Date of Meeting: November 27-28, 1949

Date of Memo: November 2, 1959

Memorandum 2a

Subject: Study No. 36 - Condemnation

Two portions of the Eminent Domain study have now been received. In connection with the preparation of the study on Moving Expenses the consultant has conferred with the Los Angeles County Counsel's office, the Los Angeles City Attorney's office, the Division of Contracts and Rights of Way of the State Department of Public Works, and certain judges and appraisers. In preparing the evidence study, appraisers and judges were consulted.

Before considering the substance of the studies, the Commission may want to determine at this time whether it wishes to obtain the views and comments of other agencies and firms interested in the problems of eminent domain. If this information is desired, the Commission may want to decide now who should be consulted and when their views should be obtained.

Other agencies or firms that probably would have an interest are: Attorney General, County Counsels of major counties -- Alameda, Sacramento, San Diego, League of California Cities, County Supervisors Association, the State Bar Association, City Attorneys of San Francisco, Los Angeles, San Diego.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

(36)

October, 1959

# EVIDENTIARY PROBLEMS

# IN

# EMINENT DOMAIN CASES

This study was made at the direction of the Law Revision Commission by the law firm of Hill, Farrer and Burrill, Los Angeles.

# EVIDENTIARY PROBLEMS IN EMINENT DOMAIN CASES

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## PREFACE TO STUDY ON EVIDENTIARY PROBLEM

The pages that follow deal with the knotty problems connected with the introduction of evidence into condemnation trials. This entire area is plagued with doubts, controversies and confusion. The attempt has been made to attack each of these problems separately and to weigh the wisdom of various statutory changes involved. It is submitted that the proposals herein advanced may be separately and independently justified; the rejection of any particular recommendation should not necessitate, by reference, the disapproval of another. Nonetheless, throughout this study, we have also endeavored to integrate suggestions in one area with changes likely to be recommended or at least discussed in subsequent parts of this study. For example, the efficacy of the introduction of testimony involving comparative sales or offers is aided or weakened by the nature of pre-trial methods of discovery; these are both in turn affected to a great degree by the method adopted for litigating condemnation actions, i.e., by judge, jury, or commission system. The aim, therefore, has been to present an integral program, the parts of which, however, may independently be justified.

The proposed statute, attached at the end of this study, is only a tentative one. It is subject to minor changes in form and substance upon the completion of other phases of the overall study -- the culmination of which will be a complete and integral revision of eminent domain law.

# EVIDENTIARY PROBLEMS IN EMINENT DOMAIN CASES

## I. INTRODUCTION

The purpose of this entire study is, in the words of the California Legislature, "to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens." [1] The obvious implication of this directive is that the present law and procedure in this field are balanced against the condemnee and in favor of the condemnor. Whether, to what extent and wherein this is the case are the investigatory subjects of this study.

Is the law and procedure in eminent domain biased in favor of the condemnor and against the condemnee? To give a categorical answer to this question would be foolhardy; the nebulous concepts of "just compensation"[2] "value"[3] and the inherent impossibility of evaluating empirical award data preclude any conclusive answer on this point. Nonetheless, it has

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1. Letter from California Law Revision Comm. to Hill, Farrer & Burrill, July 19, 1956.

2. See United States v. Miller, 317 U.S. 369 (1943).

3. Hand, J. in United States v. City of New York, 165 F. 2d 526 (2d Cir. 1948).

been argued that the condemnor has various advantages, including staffs of experienced attorneys,[4] the faculty for obtaining better qualified experts,[5] the very power and authority to condemn in itself -- and especially the existence of the market value standard -- which combine to deny the condemnee, at least in theory, indemnification for his loss.

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

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4. Cf, Hadley, George C., "Highways and Freeways - Some Legal Problems Encountered", 21 Appraisal Journal 173 (1953) where the author points out how the Highway Department in this state has amassed numerous and detailed studies showing the effect of road building on abutting property and how the Department familiarizes its appraisers with these studies by taking them on extensive tours in regard to them.

5. It has frequently been stated that the condemnee is often not in a position to defray the heavy costs necessary for obtaining the services of qualified appraisers.

6. See United States v. New River Collieries Co., 262 U.S. 341 (1923). See also United States v. Miller, supra n. 2.

7. United States v. General Motors Corp., 323 U.S. 373, 382 (1945) ("the consequences often are harsh"); General Motors

critically examining the market value concept concludes in these words:[8]

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

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

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Corp. v. United States, 140 F. 2d 873, 874 (7th Cir. 1944) ("hard law"); Newark v. Cook, 99 N.J. Eq. 527, 538, 133 AH 875, 879 (Ch. 1926) ("That is the law. It works hardships."); Oakland v. Pacific Coast Lumber and Mill Co., 171 Cal. 392, 398, 153 Pac. 705, 707 (1915) ("We are not to be understood as saying that this should not be the law when we do say that it is not our law.").

8. 1 Orgel on Valuation under Eminent Domain 174 (2d ed. 1953) (hereinafter cited as Orgel).

9. The present "rigid rules" for measuring compensation were summarized by one court which stated, "Equitable principles, no matter how well founded, are rendered inoperative in a condemnation proceeding." United States v. 257.654 Acres of Land, 72 F. Supp. 903, 914 (D.C. Hawaii 1947).

10. See Report of Massachusetts Special Commission Relative to Certain Matters Pertaining to the Taking of Land by Eminent Domain, House No. 2738 (1956); "Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses", 67 Yale Law Journal 67, nn 12, 113, 115 (1957); Moving Cost Study, California Law Revision Comm.

In the 86th Congress a Bill, H.R. 1066 (1959), was introduced to establish a commission to study the adequacy of

they have been successful.[11]

But whereas the condemnees have called for a change in the concepts which the courts have adopted, because, as owners correctly submit, these concepts work against indemnification, adherents of the condemnors' position have called for reform in the practices utilized for litigating condemnation actions. The position of some condemnors,[12] and one that is supported by some independent authorities[13] is that more often than not the condemnee is being overindemnified. Particularly, their view is that the jury's natural sympathy for the condemnee,[14] the

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compensation for real property acquired by the United States. It declared, "Because many owners and tenants whose land is required for public works projects of the United States have not been able to move, relocate, and re-establish themselves and their families or business without loss, and because that inability denies persons and firms the equal protection of the law, creates hardships, and in some instances places an inequitable burden on former owners and tenants or local communities, it is necessary to study the present methods of determining compensation, the adequacy thereof, and whether or not the procedure thereto should be defined by statute to insure a clear definition of the rights of all concerned."

See, generally, Searles and Raphael, "Current Trends in the Law of Condemnation", 27 Ford L. Rev. 529, 549 (1959)

11. See, e.g. Act of July 14, 1952, § 401 (a), 66 Stat. 624; 71 Stat. 300, Publ L. No. 85-104 (1957); New York Sess. Laws 1957, C. 798, §1. See, generally, Pearl, "Review of Efforts to Minimize Losses in Condemnation", 26 Appraisal Journal 17 (1958).

12. See, e.g. Graubart, "Theory and Practice", 26 Penn. Bar Assoc. Q. 36 (Oct. 1954); Lewis, "Eminent Domain in Pennsylvania", 26 Purdon, Eminent Domain 1, 33-34. (1958).

13. See 1, 2 Orgel §§ 46, 247; Wallstein, Report on Law and Procedure in Condemnation 187 (1932).

14. Wallstein, supra n. 13. For an example of how juries give compensation for legally noncompensible losses, despite apparent directions to the contrary, see Reeves v. Dallas, 195 S.W. 2d 575, 580 (Tex. Civ. App. 1946). But Cf, Massachusetts Report 10, supra n. 10, where it was stated that "a jury trial usually

exigencies of administering condemnation programs, [15] the confusion produced in condemnation trials by evidentiary tactics[16] and the alleged unsupported estimates of the condemnees' experts combine to produce, in their opinion, excessive awards.[17] Those biased towards the condemnees' position also find numerous grounds for challenging the methods and procedures of conducting condemnation actions, but their main thrust is aimed at the rigidity of the value standard adopted by the courts, the presentation permitted of and the interpretation given to it by the judges. Each "side", therefore, believes its rights to be violated; each "side" calls for reform.

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does not materially increase the amount available to the property owner had he accepted a settlement." Part of the reason behind this statement, however, may be the court costs, expert and attorney fees the condemnee must bear by going to trial.

15. Considerable pressure by the public is often exerted upon public officials to liberalize compensation awards; this pressure is often accompanied by political threats of retaliation. See 67 Yale L. J. 61, 64, n. 13 (1957). Among other considerations administrators have to deal with is the factor that appraisers, even if competent, often make poor witnesses. Moreover, judges feel themselves not properly qualified to pass upon the evidence of value. Massachusetts Report 3, 14, supra. See, generally, 2 Orgel 247.

16. See Graubart, "Theory and Practice", 26 Penn. Bar Assoc. Q. 36 (Oct. 1954).

17. The argument that condemnation awards are excessive has brought about two major investigations of statutory procedures and court practices in New York City. In 1932 as a result of the Wallstein study, supra, the Administration Code in regard to condemnation was drastically changed. See discussion infra. More recently, in 1958, the Mayor of New York appointed a special Commission to investigage condemnation practices and procedures as a result of frequent revelations as to exorbitant condemnation costs. See N. Y. Times, June 19, 1958, p. 33; N.Y. Herald-Tribune, June 19, 1958, p. 1. The Commission had not, at the writing of this instant study, filed its Report.

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

Historically, the strictures of the market value system, the rigid interpretation given to the word "taken" and the restrictive definition given by the courts to the term "property rights" worked against the condemnee.[20] For some years, cognizant of these deficiencies, all concerned have sought to ease the onus of discrimination borne by the condemnee. By State constitutional changes, such as the California constitutional provision of 1879, where the owner was given protection against "damages" as well as "takings";[21] by the expansion of the concept of

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

19. It has been asserted that the very vagueness of the fair market standard permits courts "to adjust the rigid rules of law to the requirements of justice and indemnity in each particular case." Frank, J. quoting Orgel in Westchester County Park Comm. v. United States, 143 F. 2d 688, 691-92 (2d Cir. 1944). The general policy of "splitting the difference", however, casts serious doubt as to the wisdom of vagueness in this particular field of law.

20. See Kratovil & Harrison, "Eminent Domain -- Policy and Concept", 42 Calif. L. Rev. 596, 603-04 (1954); 2 Nichols on Eminent Domain 288 (3d ed. 1952) (hereinafter cited as Nichols); 67 Yale L. J. 61, 66-71 (1957); Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893).

21. See Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317 (1885).

"property" as exemplified by the landmark holding in People v. Ricciardi regarding access and view,[22] by periodical statutory provisions which provide for compensation in excess of market value;[23] and by judicial and administrative legerdemain with the market value standard (often in a manner that is not necessarily appropriate)[24] -- condemnees have largely improved their position.

But has the degree of improvement achieved in this manner been sufficient in light of the changing pattern, particularly the business scene of modern society? It is advanced that existing business practices,[25] the nature of current takings for governmental development,[26] advances in appraisal methods,[27]

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

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

24. Cf "'[T]he Law' as embodied in the cases has by no means invariably held to market value ... what the law has so generally adopted is a single form of words rather than a single standard of value." 1 Bonbright, Valuation of Property 413. See also Pearl, "Appraiser's Guide Under Law Allowing Moving Costs" 21 Appraisal Journal 327, 330 (1953). See, generally, 67 Yale L.J. 61, 81-88 (1957)

25. See pp 33-42, infra.

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

27. Interview with Charles Shattuck and authors, Aug. 7, 1959; Interview with Nate Libott and authors, July 17, 1959. See also Dolan, Harry, "Market Value - the 'Informed Guess'"

and our changing concepts of public policy are such as to make much of the present law anachronistic.

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

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20 Appraisal Journal 330 (1952); Winner, Fred, "The Expert Witness -- From a Lawyer's Viewpoint." 23 Appraisal Journal 254 (1955).

28. See United States v. General Motors Corp., 323 U.S. 373, 385 (1945) (Douglas, J. concurring in part: "promises swollen verdicts"). See also United States v. 3.544 Acres of Land, 147 F. 2d 596, 598 (3d Cir. 1945); Eagle Lake Improvement Co. v. United States, 141 F. 2d 562, 564 (5th Cir. 1944); Housing Authority v.Green, 200 La. 463, 474, 8 So. 2d 295, 299 (1942); Sawyer v. Commonwealth, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902); Bailey v. Boston & P.R.R., 182 Mass. 537, 539, 66 N.E. 203, 204 (1903); Sauer v. Mayor, 44 App. Div. 305, 308, 60 N.Y. Supp. 648 (1st Dep't. 1899).

29. See Lenhoff, "Development of the Concept of Eminent Domain", 42 Colum. L. Rev. 596, 608-611 (1942). Cf. United States v. Causby, 328 U.S. 256 (1946).

30. See, generally, 67 Yale L. J. 61 (1957).

31. Such an argument was raised though rejected in Bacich v. Board of Control, 23 C. 2d 343, 350, 144 P. 2d 818, 823 (1943)

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

## II. THE MARKET VALUE STANDARD

If the struggle in eminent domain is "between the people's interest in public projects and the principle of indemnity to the landowner"[32] then market value is its fulcrum. The dictates of the federal and all state constitutions call for just compensation.[33] But nowhere in these constitutions is the phrase any further crystalized. By and large, condemnation statutes fail to spell out the meaning of just compensation; generally, they merely state that the owner shall receive "value", "actual value", "fair cash value" etc.[34]

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("On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.") Compare also Davis v. County Commissioners, 153 Mass. 218, 224-25, 26 N.E. 848, 850 (1891).

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

33. U. S. Const. amend V; Calif. Const. Art. I, § 14. All but two states have similar provisions in their constitutions. In those states, New Hampshire and North Carolina, this requirement has been read into the state constitutions by the courts.

34. 1 Orgel 79-89.

