural alterations or construction changes that were not planned at the time the award was made and there are additional damages as a result, these may be recovered in an inverse condemnation action. See People v. Ayon, supra. Cf. Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943).

Subdivision (b) recognizes that testimony as to the nature and character of the property is necessary if the trier of fact is to understand and apply the testimony as to the value of the property. "Both parties may elicit on direct examination the expert's description of such tangible characteristics of the condemned property as physical condition, geology, location, improvements, present use, use permits, title flaws, and the present uses of other properties in the vicinity. See e.g., City of Los Angeles v. Cole (1946) 28 C.2d 509, 518, 170 P.2d 928, 933-34; Santa Clara County F. C. etc. Dist. v. Freitas (1960) 177 C.A.2d ___, ___, 2 C.R. 129, 131-32; Los Angeles County F. C. Dist. v. Abbot (1938) 24 C.A.2d 728, 737, 76 P.2d 188, 193; see also C.C.P. § 1845.5." CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 324 (1960).

Subdivision (c). This subdivision permits the trial court to exercise its sound discretion in prescribing reasonable limitations on the facts and

data that a witness may state on direct examination. Since County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957), the California trial courts appear to have only very limited discretion to exclude relevant evidence in cases in which the evidence would formerly have been excluded upon the ground that the probative value of the evidence was insufficient to justify the amount of time necessary to present it or the potential confusion of the issues. See discussion in CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 335-337 (1960). But see; e.g., People v. Stevenson & Co., 190 Cal. App.2d 103, 11 Cal. Rptr. 675 (1961); Los Angeles County v. Bean, 176 Cal. App.2d 521, 1 Cal. Rptr. 464 (1959). Subdivision (c) will not prevent a witness from stating on direct examination the facts and data upon which his opinion is based; but this subdivision will permit the court, for example, to require the witness to select the five or ten sales he considers most comparable to state on direct examination.

Subdivision (c) should be of assistance to the trial courts in their effort to avoid unnecessary delay in the determination of the issues in a real property valuation case. The subdivision states the practice now followed by some trial courts.

RULE 61.3. FACTS AND DATA UPON WHICH OPINION MAY BE BASED

The opinion of a witness as to the value of property is admissible only if the court finds that the opinion is based upon facts and data that a willing purchaser and a willing seller, dealing with each other 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 purchase and sell the property or property interest being valued, which facts and data must be relevant to the value to be so ascertained and may include but are not limited to:

(a) The price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(b) The price and other terms and circumstances of any sale of or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. Subject to subdivision (c) of Rule 61.2, in determining whether property is comparable, the court shall permit the witness a wide discretion in testifying to his opinion as to which property the witness believes is comparable. In determining whether property is comparable, all factors affecting comparability shall be taken into consideration, including but not limited to whether such property is of the same or similar size to the property or property interest being valued.

(c) The rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the data of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property.

(d) For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in subdivision (e) or determing the value of a leasehold interest, the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on such property in cases where the rental is customarily so fixed.

(e) The capitalized value of the reasonable net rental value attributable to the property or property interest being valued, as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon, which may be based on a consideration of (1) the reasonable net rental value of the land and the existing improvements thereon and (2) the reasonable net rental value of the property or property interest if the land were improved by improvements that would enhance the value of the property or property interest for its highest and best use. In determining reasonable net rental value for the purposes of this subdivision:

(1) A witness may not base his calculation on an assumed rental of hypothetical improvements on the property or property interest being valued, nor shall any evidence of income from hypothetical improvements be admissible for any purpose, if the party on whose behalf the witness is called has, or intends to have, any witness testify regarding any comparable sales or contracts, as defined in subdivision (b). This paragraph does not apply where the sole purpose of basing the capitalization on hypothetical improvements is to rebut a capitalization of hypothetical improvements used by an opposing party.

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

(f) The value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

(g) The nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties.

COMMENT

Rule 61.3 states the matter upon which an opinion as to the value of real property, on an interest therein, may be based. Rule 61.3

should be considered in connection with Revised Rule 57 which permits the witness to state on direct examination the reasons for his opinion and the matter upon which it is based and permits the judge to require that the witness states the matter upon which his opinion is based before testifying in terms of opinion. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Draft of December 31, 1963), page 9.