A few states as well as England have actually actually adopted in statutes the term "market value" to represent the measure of just compensation.[35] But regardless of such terminology or lack thereof in the statute, it is, as the California courts have stressed, "universally agreed that the compensation required is to be measured by the market value of the property taken."[36]

Approximately 500 different definitions of market value appear in Words and Phrases.[37] There is, in fact, genuine dispute as to what this term means.[38] The controversy, however, is one not so much as what the term reasonably connotes as it is what the elements are that bring it about. That is to say, in the standard definition which equates market value with "the price that can be obtained under fair conditions as between a willing buyer and a willing seller when neither is acting under necessity, compulsion, or peculiar and special circumstances,"[39]

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35. See 9 and 10 Geo. 5, C. 57, § 2 (1919). See also 26 Purdon (Penn.) § 101; Wash. Stat. §§ 8.04, 112, 8.12.140; Revised Civil Statutes of Texas (1925), Art. 3625 (2).

36. Rose v. California, 19 C. 2d 713, 737, 123 P. 2d 505, 519 (1942); People v. Al. G. Smith Co., 86 Cal. App. 2d 308, 194 P. 2d 750 (1948); Sacramento Southern R. R. Co. v. Heilbron 156 Cal. 408, 104 P. 979 (1908). See also Spencer v. The Commonwealth, Law Reports 1907-08 (Melbourne: Charles F. Maxwell Ltd. 1908) V.S., pp. 418-444.

37. 26 (a) W. & P., pp 66-110.

38. 1 Orgel 93 et. seq.

39. Mahar v. Commonwealth, 291 Mass. 343, 197 N.E. 78 (1935).

disagreements mainly concern the factors that must be considered to determine this hypothetical result rather than the "ideal" itself. True, there are conflicts as to whether this standard presumes that price which an "informed" buyer would consider or merely that price which the "average" buyer, whether he be informed or not, would consider. Further, does the definition imply an average price or the highest price obtainable in the market? Both of these points are fairly much resolved in California; in this state, both the informed buyer and the highest price he could get are elements of the standard. As a working definition and as an accepted frame of reference, the meaning of market value is accepted as spelled out in Sacramento S.R. Co. V. Heilbron:[40]

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

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40. 156 Cal. 408, 104 Pac. 979 (1908). Compare Taeuber, "An Argument in Favour of the Acceptance of the Doctrine of One Value for All Purposes" 24 Appraisal Journal 561, 563 (1956) where the author, speaking of the definition of market value, states: "It may be argued that very few sales of property -- the main source of a valuer's data - satisfy the requirements of that definition. That may well be the case but at the same time the definition provides a set of circumstances which are easy to visualize in the concept of the hypothetical sale. Better to consider the hypothetical sale as taking place under those conditions than to attempt to conceive a definition which will cover the infinite range of combinations of circumstances when either of the hypothetical parties do not satisfy the requirements of that definition. In making the valuation, the available data and the methods of application should be used to meet the demands of the market value definition. If this concept of market value is accepted there can never be any ambiguity over the meaning of valuation."

The crux of the problem, therefore, is not the definition of this term, but rather the manner of ascertaining its elements, its inherent limitations, and the method of its presentation in a trial--it is to these that we shortly shall turn our attention.

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

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

have a high value to the owner and on the market but for the condemnor's purpose it is worth significantly less than would be demanded and received on an open market. Patently, to adopt value to the taker as the basic standard in eminent domain would be indefensible. It is for this obvious reason that the Supreme Court stated:[41]

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

Value to the Owner

If indemnity to the landowner is the equivalent of just compensation, as the courts have repeatedly indicated,[42] then the criterion "value to the owner" should, in theory, be the measure of compensation. While the courts are prone to stretch the market value standard or to declare there is no market value in order to effectuate indemnification, generally they are reticent to adopt the value to the owner standard in lieu of market value. The reason for this is basically a practical one.[43]

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41. United States v. Chandler-Dunbar Co., 229 U.S. 53, 81 (1913).

42. See, e.g., United States v. Miller, 317 U.S. 369, 373, (1943) ("the owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken.")

43. United States v. Miller, supra.

Value to the owner is a subjective standard; it enables the condemnee to present a myriad of factors--that may or may not in fact exist--to enlarge his award. It opens the door to sham and fabrication. It has no limits, it has no control. By itself, it seriously weakens the concept of "just compensation" --"just" to the condemnor as well as the condemnee.

Experience has indicated that value to the owner is often an unworkable standard. In England for many years,--from 1845-1919--the final criterion of compensation, as established by judicial decisions, was the value of the land to the owner.[44] But in 1919, a special Parliamentary Report pointed out that the utilization of the formula "value to the owner" resulted in entirely unpredictable compensation and excessive condemnation costs. This criterion, the Report asserted, often produced "highly speculative elements of value which had no real existence."[45]

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44. Laurance, Compulsory Purchase and Compensation 62 (1952); Ministry of Reconstruction, Second Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes 8 (Scott Rep. 1918) The basic reason for this standard was the public distrust of private railroad enterprises. See idem. Cf., Watkins, "Appraisal Practices in Great Britain", 21 Appraisal Journal 251, 253 (1953)

45. Scott Report, n. 44 supra.

As a result of this Report, that country adopted the market value standard. It should be noted here, however, that while market value has been adopted as the standard of compensation in Great Britain, other statutory provisions allow for losses in addition to market value and also, unlike the general rule in this country, the method of proving market value is far more liberal.[46]

On the other hand, Canada fairly clearly has adopted value to the owner as the final criterion of compensation. And in so doing, that nation has unequivocally refused to equate just compensation with market value--unlike its neighbor to the south. In 1951, after a period of some uncertainty, though based upon the growing pattern of valuation cases in that country, the Supreme Court of Canada in Woods Manufacturing Co., Ltd. v. The King[47] enunciated the final criterion and measurement of compensation. There the Court pointed out that the principles of compensation as adopted in England (prior to 1919) are now in effect in Canada. Succintly, in words adopted by the court, the final manner of measuring compensation is that:

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

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46. Cf., Watkins, "Appraisal Practices in Great Britain", 21 Appraisal Journal 251, 253 (1953); W. Rought, Ltd. v. West Suffolk County Council [1955] 2 All E.R. 337 (C.A.); 9 and 10 Geo. 5, C. 57, § 2 (1919).

47. [1951] S.C.R. 504.

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

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

The Canadian practice, therefore, as shown by this and other cases,[48] is that if there is a discrepancy in the amount the owner could get on the market and the amount he would be willing to sell for, the latter figure is the final determinant of compensation. This practice is, at least from the American point of view, a radical standard. Clearly, it is the extreme position as between the United States, England and Canada.

On one side, this country limits compensation, at least in theory, to market value. In addition, present methods of proving value are generally restricted to the real property itself.

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48. Diggon-Hibben v. the King, [1949] S.C.R. 712, 715; Lake Eire Ry. v. Bractford, (1917) 32 D.L.R. 219, 229; The King v. Northern Empire Theatres [1951] Ex. C.R. 321, 324.

On the other side, Canada not only adopts value to the owner at the final determinant but further allows for loss of "incidentals," "disturbance" costs and even grants an added 10% to the award simply because the owner must move against his will;[49] furthermore, Canada, like England, permits a broad latitude of factors to be presented to establish market value.

But while the final determinant of compensation in Canada is value to the owner, it is to be noted that market value is still the basic criterion for ascertaining value. Thus the Canadian Supreme Court has said:[50]

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

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

In instances wherein there is no market value--generally service type property like a park, church, college campus, recreational camp[51]--and on rare other instances,[52] American

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49. See, generally, 2 U.B.C. Legal Notes 623 (Mar. 1958).

50. (1917) 54 S.C.R. 395, 419. See also The King v. Eastern Trust [1945]. Ex. C.R. 115, 121.

51. Winchester v. Cox, 129 Conn. 106, 26 A. 2d 592 (1942) (park); Idaho Western Ry. Co. v. Columbia Synod, 20 Idaho 568, 119 Pac. 60 (1911) (college campus); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 138 N.E. 2d 769 (Mass. 1956) (recreational camp); In re Simmons, 127 N.Y. Supp. 940, 944 (Sup. Ct. 1910) (Church). See Housing Authority v. Green, 200 La 463, 474, 8 So. 2d 295, 298 (1942).

52. See 67 Yale L.J. 61, 85, nn. 109, 110.

courts have awarded compensation based upon a value to the owner criterion. Nevertheless, when courts carve out exceptions to the market value formula or circumvent its restrictions, they invariably stress that market value remains the general standard of compensation in eminent domain. Recently, however, some courts have frankly discarded the market value formula when it has failed to indemnify the condemnee for all his lossess, particularly "incidental losses." For example, in Housing Authority v. Savannah Iron & Wire Works, Inc.,[53] a case wherein the court allowed for "good will", the following charge to the jury was approved:

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

In 1958, the Florida Supreme Court allowed for moving costs, though recognizing that the weight of authority was clearly against its decision. The court said:[54]

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53. 91 Ga. App. 881, 884-85, 87 S.E. 2d 671, 675 (1955). The court admitted that the market value formula is the general measure of damages. However, unlike almost any other case at that time, it did not state that special conditions need to exist to set market value aside. Rather, the general standard was to be discarded if it failed to give fair and reasonable value to the owner.

54. Jacksonville Express Authority v. Henry G. DuPree Co., 108 S. 2d 289, 291 (Flo. 1958).

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

Each of these decisions, and more particularly the language employed, is unusual. It is too early to suggest that this is a definite trend in American Law. Each clearly represents, however, a generally held belief that the present strictures of the market value formula often prevent just compensation.

The market value standard has been attacked from still another point of view: its alleged objectivity. Courts are reluctant to go beyond the market value system for fear of creating a Babel of wilderness in place of a standard of symmetry. But this overlooks serious imperfections in the existing standard. For often the application of market value "involves, at best, a guess by informed persons".[55] The system produces radically inconsistent results. A 1932 study of condemnation practices in New York City illustrates that in practice market value is far from objective: expert appraisals made for the condemnor and for the condemnee generally varied by about one hundred percent.[56] Analysis of data on more recent Massachusetts takings

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55. United States v. Miller, 317 U.S. 369,375 (1943).

56. Wallstein, Report on Law and Procedure in Condemnation iv (1932).

reveals this inconsistently more startlingly. Not only do the figures confirm the New York findings--the difference between appraisals averaging fifty-six percent and ranging to a maximum of five hundred seventy-one percent--they represent the estimates of two or more state experts, each acting on behalf of the condemnor and apparently lacking the conflicting interest which might be said to underlie the divergent estimates of the earlier New York study.[57]

But we must conclude, that despite the inherent weaknesses of the market value system it should be retained as the basic criterion. First, despite its limitations, it is probably more objective and ascertainable than either of the alternatives.[58] Secondly, it usually has at least a rough correspondence with value to the owner - indemnity.[59] Lastly, the standard can be improved in both regards.

In the final analysis, market value must be retained, "faute de mieux" (for the lack of a better).[60]

But this conclusion really only begins the problem. The effort to insure just compensation in light of the retention of

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57. 67 Yale L. J. 61, 73 (1957).

58. Market value, like the appraiser in condemnation cases, may often be characterized as "that scoundrel who stands between the landowner and sudden wealth."

59. Cf., 1 Orgel 79; 1 Bonbright 447-49.

60. Idem.

market value falls into two fairly distinct paths. First, the system can be improved by strengthening the methods of presenting and proving, in a court, the elements of market value i.e., the value of the property taken. This is an "internal" approach. This study on "Evidence" is mainly directed along such a path. A second route for insuring just compensation, the external approach, is not too concerned with the evidentiary mechanics of arriving at market value. Rather it is directed toward those matters that should or should not be included as elements of just compensation in addition to the market value of the property taken, such as moving costs, lost profits, access, noise, etc., These matters shall be examined in subsequent studies.[61] For now, it is important to keep these distinctions in mind.

Before turning our attention to the internal problem the market value standard creates, we may briefly direct ourselves to the consideration as to whether the pertinent statutes in this state, which presently make no reference to market value (but merely call for "value" and "actual value"), should be amended to include the market value term. As pointed out above,

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

both in England and in a minority of states the market value term is employed by statute as the basic measure of compensation. Yet, California, like all other states without such statutory language, has adopted, by judicial interpretation, the market value standard--equating "value" with market value. Presuming that we are retaining the market value standard as the basic criterion, it would seem proper to include in the statute the substantive law as it exists. It would help to resolve the doubts of those who question the legal justification of using this standard;[62] and provision could be made for those cases wherein there is no market value. More important, however, it might help to avoid confusion that would otherwise likely result in ascertaining an award figure should just compensation be made to include factors not within the market value formula - such as incidental losses. These latter factors could be separately spelled out in other statutory provisions; precedence for this statutory method exists in England.[63]

On the other hand, the terminology "market value" need not be included in the statute since it exists by judicial adoption. Further, in support of the status quo of silence in this regard, it might be said that the inclusion of this term might raise other problems, particularly in those cases where there is no market value for the property and courts have found it necessary to openly resort to a value to the owner criterion.

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62. See e.g. letter to California Law Revision Comm. from Frank A. Flynn, Esq., July 31, 1958.

63. See 9 and 10 Geo. 5, c. 57, § 2, rr. 1-6 (1919).

More important, however, it is felt that it would be wiser to make this change only in conjunction with a complete recodfication of the laws of condemnation in this state. This general recodification is the final aim of the authors and this particular change will be considered for incorporation at that time.

## III. JUSTIFICATION FOR STATUTORY CHANGES

In subsequent sections of this study a number of proposed additions requiring statutory enactment will be recommended. Each will be examined in detail. In this section, it is proposed to summarize the reasons and generally justify major additions and changes, involving evidentiary rules, where, in truth, there is little (though some) precedent for statutory enactment in this field. Admittedly, almost all state codes contain hardly any provisions regarding the rules of evidence in condemnation. The principal reasons for this situation may be briefly summarized. First, it has only been in recent years that eminent domain in this country has grown to the staggering proportions it now occupies and, concurrently, have the problems been magnified.[64] Secondly, the courts have frequently maintained that matters of just

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64. See, e.g. Dolan "Market Value--the 'Informed Guess'" 20 Appraisal Journal 330, 336 (1952): "During the past ten years more federal condemnation cases have been filed in a single year in New York City than were filed in the entire past history of the federal courts in this area." See also House Committee on Banking and Currency, Subcommittee on Housing "Slum Clearance and Urban Renewal" H.R. Rep. No. 7, 84th Cong., 2d Sess. (1956); Housing and Home Finance Agency Ann. Rep. 406 (1956).

The extent of condemnation in California may be seen in the number of such cases litigated in Los Angeles County. From July 1, 1958, to June 30, 1959, there were 382 condemnation cases filed in that county alone, representing fairly much the annual number of such actions in recent years. (Data supplied by Harold J. Ostly, County Clerk.)

compensation are for judicial not legislative determination.[65] While in most cases, this position should not affect evidentiary rules, it may have had the effect of restraining legislative action in the field even though legislative action would be permissible. Lastly, there exists on the part of some, including some who are familiar as well as the far greater number among the bench and the bar less familiar with this field of law, that methods of proving valuation are not of the nature conducive to statutory control.

While the above argument has merit, it is advanced that there is now more than sufficient reason and necessity to justify and require legislative action:

(1) It is clear, as indicated by almost all who are familiar with the field[66] that the courts, California included, are quite uncertain as to the proper methods of

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65. See Monongahela Nav. Co. v. United States, 148 U.S. 312, 327 (1893) ("The Legislature may determine what private property is needed for public purposes--that is a question of political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation."); Dore v. United States, 119 Ct. Cl. 560, 581-83, 97F.Supp. 239, 242-44 (1951). See also 1 Nichols 347; 3 Nichols 157.

66. See Report of Massachusetts Special Comm. Relative to Certain Matters Pertaining to the Taking of Land by Eminent Domain 3, 14 (1956); Interview between Judge John J. Ford and authors on July 21, 1959; Graubart, "Theory and Practice," 26 Penn. Bar Assoc. Q. 36 (Oct. 1954); Lewis, "Eminent Domain in Pennsylvania," 26 Purdon, Eminent Domain 1, 33-34 (1958); Remarks made at American Society of Appraisers, Education Seminar, "Recent Decisions in the Law" on May 23, 1959, by Day,A. and Cleaves, M. (to be published).

presenting evidence in condemnation actions.

(2) That as a result of the recent and celebrated case of County of Los Angeles v. Faus,[67] which constituted a major change in the evidentiary rules of condemnation in this state, a great deal of uncertainty and further confusion has resulted. This can best be resolved by legislative action. The general pattern of uncertainty compounded by the Faus case has produced and will probably continue to bring about extensive and expensive litigation.

(3) Particular decisions of the California courts as to permissible and preferable methods of proving market value present serious doubts as to their justification. These decisions can best be remedied by legislative action.

(4) As a general proposition, codification tends to clarify; as such, all engaged in the field, including the courts as well as appraisers, will be put on notice as to the scope and limitations of various aspects of this area of the law.[68] And obviously, clarification will make the basic

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67. 48 Cal. 2d 672, 312 P.2d 680 (1957).

68. Compare, Pearl, "Appraiser's Guide Under Law Allowing Moving Costs," 21 Appraisal Journal 327, 330 (1953). There the author points out how often appraisers "subconciously" allowed for moving costs; a 1952 federal statute made provision for such costs. In light of that statute, the author adds, "...suffice to say that henceforth defense projects, large and small alike, will be removed from the pole of such influences, objective or subjective. All will know and be ever mindful that by the payment of his expenses in moving a fair and specific contribution is being effected toward making the seller truly 'whole.'"

standard--market value--more efficacious.

(5) Because modern concepts of appraising have changed and much of the legal concepts in the field have not kept pace with business practices, the introduction of statutory provisions may help to bridge this gap. As has been repeatedly stated: "The methods of proving valuation are 50 years outdated."[69]

(6) The technical difficulties involved in the ascertainment of valuation may be such that to some extent the present void (resulting from ignoring the problem by failure to enact specific legislation) may necessitate alternative and/or additional methods to ensure just compensation in eminent domain.

It is understood, of course, that whatever statutory additions are advanced in this area of evidence, they must be done with restraint. A good deal of discretion must remain with the courts simply because no definition can cover the wide ambit of situations that arise regarding this subject matter. The science of appraising, as such, cannot be put into legislation. Only limited areas can be controlled.

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59. See Lewis, 26 Purdon, Eminent Domain 1 (1958).

## IV. THE PRESENTATION OF MARKET VALUE

Two criteria should control the introduction or exclusion of evidence to prove market value. First, the matter to be introduced must be relevant to the question of compensation. Secondly, the evidence offered must to some extent conform with the Auxiliary Probative Policy, or expediency.[70] Factors of consideration affecting the latter criterion include materiality, the degree of confusion such testimony would create upon a jury, the amount of time it would take to present such matter and the number of collateral issues involved and, finally, the trustworthiness of such evidence. Often times, these two criteria are in conflict with each other. In reality, the principal issue in the Evidence problem is just this conflict.

This conflict, of course, cannot be resolved by selecting for all factual situations one of the two alternatives and employing that criterion to the exclusion of the other. Experience has shown, however, that these controversies tend to fall into a number of major and distinguishable categories. Each such category will be examined in light of both criteria. Recommendations will be based upon the probability or improbability of obtaining expediency and

70. See County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957); People v. Cava, 314 P.2d 45 (1957) (case dismissed).

insuring just compensation at the same time.

## A. TRINITY RE-APPRAISED

There are three basic methods of appraising real property for the purposes of ascertaining its market value. They are (1) the market data (or comparative sales) approach; (2) the income (or capitalization) method; and (3) the summation analysis (or reproduction less depreciation formula). Where applicable, appraisers utilize all three approaches in arriving at market value for a particular piece of property. Each approach, however, has serious drawbacks. Rarely does any one approach present an unchallengeable market value figure; rarer still does an appraiser admittedly fail to consider alternatives to support whatever approach he designates as most proper. We shall briefly review each approach before examining each in detail.

The principally utilized method of the Trinity approach is the comparative sales method. Patently, the main problem to this method is the determination of "comparative." In this regard, the appraiser may need to consider, among other things, the proximity of time and location between the subject property and the "comparable" sale and often he must go beyond this and go into the differences in zoning, terrain, adaptability and other factors depending upon the particular property.

There are also other serious difficulties and shortcomings to the comparative approach. These include situations wherein controls or restrictions interfere to an unusual degree with the free operation of market forces. Furthermore, oftentimes market information is lacking or incomplete. When available, there is an inherent risk involved in the subjective process of adjusting and evaluating the differences in time, location and other characteristics of the two properties. Also care must be taken to eliminate the isolated, forced or capricious sale not representing true market value.

The second method of valuation is the capitalization approach. Capitalization is the process of arriving at value by expressing the principal amount which will earn the indicated income at the appropriate return.[71] This approach

71. See Schmutz, George cited in McMichael's Appraising Manual, 48-49, (Prentice-Hall 1931):

"By the capitalization method is meant the estimation of value based upon the earning capacity of property, present and future. It is axiomatic in real estate appraising that, while it takes brick, mortar, lumber and labor to create a building, once the structure is erected a buyer or owner is not interested in the number of bricks in the building nor their costs per thousand nor the labor cost in combining these into the whole. His only interest is in the amount of income the structure will produce. Nor can it be said that this income is from either the land or the improvement for the simple reason that it is the resultant of the combination of the two and any attempt to segregate the income must necessarily be highly arbitrary. In the capitalization method the depreciated present value of the improvement is estimated. Next the gross income or reasonable expectancy is estimated; then expenses are estimated, including interest on the capital

obviously can be used to evaluate only income or potential income property. And this approach, too, has its shortcomings. First of all, it may not be applicable in instances where and to the extent income derived is due to the business conducted on the property rather than to the property itself. This is one of the major reasons courts are strict in excluding such data. Secondly, the capitalization rate is the resultant of not only an intricate and detailed process but also, in addition, is heavily based upon non-concrete elastic and subjective factors and a small variation in the rate can have an enormous effect on the value of the property. Furthermore, in the utilization of the capitalization method other subjective factors enter such as the selection of the

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invested in the building as well as depreciation; then the difference between the income and expenses is the surplus productivity or income imputable to the land which, capitalized at the proper rate of interest, will produce the capitalized land value, which when added to the present building value will show the capitalized value of the property. It is apparent that the estimation of value by the capitalization method is, to a large extent, mathematical or actuarial. However, the one factor that requires more than ordinary judgment in its selection is the rate of capitalization. If a 4% rate were used the land value found would be just twice that if an 8% rate were employed. Even the difference of 1%, as between 6% and 7%, will produce a difference of 17% in land value resulting therefrom. The importance of the selection of the proper interest rate for capitalizing land value may be shown in the accompanying table. It is assumed that the net income imputable to the land is $6,000 per year. Then--

$6,000 capitalized at 4% has a capitalized value of $150,000,
$6,000 capitalized at 5% has a capitalized value of $120,000,
$6,000 capitalized at 6% has a capitalized value of $100,000,
$6,000 capitalized at 7% has a capitalized value of $84,714,
$6,000 capitalized at 8% has a capitalized value of $75,000."

vacancy, management and other expense factors and the rate of depreciation.

For these reasons--basically because it tends to confuse the court and jury and often brings up "collateral" matters--courts generally, as will later be shown in detail, exclude the presentation of an income analysis except that in most instances rents may be capitalized to show the value of rental property.[72]

The summation analysis or reproduction less depreciation approach is the third method of estimating value. This method estimates (1) the value of the land considered as vacant and available for improvement in addition to (2) the depreciated replacement cost of the improvements.[73] A property usually cannot have a value in excess of its cost of reproduction--the price at which an equivalent and at least equally desirable holding can be acquired;[74] thus, in most instances the summation method represents the highest value the property can have on the market. At a minimum, it serves as a check on the other methods of appraising.[75]

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72. See, generally, 18 Am. Jur., Eminent Domain §345; 1957 Ill. Law Forum 291; Diamond, "Condemnation Law," 23 Appraisal Journal 564, 575-77 (1955).

73. Handbook for Appraisers, American Institute of Real Estate Appraisers 3.

74. Falloon, "Appraisal Fundamentals and Appraisal Terms," 19 Appraisal Journal 106-07 (1951); 2 Orgel 1-3.

75. Idem; Diamond, "Condemnation Law" 23 Appraisal Journal 564, 571 (1955).

Yet, like each of the other approaches, this method has its drawbacks, which the courts are quick to indicate. Foremost among the drawbacks is the difficulty of ascertaining whether the physical structure is adapted to the land. Certainly a very new and expensive residence amidst a slum area is certainly not susceptible to the reproduction approach. Furthermore, another drawback is the difficulty in determining the proper amount of depreciation. Is it functionally as well as physically depreciated and if so, to what extent? And how do you measure such depreciation? Is the structure now obsolete? These are difficult questions and plague this approach, not only to the courts but to appraisers as well. The courts, however, often tend to take the path of least resistence and effort: they often exclude the introduction of such data.

The above examination of the Trinity approach to market value is, admittedly, brief. In subsequent pages we will examine each more fully in an attempt to indicate what statutory changes need to be made. But even this brief review permits us now to show that the present tendencies and rulings of the courts are not attuned to the existing complexities of the market, and we may query: what price simplicity?

It is advanced herein that the dual tendency of the courts to limit the presentation of market value to the comparative sales approach and/or to label this method the

"best evidence" constitutes an unwarranted and often erroneous simplification of the value problem. Such an approach is blind to the advancement of appraising techniques [76] and, more, to the market place. In an effort to achieve expediency and simplicity, it reconstructs a Procrustean Bed. If the subject does not fit comfortably--and with comparative ease--into the ready-made bed, then the victim's head and/or feet are cut off down to the convenient size. There is no justification for the existence of such a limited area of approval when the advancements in appraising techniques are fairly reliable (if not simple) and when the market place is oblivious to such judicial restrictions.

And buying and selling in the mid-Twentieth century is far different in the market place than it is as viewed from the courthouse. This assertion can be no better supported than by the testimony and writings of those long engaged in the appraising as well as the real estate field. We begin by quoting extensively an appraiser with many years' experience who stresses that the courts' interpretation of value no longer really reflects value and that value today is derived and molded by many more factors than comparable sales.[77]

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76. Interview with Charles Shattuck and authors, Aug. 7, 1959; Interview with Nate Libott and authors, July 17, 1959.

77. Dunn, "Some Reflections on Value in Eminent Domain Proceedings," 24 Appraisal Journal 415, 416-418 (1956).

"The courts generally adhere to the theory that only sales of comparable real estate may be introduced as evidence of value. What creates the sale, what knowledge buyers and sellers possess, and how they acquire such knowledge, so far as the present interpretation by the courts is concerned, are deep psychic mysteries that cannot be introduced as evidence...

Why is land at the corner of State and Madison Streets in Chicago worth $25,000 per front foot, while 600 feet west at Dearborn Street, it is worth $6,000 per foot?...

Why is land at 63rd and Halsted Street, nine miles from State and Madison Streets, worth $8,000 per front foot; but at 62nd and Englewood Streets, less than 1,000 feet away, it is worth only $75 per front foot?

Why is land on Broadway at Thorndale Avenue (one of the best automobile row streets in Chicago), zoned for commercial use, worth only $250 per foot; while on Sheridan Road, two blocks east, zoned for residential use, it is worth $400 per front foot?

Many other contrasts could be cited in Chicago or any other large city in the country. This phenomenon of one site being worth more, sometimes much more, than another site only a short distance away, is not peculiar to any one city or any one time. It is one of the basic truths of real estate economics...

The large chain store organizations, national in scope, do not determine the value of a location they wish to acquire, by purchase or lease, merely by asking for sales prices within a mile or half-mile of the location. Long ago they established methods of value determination by a scientific analysis of such factors as:

Population trends.
Payroll totals.
Stability of payrolls.
Traffic counts.
Direction of travel.
Time of travel.
Age and sex of persons counted.
Percentage of travel on foot.
Area factors that cause the assembly of people.
Quality of government.
Taxes and their trend.

"These and many other data are assembled and weighed by time proven scales, and from them a decision can be made as to the value of the property for puchase or lease for merchandising purposes. Equally scientific methods, well known to professional appraisers, determine value of real estate for other uses...

In a recent condemnation case, the property in question involved a leasehold of land made in 1931 and on which the lessee had built an expensive department store. The lease is for 99 years, the tenant pays all taxes, and the rental is a very substantial sum. The tenant is two large national merchandising firms, with top rating and assets of many millions with no bonded indebtedness or mortgages.