Prior to County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957), the witness in an eminent domain case was not permitted to state on direct examination the matter upon which his opinion was based. The Faus case held that the witness was permitted to state on direct examination the comparable sales upon which he based his opinion. The extent to which the Faus case permits the witness to state other valuation date on direct examination is not clear. Revised Rule 57 will make it clear that the witness may state the reasons for his opinion and the matter upon which it is based on direct examination. Revised Rule 57 is, of course, subject to Rule 45; and, in a property valuation case, also is subject to subdivision (c) of Rule 61.2.

The uncertainty created by the Faus case as to the valuation evidence admissible on direct examination will be eliminated by Revised Rule 57. Moreover, that rule will eliminate the situation that existed prior to the Faus case (and still exists in some trial courts) whereby it was necessary for a party to attempt to get his valuation data into evidence through cross-examination of the adverse party's witnesses. Thus, prolonged cross-examination was generated as parties attempted to introduce evidence through indirection that they could not

introduce directly. Under this system, the witness principally relying upon particular data never was given the opportunity to explain its relevance--he was always asked about the data that supported the adverse party's case. Insofar as the Faus case declared that sales evidence is admissible on direct examination, it has expedited the admission of this data. Revised Rule 57 will make it clear that the same rule is applicable to all valuation data. The rule does not make any new evidence admissible--it merely provides that what is admissible may be shown on direct examination by the witness who relied on it. Thus, no additional time should be required to prepare the case for trial. In fact, by permitting the evidence to be introduced at the trial in an orderly manner, Revised Rule 57 may actually expedite the preparation of a case for presentation. Accordingly, by substituting a direct method for the introduction of relevant evidence for an indirect method, by eliminating the uncertainty concerning the admissibility of this evidence on direct examination, Revised Rule 57, together with Rule 61.2(c) and 61.3(b), should shorten trial time and will result in better informed juries.

Introductory clause. In formulating and stating his opinion as to the value of property, the witness should be permitted to rely on and testify concerning any matter that a willing, well-informed purchaser or seller would take into consideration in determining the price at which to buy or sell the property. This basic standard is set out in the introductory clause of Rule 61.3. Since the trier of fact is trying to determinine the "market" value of the property, it should consider the factors that would actually be taken into account in an arm's length transaction in the market place.

To give some certainty to the basic standard set out in the introductory clause of Rule 61.3, subdivisions (a) through (g) of Rule 61.3 list certain factors that may be considered by the witness when relevant and Rule 61.4 lists certain other factors upon which an opinion cannot be based. For example, in modern appraisal practice, there are three basic approaches to the determination of value. These involve consideration of the sales prices of comparable property and other market data, the capitalization of the income attributable to the property, and the cost of replacing or reproducing the improvements on the property less depreciation and obsolescence. In Rule 61.3, specific recognition is given to these methods of appraising property for they are relied upon extensively to determine market value outside the courtroom.

Subdivision (a). This subdivision permits the witness to consider sales or contracts to sell and purchase the subject property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. If the sale is not too remote in time and is one freely made in the open market, there is no reason why the witness should not be permitted to consider it in forming his opinion as to the value of the property.

Subdivision (a) states the established rule for sales made before the date of valuation. E.g., Los Angeles County Flood Control Dist. v. McNulty, 59 Cal.2d ___, 379 P.2d 493, 29 Cal. Rptr. 13 (1963); Eatwell v. Beck, 41 Cal.2d 128, 134, 257 P.2d 643 (1953); Bagdasarian v. Gragnon, 31 Cal.2d 744, 755-759, 192 P.2d 935 (1948); Harold v. Pugh, 174 Cal. App.2d 603, 609, 345 P.2d 112 (1959). See also County of

Los Angeles v. Bean, 176 Cal. App.2d 521, 1 Cal Rptr. 464 (1959) (cross-examination of owner as to prior sale of subject property).

Although the California law is somewhat unclear, there is some authority permitting the witness to consider a sale of the subject property made after the date of valuation. Royer v. Carter, 37 Cal.2d 655, 548, 551-552, 233 P.2d 539 (1951). Cf. County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 79-80, 291 P.2d 98 (1955) (sale of comparable property); Hayward Union H.S. Dist. v. Lemos, 187 Cal. App.2d 348, 351, 9 Cal. Rptr. 750 (1960) (use of comparable property after date of valuation). See generally CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 332-333 (1960).