In such a situation, any appraiser knows that the value of such a property is purely the present worth of the income for the unexpired term of the lease measured by some rate of interest consistent with the character of the security of the lease.

But can such evidence be introduced in court as a measure of value? No, it cannot ! 'The only measure of value is comparable sales within a mile,' said this particular court. Since there is no comparable property within the area circumscribed, there could not be any such sale.

At this moment in our economy when there is a great demand for land suitable for home building, improved land (land with water supply, sewerage, utilities, street improvements) for large scale operation is exhausted. Therefore, it is now necessary to seek out tracts of raw land and this is customarily found in the farm lands surrounding our cities. Such land for agricultural purposes may have a uniform value per acre, yet for the builder perhaps only 10 acres out of an 160-acre farm will be of such a character as to serve his purposes. For these 10 acres the builder will be willing to pay several times their value as farm land. Why? Because they may have good drainage, attractive view, trees, proximity to water, freedom from railroad or airplane travel, and so on.

Does the farmer who sells such land measure its value by comparable sales of farm land within a mile or half mile? Does the builder measure it thusly? Certainly not!

"Industrial land in a given area may have an average selling price of $1.00 per square foot if supplied with water, sewer, and switchtrack. Does this mean that all industrial land in the area so improved is worth $1.00 per foot? Again, certainly not. It may range from 25¢ per foot to $1.50 per foot. Sales within a mile or half mile have little to do with a particular parcel, unless they are carefully analyzed with due weight given each and all value making factors.

One of the wisest and most successful real estate dealers in the country recently said, 'No one knows the value of a corner.' The truth of that statement is evident in any city, large or small, in the country. At one period a corner is not worth any more than land half way down the block. At another period, it may be worth much more..."

The author adds that many appraisers who are familiar with the numerous studies showing the effect relation of rents to the volume of business and their subsequent effect on the value of land

"...know from averages what the rental value of a store may be from Boston to Birmingham. To them the volume of sales governs rents and rents govern value of the property.

A theory held in the courts which disqualifies income as evidence of value, is that one man may succeed in business where another may fail. This may have been true in the 'horse and buggy' days but it is not necessarily true today, because those who set the rents and those who pay the rents know the potential business volume for a given location and know, also, that any good management can reach that volume..."

Realtors, too, have proclaimed that modern real estate transactions are of such a nature as to make present court procedures in this field analogous to comparing present agricultural methods with Millet's "Man with a Hoe."

One of California's leading real estate investors, Mr. Ben Swig, has recently written on the matter, emphasizing the present relationship between real estate investment and taxation and depreciation factors. Supporting his position with a number of concrete examples, Mr. Swig states.[78]

> "There was a time, a few years ago, when an investor could tell by its location just what a piece of property was worth in a retail business section of a city. The number of shoppers could be clocked from given points, and that location determined which was considered to be '100%'. Real estate brokers and investors could set the value of the land per foot in a great many cities in the United States. It was possible to know how much rent the properties would produce and the 'value' of the real estate could be determined very readily. The same situation applied to office buildings.
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> But in the last few years things have changed tremendously..."
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> "People are much more conscious of their tax problems than they have ever been before. I know of a great many investors who will buy property on a very low yield, and in some instances without any income at all, providing they can take enough depreciation to offset other income they may have..."
>
> "Today a great many investors are buying tax benefits in preference to real estate investments and whole concepts of real estate investment buying are rapidly changing..."
>
> "[W]hat people are buying today is not entirely real estate but also they are buying financing and tax benefits.
>
> This new point of view also affects the seller. Many an investor today is obliged to sell his property after a certain number of years because he

78. Swig, "How the Picture Has Changed For Real Estate as an Investment," Journal of Property Management, v. 24, #2, (Dec. 1958).

takes accelerated depreciation and has no more depreciation left; if he has a mortgage on it, the amortization on the mortgage catches up with him and he has to sell his property because all of his income is taxable. He immediately looks for new investments, tries to sell his property and buy a new property from which he can take a great deal more depreciation..."

Other realtors have echoed this every-day consideration. For example, one realty company has pointed out:[79]

"Not long ago a man purchased a sizable piece of property by paying $300,000 for the equity. Yet after paying the interest on the mortgage and the yearly amortization, he didn't receive a cent of income.

He was perfectly satisfied. Why?

Because the property was subject to an unusually high amount of depreciation--as much as $270,000. This new owner was in the 90% income tax bracket, so he was able to deduct approximately $216,000 from his ordinary income. The building was under a long lease to a topflight concern, so its future was bright. And it made no great difference that the investment yielded no direct cash-in-hand benefits..."

It is just such factors as these that challenge the tendency to find sole and final resort in the comparative approach. Recognizing this limitation, still another appraiser has stated:[80]

"At the time we began using market comparisons as an indication of value, the ordinary transaction in real estate was a comparatively simple transaction and did not reflect the great mass of economic questions unrelated to real estate which we

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79. Ownership, published by the Shattuck Co., p.2, (Aug. 1959).

80. Kniskern, "The Difficulties and Menaces in Professional Practice," 23 Appraisal Journal 334, 339-40 (1955).

find today.

> More and more we find that there are no business transactions of any kind where the deal or the price or terms agreed upon have not been strongly influenced by income tax effects or implications.
>
> If space permitted, it would be easy to relate quite a number of rather fantastic transactions[81] of recent years which, while affecting the title to real estate, were in fact income tax transactions.
>
> Another factor which throws transaction prices all off for comparison purposes as a real estate transaction is the present liberal financing through VA and FHA, long-term minimum downpayment, low interest rates in the residence field, the lease-purchase transactions in the commercial field, and those other business property loans which are made by insurance companies permitted by their state laws to lend up to 75% of value and in some states even to 100% of value under certain conditions..."

It is for such reasons as these that appraisers insist upon exploring the full gamut of factors influencing market value, including the utilization of the entire Trinity approach. And whether the courts admit or exclude this pertinent data, many appraisers, at least indirectly, take such factors into consideration; in good faith they can't arrive at market value without doing so.[82] But while we may sympathize with the appraisers in this regard for the dilemma they encounter, it is questionable whether the legerdemain they resort to is the best way of solving the problem.

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81. For detailed treatment of income tax effects on comparability, see Considine and O'Bryan, "Income Tax Pitfalls in Appraising," 22 Appraisal Journal 256, 415, 590 (1954).

82. Interview with Nate Libott and authors, July 17, 1959; Interview with Charles Shattuck and authors, Aug. 7, 1959.

Occasionally, courts have risen above their established restrictions. For example, one federal circuit court, speaking through the late Judge Parker, permitted the introduction of income and capitalization data for a yet to be built apartment house. Over the objection of the condemnor, the court said:[83]

> "It seems equally clear that in estimating the value of the property for this use, i.e. what a willing buyer would have to pay a willing seller to purchase it, the witness should be allowed to take into consideration what it would cost to develop the property in this way and what income could be expected from it when developed. Certainly such matters would be considered by any business man in selling, buying or valuing the property; and when the court adopts the standards of the market place in making valuations there is no reason why it should close its eyes to how the market place arrives at and applies the standards. As was well said by the late Judge Henry G. Connor, one of the great judges of this Circuit, 'It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse.' "
>
> "Artificial rules of evidence which exclude from the consideration of the jurors matters which men consider in their everyday affairs hinder rather than help them at arriving at a just result. In no branch of the law is it more important to remember this, than in cases involving the valuation of property, where 'at best, evidence of value is largely a matter of opinion'..."

But such language and action, as will be seen, does not represent the prevailing judicial pattern of decision.

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83. United States v. 25.406 Acres of Land, 172 F.2d 990, 993, 995 (4th cir. 1949). See also Cade v. United States, 213 F.2d 138 (4th cir. 1954); United States v. 4436 Acres of Land, 77 F. Supp. 84 (North Dakota S.W.D. 1948).

The usual practice is to limit the presentation of market value to comparable sales.[84]

It may possibly be argued that comparative sales, by being a market phenomenon, will reflect these many and sundry variables, tangible as well as intangible, that affect sales; that is, the subjective factors, too, will adjust themselves in the very prices buyers and sellers exchange property for.[85] This is true, but only to a limited extent. Mainly, because it is seldom that two pieces of property (particularly investment and industrial type property) are truly comparable that appraisers conclude that these "extra-judicial" factors do not necessarily reflect themselves in the market data approach.[86]

Perhaps of at least equal importance is an inherent inconsistency in the market value definition. That

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84. Cf. City of Los Angeles v. Deacon, 119 Cal. App. 491, 7 P.2d 378 (1932); De Freitas v. Town of Suisun City, 170 Cal. 263, 149 P. 553 (1915).

85. See Becker, "Market Data Analysis," 23 Appraisal Journal 486-87 (1955). See also Schmutz, Condemnation Appraisal Handbook 8, 24, 25 (1949): "Since market or market price is a figure presumed to be established in the market, it follows that market value is presumed to be a market phenomenon. For this reason, actual sales are the best evidence of market value...In valuation for purposes of eminent domain the goal of the estimate is 'market value.' If there are adequate sales data to indicate the probable market value of the property under appraisement, then it is not necessary to make studies of capitalized value and depreciated costs..."

86. See n. 82 supra.

definition seems to contemplate the inclusion of all type buyers and sellers. Yet, the courts have indicated that each party must be considered informed,[87] or at least he must be considered so from a practical point of view. But often the informed buyer at any one particular time is not reflected or adequately reflected in comparative data. Past "comparative" sales may have been made by uninformed buyers and sellers.

In the 1959 session of the California Legislature a bill was introduced obviously with the above considerations in mind. This Bill which was referred to Committee was worded as follows:

Senate Bill No. 1313

"SECTION 1. Section 1248c is added to the Code of Civil Procedure, to read:

1248c. All evidence relevant to the issue of fair market value of the property sought to be condemned and the value of the condemnee's property not sought to be condemned, after the proposed severance, if any, shall be admissible in evidence in the condemnation proceedings, including, generally, such evidence as a reasonable, well-informed prospective purchaser of real property would take into consideration in deciding whether to purchase the property and what price to pay, including, but not limited to, the price at which comparable property has been recently sold, the current cost of, functionally or otherwise, replacing the condemnee's property and, if income-producing property, the income potential of the property based in part upon its recent income history..."

87. See n. 40 supra.

One thing is clear: SB 1313 elevates the rule of relevancy to an unchallenged position; it relegates the policy of expediency to an inconsequential status. Whether such an extreme position is proper needs analysis. The ensuing pages will examine in detail many of the problems this Bill seeks to solve as well as those which it may possibly create. Following this analysis, statutory recommendations will be advanced that will consider the intent and language of SB 1313.

## B. THE MARKET DATA APPROACH

Comparable prices are frequently referred to by the courts and others as the "best evidence" of market value.[88] First, because comparable prices are the easiest way to ascertain market value without accompanying confusion.[89] Secondly, in an area of the law where bias of expert witnesses is a troublesome problem the results of this method are less likely to be influenced by biased considerations which sometimes have tremedous effect upon a market value figure.[90] Lastly, despite its inherent limitation and at times its misleading results, if sales are truly similar, then the best indication as to what a condemnee could actually get on the market for his property would usually be derived by this method.

The drawbacks to proclaiming this method the "best" are, however, too formidable to be ignored. Real property is

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88. See United States v. 329.05 Acres of Land, 156 F. Supp. 67, 71 (S.D. N.Y. 1957): "Sales of the same property or those of comparable character in the same neighborhood in recent times constitute the best evidence upon which to establish value in a condemnation proceeding."; United States v. 70.39 Acres of Land, 164 F.Supp. 451, 489 (S.D. Cal. 1958); United States v. 5139.5 Acres of Land, 200 F.2d 659, 662-63 (4th cir. 1952); St. Louis K & N.W. Ry. Co. v. Clark, 121 Mo. 169. 25 S.W. 192 (1893); "Market Value vs. Economic Worth" 20 Appraisal Journal 9, 10 (1952); Schmutz, n. 85, supra; Dolan, "Federal Condemnation Practice" 27 Appraisal Journal 15, 22 n. 47 (Jan. 1959).

89. 5 Nichols 277; 1 Orgel 696.

90. See, generally, Dolan, "Market Value--the 'Informed Guess,' " 20 Appraisal Journal 330 (1952); n. 89 supra.

unique, even of the "tract house-development" type. Even if truly similar in structure, problems of determining similarity in time and vicinity remain vexatious. Further, the problems connected with ascertaining a "free and open" sale are, at the least, weighty and, at the most, unanswerable. And at least in theory, value of income property, to an economist, is what income property will produce, not what its sales price is.

Whatever the limitations of the comparative approach however, because of its keystone position in ascertaining market values and because of its obvious relevancy, the acceptance of comparable sales prices into evidence in condemnation cases is, without question, a necessity for the determination of market value. The rule in the Faus case,[91] therefore, is to be commended insofar as it has broadened the base for proving market value. There is no question that Faus correctly held in favor of relevancy as against expediency.[92]

Succinctly, the court in Faus held that California would henceforth permit comparable sales prices to be introduced on direct examination to indicate value. Prior to this decision in 1956, this state belonged to a dwindling minority

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91. 48 Cal. 2d 672, 312 P.2d 680 (1957).

92. Cf. People v. Cava, 314 P.2d 45, 47 (1957) (case dismissed).

of states that excluded comparable prices from being brought out on direct examination principally because they tend to introduce collateral matters and impair the expedient progress of the trial.[93]

Prior to the decision in Faus, the parties were "playing a complete game," as one appraiser put it.[94] Judge Ashburn in his concurring opinion in the lower court in the Faus case, clearly describes the complete void and nonsensical procedure that featured the pattern of pre-Faus

93. See 5 Nichols 277 where it is stated:

"Actual experience in the trial of land damage cases in states in which evidence of this character is admitted does not show the objections mentioned above to be as formidable as supposed. If the admission of such evidence is regulated with reasonable judgment by the presiding justice, it throws light upon the issue before the jury as nothing else can. Experts upon one side or the other can say what they think the land is worth and still leave the jury in doubt as to the same character upon the same street was sold with reasonable frequency at a certain price per foot at or about the time of the taking, there is something definite for the jury to rely on, and actual sales as a criterion of value in such a case are almost as conclusive as the daily quotations of the exchange in the case of corporate stocks. Of course, cases in which values are so clearly fixed are not often brought to trial, but it is an unusual case in which no evidence of the sales of neighboring land can be offered which will not be in some degree helpful. The disadvantages arising from the use of such evidence are more than compensated for by the benefits which are likely to come to the jury from its reception." See also 1 Orgel 582-586.

94. Interview with Nate Libott and authors, July 17, 1959. See Note, "Admissibility of Prices Paid for Other Properties as Proof of Damages in Eminent Domain Proceedings," 31 So. Calif. L. Rev. 204 (1958); Note, "Eminent Domain: Valuation of Land Taken: Evidence of Prices Paid for Similar Property," 5. U.C.L.A. L. Rev. 151 (1958); Note, "Evidence: Admission of Testimony of Sale Price of Similar Realty in Valuing Real Property in Condemnation Proceedings," 46 Calif. L. Rev. 630 (1958).

condemnation actions.[95] The one thing that the juries wanted to know, the one thing that would help them to reach a

95. 304 P.2d 257, 267 (1957):

"Long experience with application of the rule in the trial court has disclosed to me that the following pattern develops in the case of a property of substantial value which is tried by attorneys experienced in condemnation. Defendant calls his expert who testifies that he has considered in arriving at his valuation some 10, 20 or 30 comparable sales. He has them spotted on a map which is received in evidence and placed before the jury. The examiner then elicits from the witness the exact location and area of parcel number 1, whether improved or unimproved, when last sold, to whom and by whom, whether for cash or cash and credit, the terms of credit if any, and any other particulars which he can bring to mind. Then he says to the witness, 'Do you have the price on that sale?' 'Yes.' 'And you can give it to Mr. Loveland (opposing counsel) if he asks you about it on cross-examination?' 'Yes.' This is supposed to put the cross-examiner in a position requiring him to ask the price. Here the direct examiner must stop. Opposing counsel blithely ignores the challenge. He has objected to none of this because he has a map with 20 sales on it which he expects to use in the same manner. This process is repeated as to all of lots 2 to 20, inclusive, if 20 be the total number of lots on the map. The cross-examiner asks the witness about the sale prices on such lots as he considers helpful to him (let us say all but numbers 1, 5, 10 and 15); but he is studiously silent as to those numbers and the attorney who called the witness is helpless with respect to them. This procedure occurs when each of the owner's witnesses is on the stand and again with the condemner's witnesses, and the case goes to the jury with information as to prices of all lots except those which are most helpful to the parties who called the respective witnesses."

"The jury, having the case submitted to it upon the least enlightening evidence, is in for a real surprise when the instructions are given. Ever since adoption of the rule excluding other sales on direct it has been stated repeatedly that such sales, though the prices are given on cross-examination, are not evidence of value, are to be considered only upon the imputation of lack of information or trustworthiness of the witness. The jurors are so instructed. They know that sales are the basis on which mankind universally values properties; they have many of the pertinent sales before them when they hear the judge instruct that those sales are not any evidence of value the jurors who are still listening begin to wonder what is the matter with the judge; but those who are listening, as well as those who are not, pay no attention to that instruction and proceed to do the job the best way they can despite the barriers placed in their path by the court. This whole picture is unrealistic."

meaningful verdict, the only thing they could unquestionably comprehend was clearly barred to them by the law. However, a certain amount of sales information could be brought in by skilled counsel in the guise of testing the credibility of the witness.[96] The situation has been described by a condemnation expert in Pennsylvania who strenously called for a departure from the minority rule adopted in that state.[97] Pointing out that it is "price" which is almost all that has meaning to a trier of fact, he notes:

> "Furthermore, all the testimony in these cases except the opinions of the experts is ignored. Indeed, in hearings before Boards of View [commissioners], the Viewers listen only half heartedly to the testimony; they pay no attention to anything except the final question addressed to the expert: 'What, in your opinion, was the fair market value of the property at the time of condemnation?' At this question, each member rouses himself, grasps his pencil and writes down the magic figure."

For similar reasons, and also because it found that the minority rule of exclusion resulted in exaggerated awards, New York City in 1932 discarded the exclusionary rule and permitted comparable prices into evidence.[98] The Wallstein Report, which was the basis for the change, pointed out how "uncertainly and blindly compensation was assessed" under the

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96. See n. 95, supra. See also 5 U.C.L.A. L. Rev. 151, 153, 11, (1958).

97. See Graubart, "Theory and Practice" 26 Penn. Bar Assoc. Q. 36 (Oct. 1954). See also, Note, "Methods of Proving Land Value," 43 Iowa L. Rev. 270, 274-76 (1958).

98. See Village of Lawrence v. Greenwood, 300 N Y. 231, 90 N.E. 2d 53 (1949) where the State of New York adopted the majority rule that existed in New York City since 1932.

pre-Faus types of rule.[99] The New York City rule, which is still in effect, reads as follows:[100]

> "Upon the trial, evidence of the price and other terms upon any sale, or of the rent reserved and other terms upon any lease relating to any of the property taken or to be taken or to any other property in the vicinity thereof, shall be relevant, material and competent, upon the issue of value or damage and shall be admissible on direct examination if the court shall find the following:
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> 1. That such sale or lease was made within reasonable time of the vesting of title to the city.
>
> 2. That it was freely made in good faith in the ordinary course of business, and
>
> 3. In case such sale or lease relates to other than property taken, that it relates to property which is similar to the property taken or to be taken."

This code provision goes on to provide for pre-trial safeguards and other important matters, the nature of which will be discussed in subsequent parts of this study.

It is important now to note that this New York code provision is clearer and more complete than §1845.5 CCP which was enacted by the California Legislature contemporaneous with the decision in the Faus case.[101] As will be

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99. Wallstein, Report on Law and Procedure in Condemnation (1932); 2 Orgel 267.

100. Administrative Code of City of New York, §B15- 16.0 (1957).

101. That statute as originally enacted read:
"In order to qualify a witness in an eminent domain proceeding to testify with respect to the value of the real property or interest in real property to be taken, the witness may testify on direct examination as to his knowledge of the amount paid for comparable property or property interest." See infra for subsequent change to this statute.

further explained, it is recommended that, with minor changes and various additions, this statutory provision be adapted in lieu of the present language of §1845.5 CCP. These changes and additions will presently be discussed and a proposed statute advanced.

Before turning our attention to suggested statutory changes in light of Faus and the policy behind it, it is convenient and helpful to evaluate, as far as possible, the practical effects of the rule in the Faus case. The importance of the change is more procedural than substantive; it enables the court and jury to work in the light rather than the dark; it doesn't insure just compensation, it only better enables its fruition. There is little reason to believe that it will have pronounced effect on the totality of awards. But it should force extreme estimates of opposing experts to be narrowed to within an area of understandable difference.[102] As the Massachusetts court stated:[103]

> "Evidence of the price received from sales of comparable property is so necessary in order to bring extravagant appraisals by real estate experts into comparison with realities, that the introduction of such evidence ought not to be made so difficult as to be impracticable."

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102. Interview with Nate Libott and authors, July 17, 1959.

103. Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N. E. 2d 135 (1944). See also Town of Williams v. Perrin, 70 Ariz. 157, 217 P.2d 918 (1950); St. Louis K. & N.W.R. Co. v. Clark, 121 Mo. 169, 25 S.W. 192 (1894).

With this realistic base to begin from, the market data approach can be given the importance it deserves. The rule in the Faus case, however, while it is without doubt a proper one, presents a series of problems, the possible solutions to which we now turn our attention.

1. Proposed Statutory Changes to the Market Data Approach

In choosing relevancy over expediency the Faus court recognized that even the rule of relevency cannot be left unbridled.[104] While that case considered the discretion of the court as being a sufficient safeguard to check and control the type of evidence that should be allowed in, the following recommendations are made to facilitate the aim of the Faus court and at the same time both overcome the confusion of the bench and the bar on such matters and better secure the element of trustworthiness involved in such matters.

(a) Sales Price of the Identical Property

Unlike the question as to whether similar sales prices may be brought out on direct examination, there has been virtually no dispute or difficulty in allowing the prior sales price of the same property to be entered into evidence in California and almost all other states. It is almost the universal rule that such evidence is admissible.[105]

104. 48 Cal. 2d 672, 678, 312 P.2d 680, 684 (1957).

105. 1 Orgel 581; 5 Nichols 266; 55 A.L.R. 2d 792.

California, since the decision in Bagdasarian v. Gragnon,[106] and particularly since Faus, has adhered to this position. Providing the sale was not too remote in time and was one made in a free and open market, there is no reason why such evidence should not be admitted. While the Bagdasarian case serves as authority for admissibility, there is also no reason why this rule should not be codified, as in the New York statute, supra.

(b) Comparable Rentals

Neither the Faus case nor any California case reported since that time clearly deals with the question as to the admissibility of comparable rents for the purpose of indicating the value of a condemned leasehold. Section 1845.5 would appear to sanction the use of comparable rentals for this purpose, though it may not be sufficiently clear. That section speaks of "comparable property or property interest." "Property interest" logically should include leaseholds, but it seems proper to clarify that language somewhat along the lines spelled out in the New York code, cited above.

It is to be noted, however, that comparative rentals in this context are to be used solely for the purpose of evaluating the lessee's interest; they are not to be used in order to arrive at the owner-lessor's interest in his

106. 31 Cal. 2d 744, 755, 192 P.2d 935 (1948). See also concurring opinion of Ashburn, J. in lower court in Faus, 304 P.2d 257, 267, 269 (1957); Redondo Beach School Dist. v. Flodine, 153 C.A. 2d 437 (1957), 314 P.2d 581 (1957).

property which may otherwise be determined by capitalizing comparable rentals. Courts seldom permit comparable rentals to be used for this latter purpose, as will be discussed below in that part of the study devoted to capitalization problems.

(c) Subsequent Sales

While there seems to be some opposition to the general view [107] as well as some disagreement as to what the general view really is[108]

> "Generally speaking, the courts make no distinction between sales occurring prior to the taking and sales consummated after the date when title has vested in the condemnor. They usually admit the latter type of evidence, sometimes qualifying their ruling by stating that the sale adduced must not be too remote in time or that there must be no drastic change in market conditions."[109]

The law in California, as indicated in County of Los Angeles v. Hoe,[110] is in accord, at least under certain circumstances, with the rule admitting subsequent sales. In that case the court permitted evidence of a sale of property occurring seven months after the date of valuation. The

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107. Dolan, "Federal Condemnation Practice," 27 Appraisal Journal 15, 23-24. (Jan. 1959); Schmutz, "Appraising for Condemnation," 20 Appraisal Journal 306 (1952); McPherson, "The 'Hindsight' Rule," 21 Appraisal Journal 55 (1953); Interview with Judge Clarence L. Kincaid and authors on August 13, 1959; Interview with Alec Early and authors on July 29, 1959.

108. Nichols seems to suggest that the weight of authority is to the contrary. 5 Nichols 288.

109. 1 Orgel 591.

110. 138 C.A. 2d 74, 80, 291 P.2d 98, 101 (1955).

court stated that a consideration of such sale was proper and that if conditions were similar, the time element merely goes to the weight of the appraiser's opinion and that it was not error to refuse such an opinion because the witness included a subsequent sale. In so ruling, the California court had ample supporting case authority from other jurisdictions.[111]

But despite the general rule, courts are reluctant to admit evidence of sales of similar property made after the condemnation of property, the value of which is in question, because of the tendency of some condemnation proceedings to cause an increase in property values in the vicinity.[112] (In like manner, a subsequent sale may show a deflated price because of the nature of the condemnation.) Still another reason advanced for excluding such sales is the concept that ideally compensation is to be paid at the exact time of the taking.[113]

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111. See e.g., Roberts v. Boston, 149 Mass. 346, 354, 21 N.E. 668 (1889); Morrison v. Cottenwood Development Co., 38 Wyo. 190, 266 P. 177, 121 (1928); Bartlett v. Medford, 252 Mass. 311, 147 N.E. 739 (1925); United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 267 (1950); United States v. Brooklyn Union Gas Co., 168 F.2d 391 (2d cir. 1948).

112. See " 'Sales Made at or about the Same Time' May Include Sales Subsequent to Condemnation," 26 Appraisal Journal 126 (1958).

113. In Old Dominion Land Co. v. United States, 269 U.S. 55, 65 (1925) the court followed this reasoning and quoted for support the language of Chief Justice Shaw: " 'If a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be to pay the compensation with one hand, while they apply the axe with the other.' Parks v. Boston, 15 Pick. 198, 208."

The bulk of cases that have excluded evidence of subsequent sales did so on the ground that the facts indicated that the taking had enhanced the other property in the vicinity.[114] Cognizant of this, one court in a recent case stated:[115]

> "There is no absolute rule which precludes consideration of subsequent sales. The general rule is that evidence of 'similar sales in the vicinity made at or about the same time' is to be the basis for the valuation and evidence of all such sales should generally be admissible...The generality of this rule is limited, however, by the consideration that condemnation itself may increase prices and the government should not have to pay for such artificially inflated values. See International Paper Co. v. United States, 5 Cr. 1955, 227 F.2d 201. But that possibility does not produce a hard and fast exclusionary rule. In every case it is a question of judgment as to the extent of this danger and, particularly where a judge is sitting without a jury, it would seem the better practice to admit the evidence and then to weigh it having due regard for the danger of artificial inflation."

Not only are subsequent sales justified on the ground that they indicate what the value would have been on the date of the taking, but they are especially important when prior comparative sales are (1) few in number or (2) at a period of considerably greater spread from the date of taking than are the subsequent takings. Further, such sales may indicate a trend in the market. It herein is advanced that statutory provision (set forth in later pages) be adopted

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114. See, e.g. Shoemaker v. United States, 147 U.S. 282 (1893); United States v. Iriarte, 166 F.2d 800 (1948).

115. United States v. 63.04 Acres of Land, 245 F.2d 140 (2d Cir. 1957).

which will clearly permit the admission of subsequent sales when such transactions will facilitate a determination of market value and when the party presenting them can show to the satisfaction of the court that the subsequent sales were not significantly affected by the condemnation.