Subdivision (b). This subdivision permits the witness to consider sales or contracts to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. This is established law. E.g., County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957); County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 291 P.2d 98 (1955) (held proper to refuse to strike testimony of witness who relied on the price paid for comparable property seven months after the date of valuation). See CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 331-335 (1960).

Subdivision (b) also provides that the witness is to be granted considerable freedom in determining which property is comparable. If the witness reasonably believes property is comparable, the court should permit him to base his opinion on a sale or contract to sell and purchase such property, subject, of course, to the discretion of the court under

Rule 61.2(c) to limit the number of comparable sales that may be stated on direct examination. This provision of subdivision (b) will change the rule of the Faus case, supra, under which the trial judge must initially determine the question of comparability of the market and the properties for the purpose of admitting or excluding the evidence of comparable sales. As indicated in Faus, "[m]anifestly, the trial judge in applying so vague a standard [the standard set out in Faus] must be granted a wide discretion." 48 C.2d at 678, 312 P.2d 684. The result of the Faus case has been that condemnation trials have been lengthened, sometimes as much as several days. Although this result has not ensued solely from the fact that the trial court must determine initially for each sale whether the property was comparable, this requirement has been a factor in lengthier trials. The proposed changed will not prevent the court from excluding sales of property where the property or market obviously is not comparable, but it will do much to eliminate the time now consumed by the requirement that the trial judge rule on the comparability of each sale under the vague standard of the Faus case. Moreover, the right given the trial judge under Rule 61.2(c) will permit him to restrict the number of comparable sales that may be stated on direct examination. Thus, the proposed provision will permit the expert to select those comparable sales he will state on direct examination without running the risk that the particular trial judge will be unduly strict in his interpretation of what constitutes comparable property. For those sales that are not obviously not comparable, the trier of fact, whether judge or jury, must ultimately weigh the probative value of the comparable property's selling price for the purpose of weighing the witness' opinion testimony.

The net result of this provision of subdivision (b) and of Rule 61.2(c) should be to reduce the amount of time consumed in property valuation trials.

Subdivision (b) also states that all factors affecting comparability are to be considered in determining whether property is comparable, including whether the property thought to be comparable is of the same or similar size to the subject property. Although the Faus case did not specifically mention size as a factor in determining comparability, this is a factor taken into account in determing comparability. See CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 333 (1960). The significance of the factor will depend, of course, upon the circumstances in the particular case. See Covina Union High School Dist. v. Jobe, 174 Cal. App.2d 340, 349-350, 345 P.2d 78, 84 (1959) (where there was no sale of similar size and zoning to the property being valued, the trial court did not abuse its discretion by admitting into evidence considerably smaller sales of different zoning).

Subdivision (c). This subdivision permits the witness to consider the rental income from the subject property in forming his opinion as to its value. "[I]t is the general rule that income from property in the way of rents is a proper element to be considered in arriving at the measure of compensation to be paid for the taking of property." People v. Dunn, 46 Cal.2d 639, 641, 297 P.2d 964, 966 (1956). This information is essential in determining the capitalized value of the reasonable rental income from the subject property and in determining the value of a lease on the subject property. And in an eminent domain case, a lease of the portion of the parcel not taken, whether made

before or after the date of valuation, would be significant in determining damage or benefit to the part remaining.

Subdivision (c) is limited to rental income (as distinguished from the income or profits attributable to a business conducted on the property). Evidence of profits derived from a business conducted on the property has been traditionally considered too speculative, uncertain, and remote to be considered in determining market value. People v. Dunn, 46 Cal.2d 639, 641, 297 P.2d 964, 966 (1956) (dictum). This limitation on the factors a witness may consider has been criticized. E.g., CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 45-47 (1960); 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, A-55--A-60 (1961). Cf. People v. Alexander, 212 Cal. App.2d 84, 27 Cal. Rptr. 720 (1963) (although the income or profits that might be obtained from devoting land to a particular use is not a proper measure of compensation, the jury may consider profitability of a particular actual or proposed use in arriving at the highest and best use of the property).