### (d) Sales Made to One Having the Power of Condemnation and Forced Sales

One of the most troublesome and most litigated problems concerning the market data approach is the treatment to be accorded sales made to a governmental or quasi-governmental body having the power of eminent domain. Though not without an element of ambiquity,[116] the California Supreme Court in Faus seems to have held that sales (and sale prices) to condemning parties and those having the power and condemnation are admissible on direct examination as "evidence" of value--notwithstanding the latent "forced" aspect inherent in such transactions. In so ruling, the court expressly overruled its prior holding in City of Los Angeles v. Cole[117] which held against the admittance on direct examination of amounts paid for similar property by

116. See, generally, 31 So. Calif. L. Rev. 204 (1958).

117. 28 Cal. 2d 509, 517, 170 P.2d 928 (1946). See also Heimann v. City of Los Angeles, 30 Cal. 2d 746, 754, 184 P.2d 597 (1947) where the court reiterated the language of the Cole case: "[I]t is not competent for either party in a condemnation proceeding to put in evidence the amount paid by a condemning party to the owners of adjacent lands..."

condemning parties. Subsequent to but based upon the Faus decision, the court in People v. Murata[118] indicated that prices paid by entities with the power of condemnation were admissible into evidence providing such were "sufficiently voluntary."

If the Faus and Murata decisions regarding condemnors' sales establish the position that such sales are admissible, as seems the case, then California has aligned itself against the majority in this regard. The weight of authority clearly is that evidence as to the price paid by the same or another condemning agency for other land which, although subject to condemnation, was sold by the owner without the intervention of eminent domain proceedings, is inadmissible to show the value of the land sought to be condemned.[119]

One of the principal reasons advanced by courts for excluding evidence of such sales is that they constitute "compromises" between the vendor and the condemnor-vendee.[120] This, however, is a weak argument for exclusion; for as one

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118. 161 C.A. 2d 369, 326 P.2d 588 (1958).

119. See 5 Nichols 293; 1 Orgel 615; 174 A.L.R. 395; 118 A.L.R. 893.

120. See, e.g., Durell v. Public Service Co., 174 Okla. 549, 51 P.2d 517 (1935); South Park v. Ayer, 237 Ill. 211, 86 N.E. 704 (1908).

court which favors the admission of such sales has correctly stated:[121]

> "Almost all sales, however, are necessarily influenced on the one side or the other by considerations outside the fair market value of the property. Either the seller is influenced by the circumstances of his affairs, which make it desirable for him to sell even at some sacrifice, or else he thinks he is getting more for his property than its real worth; and, on the other hand, the purchaser has some special need or use for the property which makes it more valuable to him than to others not having such need, or else he thinks he is buying at less than the property is really worth."

Thus, it would not be logical to exclude these sales solely or primarily on the grounds that they constitute compromises.

There are more valid grounds, however, for warranting their exclusion. First and foremost, the sale is not, almost by definition, a voluntary sale on the free and open market.[122] The vendor, knowing his property must "go", is seldom a "willing seller"; the vendee, who out of necessity must obtain the property, is hardly a "willing buyer." Rarely can it be said that such a sale took place on the "open market." Thus, exclusion should be based upon the fact not only that evidence of such transactions will lead to confusion (as will be discussed below) but that these sales seldom conform to a market value definition. It is

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121. Curley v. Jersey City, 83 N.J.L. 760, 761-63, 85 A. 197 (1912). Cf., Amory v. Commonwealth, 321 Mass. 240, 72 N.E. 2d 549 (1947).

122. Even if by chance or design the vendor is unaware that the vendee has the power of condemnation, the vendee is aware of his power and bargains accordingly.

primarily for this reason that most condemnation experts in this state have asserted that all sales to entities having the power of condemnation should be excluded both on direct and cross-examination.[123] In like manner, the Oregon court pointed out the major objection to admitting such sales:[124]

> "Evidence of sales of neighboring lands, even where permitted, is not admitted unless voluntary on both sides. A sale which is not voluntary has no tendency to prove market value. It is not competent for either party to put in evidence the amount paid by a condemning party to the owners of neighboring lands taken at the same time and as part of the same proceedings, however similar they may be to that in controversy, whether the payment was made as the result of a voluntary settlement, an award or verdict of a jury. The rights of an owner to recover just compensation for the taking of his land are not to be measured by the generosity, necessity, estimated advantage or fear or dislike of litigation, which may have induced others to part with title to their real estate or to relinquish claims for damages by reason of injuries thereto; and it would be equally unwise, unjust, and unpolitic to make it impossible for a corporation to compromise the claims of one owner without furnishing evidence against itself in the cases of all others who had similar claims. If a sale is made to a corporation about to institute condemnation proceedings, if it cannot acquire the land by purchase at a satisfactory price, the price paid is not a fair test of market value."

A second important reason is that often the condemnors' sales prices include not simply the value of the

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123. Interviews between the authors and Judge Clarence L. Kincaid (August 13, 1959); George Hadley (July 16, 1959); Alec Early and Baldo Kristovich (July 29, 1959).
For basically the same reasons the Condemnation Committee of the Los Angeles Bar adopted in principle the same position. See minutes of the Committee meeting of June 3, 1959.

124. Coos Bay Logging Co. v. Barclay, 159 Or. 272, 79 P.2d 672, 680 (1938).

property taken but damages for remaining property in partial taking cases. To make meaningful comparisons when this element is involved is virtually impossible.[125] Some condemnees' attorneys have expressed the fact or at least the fear that condemnors tend to make a settlement with a particular property owner for a certain sum, and credit an undue part of such sums to "damages," which seldom concerns or affects that property owner. Thereafter, the condemnor employs in court the smaller sum for the taking as against a subsequent comparable condemnee. Whether in fact such tactics have been used in the past, permitting condemnation sales into evidence would offer the possibility for using such tainted sales in the future.

A third justification for excluding such evidence lies in the fact that establishing or attempting to establish their voluntary nature "would introduce aggravating and time consuming collateral issues tending to promote confusion rather than clarity."[126] While as a general proposition in this field of law preference should be given to relevancy as against expediency, the general standard should not be applicable in this instance. The limited amount of times that such a sale can be labeled "voluntary," the

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125. See 5 Nichols 295; Simon v. Mason City R.R. Co., 128 Iowa 139, 103 N.W. 129 (1905); Lyon v. Hammond Rwy. Co., 167 Ill. 527, 43 N.E. 775 (1897); Blick v. Ozonkee County, 180 Wis. 45, 192 N.W. 380 (1923).

126. Blick case, supra, n. 124.

complexity and the strong possibility of prejudicing the condemnee when damages are involved in 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 resort to the Auxiliary Probative Policy in these situations.

Despite these drawbacks, it may be argued there should be at least one exemption to the rule of exclusion.

There are certain times when, because of market conditions, there are no similar sales in the vicinity other than ones made to a governmental agency. In such instances, there may be justification, in spite of any Auxiliary Probative Policy, to permit either party the right to introduce such sales. One state, South Carolina, appears to have adopted this type of exception.[127]

> "[I]n this state the rule [is] that in a proceeding to condemn lands, where the only sales within recent years have been to the condemnor, the landowner has the right to show the price paid by the condemnor for similar lands in the same general neighborhood."

And at least one New York case has indicated that a similar rule exists in that jurisdiction.[128] But since such a situation seldom arises, it is felt that such an exception would promote more confusion than would be warranted.

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127. Charleston & W.C.R. Co. v. Spartanburg Bonded Warehouse, 151 S.C. 542, 149 S.E. 236 (1929). See also Wateree Power Co. v. Rion, 113 S. C. 303, 102 S.E. 331 (1920).

128. Langdon v. Mayor, 133 N.Y. 628, 31 N.E. 98 (1892).

Like condemnors' sales, but even with greater unanimity, courts exclude evidence of sales that were made under compulsion or duress--forced transactions.[129] This must necessarily follow if the goal is market value.

Sales by an administrator, under a deed of trust or execution, sheriffs' and foreclosure sales are generally excluded because they do not represent market value.[130] Although such sales can at times be shown to be free and open,[131] they should nonetheless be inadmissible. For almost invariably such sales lack the necessary requisite that the buyer and seller should have reasonable time before consummating the transaction. Moreover, seldom are such sales not accompanied by undue pressure..

All other sales, generally, are admitted, if comparable, and whatever coercion, personal or professional, may exist, goes to their weight rather than their admissibility. The prevailing opinion in this regard was expressed

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129. Put succinctly by the Massachusetts court, "If it had been a price fixed by a jury, or in any way compulsorily paid by the party, the evidence of such payment would be inadmissible before the jury." 13 Metc. 316 (1947).

See 5 Nichols 291.

130. Idem; Baetjer v. United States, 143 F.2d 391 (1st cir. 1944); Dist. of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 235 F.2d 864 (D.C. cir. 1956).

131. See Forest Preserve Dist. v. Dearlove, 337 Ill. 555, 169 N.E. 753 (1929); Fourth Nat'l. Bank v. Commonwealth, 212 Mass. 66, 98 N.E. 696 (1912).

by a recent federal case:[132]

> "A comparable sale was not under compulsion, coercion, or compromise in this sense if the witness testifies, or if it is otherwise shown, that the public records do not disclose that the sale was at foreclosure, under deed of trust securing an indebtedness, at execution or attachment, at auction, under pressure of the power of eminent domain, or other coercion sui generis--types of legal compulsion generally disclosed by public records. There need be no showing of the non-existence of, or the nature of, the varied and variable economic reasons or motivations which might have moved the parties concerned to resort to the open market to dispose of property or to sell by private negotiations. Such considerations or pressures go to the weight and not to admissibility, and may be developed, if desired, on cross examination or by independent evidence."

There is some authority, led by Hickey v. United States,[133] that would appear to expand the area of forced sales and would initially exclude a private business sale if it was made under compulsion. But since most sales, even in the ordinary course of business, have some element of necessity connected with them, such a policy would take from the jury's province a good deal of its prerogative. Such considerations should go to weight rather than

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132. Dist. of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 235 F.2d 864 (D.C. Cir. 1956).

133. 208 F.2d 269 (3d Cir. 1953). See also City of St. Louis v. Paramount Shoe Mfg. Co., 237 Mo. App. 200, 168 S.W. 2d 149 (1943). In a similar vein, one court even excluded evidence of sales within a condemned area before the condemnation action was filed, but after the probability of condemnation was known. Denver v. Lyttle, 106 Colo. 157, 103 p.2d 1 (1940).

admissibility.[134]

134. Of course, personal and business duress factors must be allowed into evidence if the related sale is admitted. See Ford v. City of Worcester, 335 Mass. 723, 142 N.E. 2d 327 (1957).

(e) Offers

As indicated, a primary aim in determining just compensation is to permit the widest possible range for the introduction of evidence to show market value. Thus, wherever possible, the rule of relevancy is to be given preference over questions of expediency. It would therefore follow, other factors not considered, that offers to buy or sell property made to or by the condemnee or owners of comparable property, should be admitted into evidence as a reflection of the market value of the subject property. Indeed, as the Faus court indicated by approving the following quotation from Wigmore on Evidence, offers often cast an important bearing on the question of value:[135]

> "When the conduct of others indicating the nature of a salable article consists in offering this or that sum of money, it creates the phenomena of value, so-called. For evidential purposes, Sale-Value is nothing more than the nature or quality of the article as measured by the money which others show themselves willing to lay out in purchasing it. Their offers of money not merely indicate the value; they are the value; i.e. since value is merely a standard or measure in figures, those sums taken in net potential result are that standard."

But as pointed out at the beginning of this chapter, when particular evidence, though relevant, conflicts not only with the Auxiliary Probation Policy but involves serious questions of trustworthiness, evidence of that

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135. 2 Wigmore on Evidence 503 (3d ed. 1940); See County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680, 683 (1959).

nature needs an even greater amount of scrutiny and re-appraisal. Offers are a type of such evidence.

Offers to buy or sell property are not only treated as an inferior type of sale evidence but most courts which have considered them have concluded that they are inadmissible.[136] The courts assign various reasons for exclusion--the most significant being their untrustworthiness. As the leading case, Sharp v. United States explained:[137]

> "Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In

136. 1 Orgel 620; 7 A.L.R. 2d 784; Note "Methods of Proving Land Value," 43 Iowa L. Rev. 270, 276 (1958)

137. 191 U.S. 341 (1903). See also Hine v. Manhattan R. Co., 132 N.Y. 477, 30 N.E. 986 (1892) where the court said:

> "Such market value may be shown by the testimony of competent witnesses but not by an offer. In the first place, the evidence...is objectionable, because it places before the court or jury an absent person's declaration or opinion as to value, while depriving the adverse party of the benefit of cross-examination. The highest value at which an offer, standing alone, can be estimated is, that it represents the opinion of him who makes it as to the worth of the property. Nevertheless, the assertion that he offered to part with his money, might give to such hearsay opinion more weight with the jury, than an opinion given by a witness before them, not thus supported. While, notwithstanding, his opinion was backed by a promise to pay money, which was not enforceable, he may not have been competent in a legal sense to express an opinion on the subject. If he was, other reasons may have prompted the offer than an expectation of actually becoming the purchaser; or of obtaining it at its market value."

> our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject. Especially is this the case when the offers are proved only by the party to whom they are alleged to have been made, and not by the party making them. There is no chance to cross-examine as to the circumstances of the party making the offer in regard to good faith, etc...A reference to the authorities shows them to be almost unanimous against receiving evidence of this kind."

This view not only represents the weight of authority--even in those states which allow comparable sales prices on direct examination, i.e., favor the rule of relevancy--but is the considered opinion of the majority of condemnation experts in this state who were interviewed by the authors.[138]

But even more so than in the case of condemnors' sales, the post-Faus decisions in California as they pertain to offers are in an inconsistent and confused state of flux. Prior to Faus, as logically would follow the then existing rule of exclusion of comparable prices, offering prices were also excluded on direct examination.

> "[N]o rule is better settled in California than the rule that the value of property cannot be proved by evidence of sales of other property or offers to buy or sell the property in question." [139]

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138. Interviews with the authors and Judge Clarence L. Kincaid (August 13, 1959); Nate Libott (July 17, 1959); Alec Early (July 29, 1959).