Although subdivision (c) does not authorize the witness to consider the profits from a business in forming his opinion, it makes clear that he may consider a lease on the subject property where the rental is fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted thereon. Although the element of personal management is a factor that may have some effect on the amount of rental received under such a lease, this type of lease represents a major trend in modern real estate transactions. Winner, Rules of Evidence in Eminent Domain Cases, 13 ARK. L. REV. 10, 20 (1958-59).

Buyers and sellers know the potential business volume for a given location and know that any good management can reach that volume. If leases based on a percentage of gross receipts were excluded from consideration, many leases entered into in the open market could not be considered in the courtroom. In People v. Frahm, 114 Cal. App.2d 61, 249 P.2d 588 (1952), evidence of a rental based on a percentage of gross profits was held admissible. In a more recent case, the trial court admitted figures of gross receipts on a month-to-month lease as a basis for proving market value. People v. Stevenson & Co., Case No. 705457 (Parcels 2A & 2B) (Superior Ct Los Angeles County, Aug. 1959).

Subdivision (d). Subdivision (d) permits the witness to consider the rent reserved and the other terms and circumstances of any lease of comparable property freely made in good faith within a reasonable time before or after the date of valuation. This information is significant in determining the reasonable rental value of the subject property--information which is needed in using a capitalization of income approach and in determining market value of a leasehold interest.

Subdivision (d) makes it clear that the witness may consider leases of comparable property where the rental is fixed by gross receipts from a business on such property in cases where the rental is customarily so fixed. This limitation will restrict the consideration of gross receipts leases of comparable property to those cases where such leases are the best available evidence as to the fair rental value of the subject property.

Take a concrete example. Assume that the highest and best use for a particular corner lot is a gas station. If the Standard Oil Company

approached the owner of the lot to lease it for a gas station, the company would take into account traffic studies indicating with reasonable accuracy the amount of gas which could be sold at the station. This would indicate to the company the estimated revenue from the station and, hence, the amount that could profitably be invested in the station. On the other hand, if a prospective purchaser of the land approached the owner, the purchaser, too, might consult experts to determine the amount of rental income that could be derived from a lease for a gas station. The rentals in leases of this nature are, in many areas, now customarily fixed by a percentage of the gross receipts.

Neither the Faus case nor any California case reported since that time deals specifically with the question of the admissibility of comparable rents for the purpose of indicating the value of a leasehold interest. Code of Civil Procedure Section 1845.5 appears to sanction the use of comparable rentals for this purpose in eminent domain cases. But, although it would be the best type of evidence, California trial courts apparently seldom permit comparable rentals to be used in determining reasonable rental value for the purpose of a capitalization of income approach. Compare CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-36 (1961) with CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 33 (§ 2.21), 45-47 (§§ 3.10, 3.13) (1960). The holdings in People v. Dunn, 46 Cal.2d 639, 297 P.2d 964 (1956) (capitalization of income) and People v. Frahm, 114 Cal. App.2d 61, 249 P.2d 538 (1952) (valuation of lease) give some indication that existing law permits a witness to consider the type of evidence covered by subdivision (d). But, whether or not this subdivision changes existing law, the rule it

states is essential if the value of property determined in a court is to reflect the value of property determined in the market place.

Subdivision (e). This subdivision makes it clear that the witness may, when it is relevant, base his opinion of value upon a consideration of the capitalized value of the reasonable net rental value of the property being valued. He may not, however, base his opinion on the capitalized value of the income or profits attributable to the business conducted on the property. Except in the very unusual case where the party calling the witness contends that there are no comparable sales, the witness is restricted to capitalizing the reasonable net rental value of the property as it exists.

Under existing law, a witness may base an opinion upon the capitalized value of the reasonable net income from the property being valued. People v. Dunn, 46 Cal.2d 539, 297 P.2d 964 (1956). The change in existing law, if any, would result from the recommendation of the Commission that the witness be permitted to state on direct examination the matters upon which he based his opinion. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Draft of December 31, 1963), page 9.

In County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957), the cases holding that the witness could not state the reasons for his opinion on direct examination were overruled. The overruled cases involved evidence of income from the property as well as sales, even though the Faus case itself involved only sales. Despite the fact that all authorities for the exclusion of a capitalization of income study on direct examination appear to have been overruled, the existing practice

in California varies among the various trial courts: Some permit a capitalization study to be stated on direct examination; others restrict the extent to which such a study may be stated on direct examination. CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 303-306 (1960) suggests that a capitalization of study may be presented on direct examination. See e.g., Sill Properties, Inc. v. GMAG, Inc. ___ Cal. App.2d ___ 33 Cal. Rptr. 155 (1963) (evidence as to business profits or losses admissible in a non-eminent domain case); City of Oakland v. Partridge ___ Cal. App.2d ___, 29 Cal. Rptr. 388, 391-392 (1963); People v. Hayward Building Materials Co., ___ Cal. App.2d ___, 28 Cal. Rptr. 782 (1963) See also De Luz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 290 P.2d 544 (1955)(use of capitalization approach in assessment for property tax).

Subdivision (c) of Rule 61.2 permits the trial court to exercise its sound discretion in prescribing reasonable limitations on the facts and data that a witness may state on direct examination. This provides ample protection in cases where the detailed presentation of capitalization study on direct examination would not justify the amount of time necessary to present it or would unnecessarily confuse the trier of fact.

Paragraph (2) of subdivision (e) provides that a witness may not base his capitalization study on an assumed rental under an assumed lease which is fixed by a percentage of gross receipts from a business conducted on the property unless rentals of property for that kind of business are customarily so fixed. See the comment to subdivision (d) for a discussion of the desirability of permitting consideration of gross receipts leases in appropriate cases. In People v. Frahm, 114

Cal. App.2d 61, 249 P.2d 588 (1952), it was held that a witness may base his opinion of the value of property upon a reasonable rental income fixed by a percentage of the gross receipts, and for this purpose evidence of a gross receipts lease may be offered in evidence. In the Frahm case, the court permitted an expert to testify not only to the existing income from the lease, but also to what the reasonable rental income would be from a hypothetical lease if the property were then leased at prevailing market prices.

Although the mathematical delicacy of the capitalization study is well known, such a study is still one of the primary considerations of buyers and sellers in the open market and should not be excluded from court valuation procedures where the trier of fact is seeking to determine the price which would be fixed in an open market transaction. Where a capitalization study is manifestly illogical and unreasonable, the court, in the exercise of its discretion, may strike it from the record as speculative. Where there are substantial variances in such studies, still within the realm of reason, it is within the province of the trier of fact to consider the credibility of the respective witnesses. With the very stringent limitations it provides on the use of capitalization of income from hypothetical improvements and on consideration of gross receipts leases, subdivision (e) provides a desirable certainty that does not now exist.

Subdivision (f). This subdivision permits the witness to consider, when relevant, a summation study (reproduction less depreciation) in forming his opinion of the value of improved property. This is the third of the major methods of ascertaining the value of property, the other

two being the comparable sales approach and the capitalization of the reasonable net rental value approach.

Perhaps because of its apparent simplicity, the majority of the jurisdictions have admitted reproduction evidence for the purpose of proving market value. See 5 NICHOLS, EMINENT DOMAIN 244 (2d ed. 1950); 2 ORGEL, VALUATION UNDER EMINENT DOMAIN 9-10, 56 (2d ed. 1953); Winner, Rules of Evidence in Eminent Domain Cases, 13 ARK. L. REV. 10, 21 (1958-59). The California courts, representing a distinct minority, often summarily exclude such data on direct examination except in those instances when there would be no feasible alternative--particularly in situations in which the property involved is service type and is not ordinarily bought and sold on the market. Compare City of Oakland v. Partridge, ___ Cal. App.2d ___, 29 Cal. Rptr. 388 (1963) (excluding summation study as not applicable in the particular case) with City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933). See Joint Highway Dist. No. 9 v. Ocean Shore R. R., 128 Cal. App. 743, 18 P.2d 413 (1933) for possible distinction. For discussion and analysis, see 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-61--A-65 (1961). See also Annot., Eminent Domain--Value--Cost, 172 A.L.R. 236, 255-56 (1948). The effect of the Faus case on the apparent California rule is not clear.

If the expert bases his opinion upon a consideration of a summation study, he should be permitted to state the study on direct examination, subject, of course, to the power given the trial court under Rule 61.2(c) to limit the amount of detail that may be stated on direct examination. If the witness is clearly wrong or on weak ground in relying on a summation study, this can be shown on cross-examination.

And if such methodology is clearly inapplicable, the court may exclude such study as not relevant.