139. Merchants Trust Co. v. Hopkins, 103 Cal. App. 473, 284 Pac. 1072 (1930). See also City of Los Angeles v. Deacon, 119 Cal. App. 491, 493, 7 P.2d 378 (1932); Central Pacific R.R. Co. v. Pearson, 35 Cal. 247 (1868).

This was the pre-Faus rule. As the same cases cited pointed out, however, such offering prices were admitted on cross-examination, as going to the credibility of the witness' testimony; and the offering price of the condemnee could be used against him as an admission against interest.[140]

The unsettled state of the law in California on this point, since Faus, is depicted in a series of recent cases. The first case of this type reported subsequent to the Faus decision was People v. Cava,[141] a district court of appeals case which was later dismissed. In that case, the court followed what it considered to be the scope of the ruling in Faus. It held that an offered price for the condemned leasehold was competent evidence in direct examination. In an even more recent case, however, another California court appears to have had a somewhat different interpretation of the Faus opinion as it pertains to offers or "asking" prices. People v. Nahabedian[142] concerned the correctness of admitting the "asking" price of comparable property. The court there held that such evidence was inadmissible mainly because it constituted a witness' opinion of other property. The court went on to state:

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140. People v. Ocean Shore Rwy. Co., 181 P.2d 705 (1947), affirmed, 32 Cal. 2d 406, 196 P.2d 570 (1948).

141. 314 P.2d 45 (1957).

142. 171 ACA 335 (1959).

> "It is important to remember that in the case of County of Los Angeles v. Faus, supra, the court was dealing only with comparable sales prices and not with asking prices or offers. And, subsequent to the case just cited, section 1845.5 was added to the Code of Civil Procedure by the Legislature, which provides that a witness may testify to his knowledge of sales prices in establishing his qualifications. We are therefore persuaded that the trial court did not err in striking the aforesaid testimony of appellant."

While these cases can be distinguished, it is clear each court afforded Faus a different interpretation insofar as the admissibility of offers is concerned. The issue was more clearly developed in Los Angeles School Dist. v. Kita[143] where a document authorizing an offer for similar land to the subject property was admitted on cross-examination. The same judge later granted a new trial because he felt the admittance of such constituted prejudice to the condemnor; his action was upheld by the appellate court. While the appellate court did not flatly pronounce offers to be inadmissible into evidence for any reason, and while it reaffirmed the holding of the Faus case as to the wide discretion had by the trial court, it did show a strong disfavor for the use of such evidence for any purpose:

> "Much has been said about the propriety of receiving in evidence unaccepted offers to buy similar property. An offer to pay a certain amount does not necessarily involve an estimate that such is its full value and should have been taken into consideration in forming an opinion of market value. At best, such offers are but expressions of opinion. They are a species of indirect evidence of the opinion of the offeror as

143. 169 ACA 687 (1959).

> to the value of the land. An unaccepted offer places before the jury an absent person's declaration or opinion of value while depriving the adverse party of the benefit of cross-examination. The offeror may have such slight knowledge on the subject as to render his opinion of no value. He may have wanted the land for some particular purpose disconnected with its value. Pure speculation may have induced the offer, a willingness to take chances that some new use of the land might later prove profitable. The person making the offer may not have been competent in a legal sense to express an opinion on the subject. Offers may be glibly made without serious intention or the required resources. The offer may contain contingencies, as in the present case. The area of collateral inquiry is far broader than in the case of consummated sales, as is also the opportunity for collusion and fraud. The assertion that the offeror tendered his money might give such hearsay opinion more weight with jury than an opinion given by a witness before them, not thus supported. If evidence of an unaccepted offer is to be received, it is important to know whether the offer was bona fide and made by a man of good judgment acquainted with the value of the property, and whether made with reference to market value or to supply a particular need or to gratify a fancy. Unaccepted offers are unsatisfactory, easy of fabrication, and even may be dangerous in their character.

The reasons advanced by the Kita court, which represent the majority view on offers, constitute strong grounds for making statutory provision for their exclusion. Further analysis of the various types of offers should give added support to such a conclusion.

(1) Offers to Purchase by the Condemnor

Though it does not appear to have arisen in any reported California case since Faus, it is almost universally agreed that offers made by a condemnor pending condemnation

are inadmissible to show market value.[144] The essential reason for this is that such offers are made in an effort to compromise the suit and hardly reflect market value. In like manner, offers to sell made to the condemnor by the condemnee should be inadmissible by either party though there is some authority which permits them to be used by the condemnor against the condemnee as admissions against interest.[145] The shadow of condemnation is too heavy to warrant their admissibility by any party for any reason. As in New York, where there is a specific code section prohibiting the introduction of such evidence,[146] it is recommended that California exclude offers made by either party to the other pending condemnation.

(2) Offers to Purchase

While offers to purchase made to the condemnee by a third party are admittedly more reliable and meaningful than offers made by the condemnee, the "dangerous" nature of even these offers is such that most courts reject their admission into evidence.[147] There are a few cases from some jurisdictions, including California, indicating that such an offer may be brought out on cross-examination in

144. 5 Nichols 300-01; 1 Orgel 625-26.

145. Id. at 626-27.

146. Administrative Code of City of New York, §B15-16.0 (c) (1957).

147. 5 Nichols 301; 1 Orgel 623, n.91.

order to test the credibility of a witness' testimony.[148] It is difficult to see, however, why what is considered "dangerous" evidence on direct should be any the less so on cross-examination. It is naivete to believe that a jury can or does understand (or differentiate) that an offering price is to be used solely for credibility purposes rather than as an indication of value; this point was clearly analyzed by Judge Ashburn in his concurring opinion in the lower court in the Faus case.[149] Thus, offers to purchase, being an inferior and dangerous type of evidence, should be inadmissible on either direct or cross-examination.[150]

(3) Offers to Sell

It logically follows that if offers to purchase made to the condemnee are a disfavored genre of evidence and generally inadmissible, courts would be even more opposed

148. See, e.g., Spring Valley Water Works v. Drinkhouse, 95 Cal. 528, 28 Pac. 681 (1891); Vinyard Grove Co. v. Oakbluffs, 265 Mass. 270, 163 N.E. 888 (1928); Lloyd v. Town of Venable, 168 N.C. 531, 536, 84 S.E. 855, 857 (1915).

149. See n.95 supra.

150. The Illinois position in this regard is of interest. It holds such offers inadmissible excepting in those situations where there are no comparable sales. Chicago v. Lehmann, 262 Ill. 468, 104 N.E. 829 (1914). See also Sanitary Dist. of Chicago v. Beoning, 267 Ill. 118, 107 N.E. 810 (1915). Later Illinois cases may have adopted a more liberal position by not necessitating that there be an absence of comparable sales in order to justify the admission into evidence of offers. See e.g. Kankakee Park Dist. v. Heidenreich, 328 Ill. 198, 159 N.E. 289 (1927); 32 Colum. L. Rev. 1058, n.37. But "there is room for doubt, however, as to whether" this pre-requisite for admissibility has been abandoned. 7 A.L.R. 800. It is advanced that, as in the possible exception in condemnors' sales, supra, such an exception would only come into play in very rare instances and as such it is felt such an exception would be more confusing than helpful.

to the admissibility of offers to sell made by the condemnee. This is clearly the case; courts almost unanimously reject evidence of offers to sell by the condemnee when he seeks to present such evidence to prove market value.[151] The reasons for the exclusion of offers to sell as evidence of market value are, in general, the same as those applicable to offers to purchase and, in particular, to the even greater propensity and facility to manufacture such evidence.

But even more, such offers are particularly suspect insofar as they are obviously self-serving. In addition, they do not really go to the question of market value; for an owner offering to sell land or listing it for sale often, and perhaps almost always, asks somewhat more for it than he really believes it to be worth, or at least more than he would actually accept for it.[152]

There is, however, one generally accepted ground for allowing into evidence an offer to sell made by the condemnee to a third party. Almost all courts, including those who summarily reject evidence of offers for any other purpose, permit such offers to be used for the purpose of

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151. 1 Orgel 623; 5 Nichols 304; 7 A.L.R. 2d 795. See also Mayers v. Alexander, 73 Cal. App. 2d 752, 762, 167 P.2d 818, 823-24 (1946).

152. See Korf v. Fleming, 239 Iowa 501, 32 N.W. 2d 85 (1948); Reynolds v. Fronklin, 47 Minn. 145, 49 N.W. 648; Montclair Rwy. Co. v. Benson, 36 N.J.L. 557 (1873). See also 7 A.L.R. 2d 797.

admissions against interest on the part of the condemnee.[153] Such also is the position of the California courts, at least as indicated by People v. Ocean Shore Rwy. Co.[154] The reasoning for this position is, first, such an offer generally indicates the amount which the condemnee himself would consider the property to be worth. Secondly, if used against the condemnee, there is little doubt as to its trustworthiness. Unless the condemnee was truly unaware of the value of his property, or made the offer for other than usual business reasons, such an offer should generally indicate the highest amount that would be received on an open sale. As one New York case succinctly said:

> "The price which this owner gave to this real estate agent or firm of real estate agents was an admission on her part as to what she considered her premises worth at that time and is clearly competent as against her. It was an asking price not a selling price and hence, perhaps, would not be assumed to be the lowest price that the owner would take for the property. In any event, it would show the estimate that the landowner placed upon the property at the time. Of course, with this evidence might be given any explanation that the owner desires to make as to her reasons for selling at that time or as to the condition that the property might have been

153. Nichols indicates that they are not so much admissions against interest as they are contradictions of the condemnee's present contention. 5 Nichols 303-304. Whatever the distinction may possibly be, however, the weight of authority considers and treats them as admissions against interest. See 1 Orgel 623; 7 A.L.R. 2d 814.

154. 181 P.2d 705 (1947), affirmed, 32 Cal. 2d 406, 196 P.2d 570 (1948).

in at that time."[155]

Despite the general use of offers to sell as admissions against interest, a more critical analysis casts some doubt as to the justification for using them for such a purpose. To begin with, it is frankly admitted by the courts that as a general rule, the property owner seeks and asks more than he would accept or receive on the open market.[156] As indicated, therefore, such an asking price is not truly an index of market value. Consequently, the only offering prices of the condemnee that the condemnor would resort to use against the condemnee as admissions against interest are low prices; these often include prices well below the prevailing price that could actually be gotten for the property on the open market. The condemnee--offeror, in other words, is an uninformed seller. Thus, not only is the condemnee often greatly prejudiced in the courtroom by his ill-considered prior offer, but further, because he is often an uninformed seller, his offer in such instances does not, by definition, reflect market value. And despite what an owner may, at any one time, consider his property to be

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155. Matter of Simmons, 68 Misc. Rep. 65, 124 N.Y.S. 744 (1910). See also Springer v. City of Chicago, 135 Ill. 552, 26 N.E. 514 (1891); Application of Port of New York Authority, 28 N J. Super. 575, 101 A.2d 365 (1953); Gulf, 308 S.W.2d 165 (1957); See also recent cases compiled in 5 Nichols 68 (Supp.).

156. See nn. 152-156 and accompanying text.

worth, he is to be paid the market value for his property.

Against the above stated position, it may be argued that the condemnee could be given the opportunity to explain his prior offer to sell when it is introduced as an admission. Practically speaking, however, in a jury trial, despite any valid explanation made by him, the condemnee can seldom completely remove the cloud created by his prior offer and sanctioned by the doctrine of "admission against interest".

The authors of this study, having presented the arguments on each side as to the question of admitting such offers as admissions against interest do not take a further position on this point.

(4) Offers for Comparable Property

There is hardly any argument that offering prices to purchase or sell comparable property is incompetent for any purpose. As Nichols states:[157]

> "The objections to the reception of evidence of offers to buy the identical land which is taken are multiplied tenfold in the case of other land in the neighborhood, and if offers for neighboring land were competent, the trial of a land damage case would degenerate into a confused and endless wrangle in which collateral issues and what is in substance hearsay evidence played the most prominent part. Doubtless under certain conditions evidence of a bona fide offer might have some probative value, but the safest course is to exclude such evidence altogether..."

This is clearly the position of the California courts as expressed in the Kita and Nahabedian cases, supra. Because the Faus case has caused some doubt as to the firmness of

157. 5 Nichols 306-307. See also Central Pacific Rwy. Co. v. Pearson, 35 Cal. 247 (1868); State v. Cerruti, 188 Or. 103, 214 P 2d 346 (1950).

this policy,[158] it is suggested that this policy be put into the statute. (See statutory language suggested below).

(f) Options

Belonging to the same species as offers, options breed similar disfavor. Because of their general untrustworthiness, courts most often reject the introduction of this type evidence.[159] Many considerations may enter into the purpose of acquiring an option, and unless it ripens into a sale it should not be admitted as evidence of value. The fact that somebody has given the option to purchase land at a certain price, as emphasized by the Oregon court, proves nothing as to its real value or market value.[160]

As indicated by People v. Ocean Shore Rwy. Co.,[161] in California, what authority exists supports the position that option prices are admissible into evidence as admissions against interest.[162] Assuming the questionable hypothesis

158. Compare the decisions of the court in the Cava case with the action of the lower court in Kita.

159. 1 Orgel 627; 5 Nichols 308; Interviews with authors and Judge Clarence L. Kincaid (August 13, 1959); Judge John J. Ford (July 21, 1959).

160. Shebley v. Quatman, 66 Or. 441, 134 Pac. 68 (1913). See also State ex. rel. Burnquist, 212 Minn. 62, 2 N.W. 2d 572 (1942); dissenting opinion of Jones, J. in United States v. Certain Parcels of Land, 144 F.2d 626 (3d Cir. 1944) wherein the opinion is expressed that the exclusion of options from evidence should be a matter of law; it should not even go to the weight of evidence.

161. 181 P 2d 705 (1947), affirmed, 32 Cal. 2d 406, 196 P.2d 570 (1948).

162. 5 Nichols 309; 7 A.L.R. 2d 814; 155 A.L.R. 272.

that "admissions against interest" are applicable in ascertaining compensation, it of course follows, a fortiori, that if offers to sell may be used as admissions against interest, options may be used for the same purpose. However, the position taken herein in regard to offers being used as admissions against interest is also applicable to options: while we recommend that option prices not be admissible on direct or cross examination for any purpose, we take no position whether "admissions against interest" should be made an exception.