Subdivision (g). This subdivision permits the witness to consider the nature of the improvements on properties in the general vicinity of the property being valued and the character of the existing uses being made of such properties. This is relevant, for example, in determing the highest and best use of the property being valued. Subdivision (g) states existing law as found in Code of Civil Procedure Section 1845.5. See also Hayward Union High School Dist. v. Lemos, 187 Cal. App.2d 348, 9 Cal. Rptr. 750 (1960) (uses of comparable property after date of valuation may be considered).

RULE 61.4. FACTS AND DATA UPON WHICH OPINION MAY NOT BE BASED

Notwithstanding the provisions of Rule 61.3, the following matter is not a proper basis for an opinion on the value of property or an interest therein:

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

(b) The price or other terms and circumstances of any offer made between the parties to the proceeding to buy, sell or lease the property or property interest being valued, or any part thereof.

(c) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease, unless such option, offer or listing is introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Rule 61.2.

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

(e) An opinion as to the value of any property or property interest other than that being valued.

(f) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage or injury.

(g) The capitalized value of the income or rental from any property or property interest other than that being valued.

COMMENT

Rule 61.4 states certain matters that are not a proper basis for an opinion on the value of property or an interest therein. This rule should be considered in connection with Revised Rule 56(3) which states:

> (3) The opinion of a witness may be held inadmissible or may be stricken if the judge finds that it is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may then give his opinion after excluding from consideration the matter determined to be improper.

Revised Rule 56(3) states existing law. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Draft of December 31, 1963), pages 7-8.

Subdivision (a). This subdivision requires the witness to exclude from his consideration sales of comparable property to persons that could have acquired such property by condemnation. This will change existing California law. California, contrary to the weight of authority, allows such sales to be considered if sufficiently voluntary. See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-38 (1961); People v. City of Los Angeles, ____ Cal. App.2d ____, 33 Cal. Rptr. 797, 804-805 (1963).

A sale to a person having the power of condemnation does not involve a willing buyer and a willing seller. The costs, risks and delays of litigation are factors that often affect the ultimate price. These sales, therefore, are

not sales in the "open market" and should not be considered in a determination of market value. Moreover, sales to condemners often involve partial takings. In such cases valid comparisons are made more difficult because of the difficulty in allocating the compensation between the value of the part taken and the severance damage or benefit to the remainder. Thus, to permit the consideration of sales to condemners introduces "aggravating and time consuming collateral issues tending to promote confusion rather than clarity." Blick v. Ozaukee County, 180 Wis. 45, 48, 192 N.W. 380, 381 (1923). The limited number of times that such a sale can be labeled "voluntary," the complexity and strong possibility of prejudicing the condemnee when severance damages are involved in the taking of either the subject or comparable property, and the greatly increased amount of time and confusion involved in presenting this evidence, as compared to a normal sale, all combine to favor the exclusion of such sales.

Subdivision (b). Subdivision (b) requires the witness to exclude from his consideration any offers between the parties to buy or sell the property being valued. Pretrial settlement would be greatly hindered if the parties were not assured that their offers during negotiations are not evidence against them. Such offers should be excluded under the general policy of excluding evidence of an offer to compromise impending litigation. Subdivision (b) is consistent with Revised Rule 52 (which would change the existing California law under which statements made during settlement negotiations may be used as admissions). See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VI. Extrinsic Policies Affecting Admissibility (Draft of December 31, 1963), pages 27-28.

Subdivision (c). Under this subdivision, offers or options to buy or sell the property being valued or any other property by or to third persons should not be considered on the question of value except to the extent that an offer to sell by the owner of the property being valued constitutes an admission.

Oral offers are often glibly made and refused in mere passing conversation. Because of the Statute of Frauds such an offer cannot be turned into a binding contract by its acceptance. The offerer risks nothing, therefore, by making such an offer and there is little incentive for him to make a careful appraisal of the property before speaking. Thus, an oral offer will often cast little light upon the question of the value of the property. Another objection to permitting oral offers to be considered is that they are easy to fabricate.

An offer in writing in such form that it could be turned into a binding contract by its acceptance is better evidence of value than an oral offer. But written offers should not be considered because of the range of the collateral inquiry which would have to be made to determine whether they were an accurate indication of market value. Such an offer should not be considered if the offerer desired the property for some personal reasons unrelated to its market value, or if, being an offer to buy or sell at a future time secured by an option, it reflected a speculative estimate rather than present value, or if the offerer lacked the necessary resources to complete the transaction should his offer be accepted, or if it was subject to contingencies. Not only would the range of collateral inquiry that would be necessary to determine the validity of a written offer as a true indication of value be great, but

it would frequently be very difficult to make the inquiry because the offerer would not be before the court and subject to cross-examination.

In view of these considerations and the fact that the value of such evidence is slight, offers should be excluded entirely from consideration as a basis for determining market value except that an offer to sell which constitutes an admission should be admissible for the reasons that admissions are admissible generally.

The existing California law on whether offers to buy or lease the subject property or comparable property is not clear. One writer has suggested that the trend appears to be to admit on direct examination offers to buy or lease the subject property as one of the reasons for the witness' opinion of value. On the other hand, he states that offers to buy or sell comparable property are probably inadmissible on direct examination. CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 338-339 (1960). Compare with 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-41--A-47 (1961). See also Mears v. Mears, 180 Cal. App.2d 484, 505, 4 Cal. Rptr. 618, 631 (1960) (dictum).

Subdivision (c) states existing law insofar as it permits a witness for an adverse party to consider the owner's offer to sell when it constitutes an admission. People v. Ocean Shore R.R., 32 C.2d 406, 196 P.2d 570 (1948), affirming 181 P.2d 705, 728-729 (1947); Hull v. Sheehan, 108 Cal. App.2d 804, 805, 239 P.2d 704, 705 (1952). But see State v. Murray, 172 Cal. App.2d 219, 229, 342 P.2d 485, 491 (1959) (dictum). However, consistent with Rule 61.2, subdivision (c) provides that such an offer to sell is not independent evidence of value upon which a verdict may be based; it goes merely to the weight to be given to the opinion of the witness.

Subdivision (d). This subdivision requires the witness to exclude assessed valuation for taxation purposes from his consideration in forming his opinion as to the value of property. The assessed value of property is merely another person's--the assessor's--opinion of its value. In many instances the assessed value is not current and does not reflect recent market changes. And it is well recognized that property is usually assessed for purposes of taxation at far below its market value. For a comprehensive discussion, see 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES H-48--H-50 (1961).

Under existing law, assessed value is not a proper basis for an opinion, but older cases permitted the witness to be cross-examined on assessed valuation to test his knowledge of and familiarity with the property. Central Pac. Ry. v. Feldman, 152 Cal. 303, 310, 92 Pac. 849, 852 (1907). Cf. Stroman v. Lynch, 91 Cal. App.2d 406, 409, 205 P.2d 409 (1949). In recent years, more and more courts have criticized the admission of assessed valuation even for limited purposes, and it probably is no longer a proper inquiry on cross-examination. CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 262-263, 310 (1960).

Subdivision (e). This subdivision states that a witness may not base his opinion upon an opinion as to the value of any property other than that being valued. Opinions as to the value of comparable property should be excluded from consideration because their consideration would require the determination of many other collateral questions involving the weight to be given such opinions which would unduly prolong the trial. Opinion evidence on value should be confined to opinions of the value of the property being valued. This is existing law. E.g., Sacramento and San Joaquin

Drainage Dist. v. Jarvis, 51 Cal.2d 799, 336 P.2d 530 (1959); People v. Alexander, 212 Cal. App.2d 84, 27 Cal. Rptr. 720 (1963) (opinion based on opinion of another person as to value). Cf., People v. Johnson, 203 Cal. App.2d 712, 22 Cal. Rptr. 149 (1962).

Subdivision (f). This subdivision requires that the witness exclude from consideration in forming his opinion as to value the influence upon the value of the property of any noncompensable items of value, damage, or injury. Evidence of value, damage or injury based on noncompensable elements is not a proper basis for an opinion under existing law. E.g., Sacramento and San Joaquin Drainage Dist. v. State Reclamation Board, ____ Cal. App.2d ____, 29 Cal. Rptr. 847 (1963).

Subdivision (g). This subdivision is a specific example of the kinds of matters excluded from consideration under subdivision (e). The capitalized value of the income or rental from any property other than that being valued would require the determination of many collateral questions which would unduly prolong the trial.

RULE 61.5. APPLICATION OF RULES 61.1 TO 61.4

Except as otherwise provided by statute, Rules 61.1 to 61.4, inclusive, apply to the determination of the value of property in any action or proceeding.

COMMENT

Rule 2 restricts the Uniform Rules--including Article VII-A (Rules 61.1-61.6)--to proceedings conducted by a court; Rule 61.1 limits Article VII-A to proceedings for the valuation of real property or an interest therein; Rule 61.5 makes it clear that Rules 61.1 to 61.4 apply only to the extent that some other applicable statute does not contain inconsistent provisions. Thus, the proposed rules will provide one uniform set of principles that will apply in all court proceedings for the valuation of real property or an interest therein unless the Legislature by statute has determined that different rules are to apply in the particular case. See, for example, City of North Sacramento v. Citizens Utilities Company, ___ Cal. App.2d ___, 32 Cal. Rptr. 308 (1963) (condemnation of property of public utility under special procedure provided by Public Util. Code § 1401 et seq.).

Obviously, the new provisions will be most used in eminent domain and inverse condemnation proceedings. But the principles contained in the new provisions are sound for all court proceedings which are governed by principles of valuation contained in judicial decisions (as distinquished from those governed by valuation principles set out in special statutory provisions). For example, the new provisions will be used in cases involving fraud in the sale of real property. Civil Code Section 3343 provides in part: "One defrauded in the purchase, sale or exchange of property is

entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." The "actual value" referred to in Section 3343 is given its ordinary meaning--market value. Bagdasarian v. Gragnon, 31 Cal.2d 744, 753, 192 P.2d 935 (1948) ("neither sound policy nor business custom suggest that the words 'actual value' as used in Section 3343 should be construed differently from the identical language in the eminent domain statutes. No California cases have been found which are contrary to this interpretation").

The new provisions will also apply to determine "market value" in cases involving permanent injury to land or improvements. "The different kinds of real property and varying types of injury make it unwise to establish a fixed rule governing damages, and consequently a number of alternative theories are applied. [Citations omitted.] However, the basic and normal rule uses diminution in value as the measure, i.e., the difference between the market value of the land before and after the injury. [Emphasis in original.]" 2 WITKIN, SUMMARY OF CALIFORNIA LAW 1630 (1960).

On the other hand, the proposed article will not apply, for example, to assessments of taxable property by the assessor because the review of the assessor's decisions is by the County Board of Equalization, not by a court. The board acts judicially, and "the board's decision in regard to specific valuations and the method of valuation employed are . . . reviewable only for arbitrariness, abuse of discretion, or failure to follow the standards prescribed by the Legislature." De Luz Homes v. San Diego, 45 Cal.2d 546, 564, 290 P.2d 544 (1955). It should be noted, however, that assessors "generally estimate value by analyzing market data on sales of similar

property, replacement costs, and income from the property." De Luz Homes v. San Diego, 45 Cal.2d 546, 563, 290 P.2d 544 (1955).

RULE 61.6. CONCEPT OF JUST COMPENSATION NOT AFFECTED

Rules 61.1 to 61.5, inclusive, are not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting "just compensation" as used in Section 14 of Article I of the State Constitution or the terms "value," "damage," or "benefits" as used in Section 1248 of the Code of Civil Procedure.

COMMENT

This rule is included to make it clear that the substantive law relating to eminent domain and inverse condemnation proceedings--other than the rules of evidence--is not affected by the proposed rules. Thus, the rules of evidence provided in Rules 61.1 to 61.5 do not provide a ground for expanding the concept of just compensation to include matters that are now not compensable in an eminent domain or inverse condemnation proceeding.

AMENDMENTS AND REPEALS

Section 1845.5 of the Code of Civil Procedure provides:

> 1845.5. In an eminent domain proceeding a witness, otherwise qualified, may testify with respect to the value of the real property including the improvements situated thereon or the value of any interest in real property to be taken, and may testify on direct examination as to his knowledge of the amount paid for comparable property or property interests. In rendering his opinion as to highest and best use and market value of the property sought to be condemned the witness shall be permitted to consider and give evidence as to the nature and value of the improvements and the character of the existing uses being made of the properties in the general vicinity of the property sought to be condemned.

This section should be repealed. It is superseded by Rules 61.1 to 61.6 and by Revised Rules 56 to 61.