(g) Sales Contracts

Mainly because executory sales contracts, if made in good faith, are important indications of market value and to a large extent because they are somewhat less suspect than offers,[163] the majority of courts have permitted such prices to be introduced both on direct and cross examination.[164] A recent federal case admitting such prices into evidence stated:[165]

> "We are, therefore, of the opinion that the evidence of the terms of the contract of sale for the property condemned in the present case should have been received in evidence. It is evidence to be considered in arriving at just compensation, affecting the appellant's substantive right, and its relevancy is therefore a federal question to be determined unfettered by any local rule. It is true that the contract had not been consummated and that, as argued by the government,

163. Compare the leading case in this entire field, Sharp v. United States, supra. There the court spoke essentially of "oral offers" glibly made.

164. 5 Nichols 307, nn. 28, 29; Cf. 1 Orgel 627.

165. United States v. Certain Parcels of Land, 144 F.2d 628 (3d Cir. 1944).

> reception of such evidence makes it possible for a landowner, learning that condemnation of his property is likely, to enter into a collusive agreement of sale so as to manufacture evidence in support of an exorbitant claim. This danger is not to be minimized, particularly in view of the difficulty which might well be entailed in proving such collusion. Yet evidence of a bona fide sale, otherwise relevant, should not be excluded because of the possibility that some landowner might conspire with another to defraud the government by manufacturing collusive evidence. Such objections go to the weight of such evidence rather than to its admissibility, and the trial affords opportunity, both by cross-examination and comment to the jury to bring such evidence to its proper perspective for the jury's consideration. The penalties of the criminal law also will afford a deterrent to such persons without depriving others of significiant evidence of the value of their property in condemnation proceedings."

The New York statute (cited on p. 50 ) would seem to include executory sales as well as completed transfers of property as being admissible into evidence to prove value. Though such transactions are at times tainted with bad faith, as the New York court[166] and the above quoted federal court indicated, it is preferable, providing the sale is shown to have been made in good faith, to allow such evidence in on direct and cross examination. This position is particularly justified since such contracts are less tinged with suspect and bad faith is more readily detectable than is the case with offers.

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166. In re Hamilton Place, 67 Misc. Rep. 191, 122 N.Y.S. 600 (1910).

(h) Assessed Valuations

With the exception of a few jurisdictions, it is the overwhelming weight of authority that assessed valuations, made for taxation purposes, are inadmissible into evidence as an indication of market value.[167] California, in theory, is in accord with that position;[168] but, as will be shown, such a policy may not be effectuated in practice in this state.

If the purpose of a condemnation trial is to shed light on the market value of the subject property, then assessed valuations contribute very little, if anything, toward that goal. One authority, who has urged the use of assessment figures in condemnation actions, argues that since such assessments for taxation must be based by law on fair market value, "what is fair market value for one purpose ought to be fair market value for every purpose."[169] There's the rub: Such valuations only rarely represent fair market value.

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167. 1 Orgel 633-34; 5 Nichols 313; 17 A.L.R. 170; 84 A.L.R. 1485; 39 A.L.R. 2d 214. See, generally, United States v. Certain Parcels of Land, 261 F.2d 287 (4th Cir. 1958) where the court reviewed the matter and held that such evidence cannot be used against the condemnor, even as an admission against interest.

168. See City of Los Angeles v. Deacon, 119 Cal. App. 491, 493, 7 P.2d 378 (1932); Central Pacific Rwy. Co. v. Feldman, 152 Cal. 303, 310, 92 Pac. 849, 852 (1907). See also City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 778, 304 P.2d 803, 813 (1956).

169. Graubart, "Theory and Practice," 26 Penn. Bar Assoc. Q. 36, 45 (Oct. 1954).

Valuation for taxation purposes is aimed at the equalization of the community tax load; in condemnation valuation is made to ascertain what the property would sell for on the open market.[170] Thus, in condemnation the goal is absolute market value; in taxation valuation, it is relativity. But the differences between the two are even more pronounced. Seldom is the assessor for tax purposes competent enough by training to determine market value for most types of property, at least as compared to his counterpart, the real estate appraiser. And even if he were fully qualified, it is beyond question that he would not have even a fraction amount of the time necessary to make a proper evaluation of its market value. The wholesale operation of evaluating that is involved in assessment for taxation purposes precludes the detailed study necessary in condemnation cases. Further, the time differential between the date when the property was assessed for taxation and the date of the taking is extremely significant; not only is there generally at least a year span but often real estate is not re-assessed for tax purposes for many years. And not least of the drawbacks is the fact that the taxation valuation figure, superficial as it may be, is not subject to any of the restrictions

170. See Louisana Hwy. Comm. v. Giaccone, 19 La. App. 446, 451, 140 So. 286 (1932); Wray v. Knoxville R. Co., 113 Tenn. 544, 558, 82 S.W. 471 (1904). See, generally, 1 Orgel 629-32.

as to hearsay evidence nor subject to cross examination. Lastly, frequently political considerations unduly affect assessments for taxation.

A few states, notably Massachusetts, have statutes permitting the introduction of assessment valuations in condemnation cases in order to indicate market value.[171] Recent legislative proposals in Massachusetts, advanced as a result of a study of a special commission on eminent domain and approved by the Judicial Council of that state, seek the repeal of that statute and the exclusion of such evidence, essentially for the reasons outlined in the previous paragraph.[172] Peculiarly enough, Pennsylvania's statute on this point permits such evidence in only at the instance of the condemnee and as an admission against interest by the government condemnor.[173]

The California practice presents a paradox. As in the case of the pre-Faus rule with comparable prices, California refuses to allow such assessments to be introduced on direct to show market value. This is in accord with the great weight of authority. But almost alone, California permits such prices to be brought out on cross

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171. Gen. Laws of Mass., Ch. 79 §35 (1932); Wash Rev. Stat. §11610 (b) (1932).

172. Special Commission Relative to Certain Matters Relating to the Taking of Land by Eminent Domain, House No. 2738 (Dec. 1956).

173. 26 P.S. §102; 16 P.S. §§528, 1051. See also Graubart, "Theory and Practice," supra n. 169.

examination for the purpose of testing the value of the witness' opinion.[174] As was pointed out by Judge Ashburn in the lower court in the Faus case when speaking about comparable prices,[175] such roundabout ways of introducing testimony, at the least, confuse the jury and, at the most, are ignored by the jury. ("The price is the thing wherein we'll catch the jury writing.") It appears that much of the testimony that has been allowed on cross examination was due to the restrictive pre-Faus rule; cross examination served as an opening to get something--anything--before the jury to show market value. It is unfortunate that since the adoption of the more liberal post-Faus rule, the dubious vestiges of the earlier position should remain entrenched.

It is to be expected that in light of a 1959 statute passed by the California Legislature, there will be increased attempts to show assessed valuations in condemnation actions. This statute[176] requires the publication of the now secret ratios between assessed value and market value of common property in all counties. While this provision will be helpful in condemnation actions, it cannot come close to overcome the many shortcomings inherent in

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174. Central Pacific Rwy. Co. v. Feldman, 152 Cal. 303, 310, 92 Pac. 849, 852 (1907). See 5 Nichols 317.

175. 304 P. 2d 257, 267 (1957).

176. Ch. 1682 (1959).

assessed valuations. While their use may be justified on the grounds that the court in condemnation actions should have "every available scrap of evidence that may give it guidance", assessed valuations are usually more misleading than helpful for proving market value. Though the few jurisdictions that admit such evidence apparently do so in order "to check" interested and biased witnesses,[177] it would seem that other methods, less misleading, would be more appropriate for obtaining objectivity.

(i) Foundation and Hearsay Matters

Germane to the problem of market data are the companion questions as to the necessity and the nature of a proper foundation and the treatment, as a matter of law, of such data in a condemnation action. The cases on these points are fraught with ambiguity, and the decisions that may be discerned show a number of divisions between the jurisdictions on these important points.

The preceding pages which discussed market data depicted the vital need of establishing, prior to the introduction of such evidence, proof of the true comparability of such data and the minimum trustworthiness necessary in order to place it on the record and before a jury. Subsequent pages, dealing with other parts of the Trinity approach, will further point out the need for these prerequisite steps.

177. See 1 Orgel 645.

In fact, so integral to the achievement of just compensation and to the orderly process of condemnation actions is the existence of adequate methods of pre-examining the contentions and evidence of the parties that a special study concerning pre-trial procedures for discovery and disclosure in this field will subsequently be devoted to these matters.[178] It is necessary now, however, to discuss some of these matters as they occur in the actual trial stage of condemnation actions.

It is the universal rule--and the very nature of the subject matter demands it--that questions of proximity in time and location of comparable property (and, where applicable the subject property) are initially decided by the court, as a matter of law, and if, at the discretion of the court, they are admissible on the grounds of comparability, the degree of comparability is a question of fact for the jury. The Faus case, in adopting the rule of admissibility of comparable prices on direct, also adopted the concomitant policy that:[179]

> "No general rule can be laid down regarding the degree of similarity that must exist to make such evidence admissible. It must necessarily vary with the

178. It should be noted here, however, that the New York statute, supra, referred to, makes definite provision for pre-trial discovery before the use of comparable prices is permitted at trial.

179. Wassenich v. Denver, 67 Colo. 456, 464, 186 P.533, 536 (1919). See County of Los Angeles v. Faus, 48 Cal. 2d 672, 678, 312 P.2d 680, 684 (1957).

> circumstances of each particular case. Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interferred with unless abused."

Whether the court decides such matters as a result of a pre-trial conference, in chambers at the time of the trial or before such prices go into the record,[180] it must first, at the time any objection to such evidence is received, make the initial ruling; the jury may then accord the weight to such evidence as it deems proper.

But more controversial and far less clear are the related questions as to the grounds for admitting such evidence and the hearsay bar that is usually involved. To begin with, the clear weight of authority is to the effect that once comparable sales are permitted into evidence they come in as independent evidence of value.[181] The Faus opinion would seem, on the surface, to agree; however, the opinion is far from explicit on this point and at least one subsequent California case has held to the contrary. In People v. Nahabedian,[182] the appellate court stated:

> "It must be remembered that the facts stated as reasons for the opinion of the witness do not become evidence in the sense that they have independent

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180. See People v. Murray, 172 ACA 244 (1959).

181. See 5 Nichols 265, 269; 155 A.L.R. 260; 118 A.L.R. 815-76; Burke, "The Appraiser-Witness," 38 Neb. L. Rev. 495, 500,501 (1959).

182. 171 ACA 335, 343 (1959).

> probative value upon the issue as to market value. On the contrary, they serve only to reinforce the judgment of the witness, that is, they go to the weight to be accorded his opinion."

The court cited the Stewart and La Macchia cases to support its position.[183] There is no question that in the pre-Faus situation, where prices could only come in on cross examination, this was the rule and had some justification. The Nahabedian court further cited 5 Nichols 1845.1 to lend weight to its position. That citation, however, does not, upon further analysis, lend support to its holding. It merely says that if such evidence is based entirely on hearsay, the witness may not testify concerning it. It does not go to the question as to how such evidence is treated once it is held admissible.

The holding of the Nahabedian case received additional support by the wording of §1845.5 of the Code of Civil Procedure as it existed at that time. Following the opinion in Faus, the Legislature had enacted §1845.5 indicating its approval to the admittance of comparable prices on direct examination. It couched this policy in the words, "In order to qualify a witness. . ." Thus, it appears, the Legislature, following the pre-Faus cases, limited the use of comparable prices; such prices did not appear to have the rank of independent evidence. However, in the last session

183. Long Beach City H.S. Dist. v. Stewart, 30 Cal. 2d 763, 185 P. 585 (1947); People v. La Macchia, 41 Cal. 2d 738, 264 P.2d 15 (1953).

of the Legislature, in amending §1845.5, the Legislature, perhaps unwittingly, altered the language of the prior section to read, "In an eminent domain proceeding a witness, otherwise qualified, may testify. . . as to his knowledge of the amount paid for comparable property or property interests. . ."[184] This language would indicate that such prices do not go to the witness' qualifications but rather are independent evidence.

This problem is important and its clarification necessary for two major reasons. First, the practice and pattern of labelling particular evidence as going to credibility rather than to the truth of the fact is a well known and entrenched one in many areas of the law. But in condemnation trials, at least, such a practice is conducive to confusion and devoid of meaningful distinction to almost any jury. It complicates rather than clarifies the issues.

A second compelling reason for deciding the issue rests in the fact that there may be a number of times when a jury might give a verdict that is below or above the experts' opinions of value but within the range of comparative sales as testified to by the experts. Under such circumstances, the validity of the verdict would depend upon whether the jury is bound by the opinions of the witnesses and, if not, whether it is bound by the evidence and whether

184. Ch. 2107 (1959).

comparable prices are independent evidence. The cases, at least prior to Faus, tended to hold that the jury cannot go beyond the range of the evidence, that is, the witness' opinions.[185]

In order to analyze the problem properly, it is first necessary to see wherein the courts agree and disagree. All courts are in agreement that if a witness qualifies as an expert (and most courts agree this includes the property owner as well) then he may give his opinion as to the value of the property.[186] (There are some differences as to what factors may qualify a witness, but this is not the issue here.) Further, because the courts are cognizant that a great deal of the factors that go to make up an expert's opinion are necessarily derived from hearsay matter, they permit an expert to give his opinion despite the hearsay factors he takes into consideration.[187] To do otherwise would virtually preclude any evidence of value from being presented.[188] It is the next stage of the problem where the

185. See People ex. rel. Department of Public Works v. McCullough, 100 C.A. 2d 101, 105 (1950); People v. Thompson, 43 Cal. 2d 13, 27 (1954).

186. 1 Orgel 563.

187. See National Bank v. New Bedford, 175 Mass. 257, 56 N.E. 288, 290 (1900); Bridgeport Hydraulic Co. v. Town of Stratford, 139 Conn. 388, 94 A.2d (1953); Wahlgren v. Loup River Pub. Power Dist., 139 Neb. 489, 297 N.W. 833 (1941).

188. See Montana Rwy. Co. v. Warren, 137 U.S. 348 (1890); Commonwealth v. Smith, 17 S.W. 2d 203 (Kent. 1929); Diamond, "Condemnation Law," 23 Appraisal Journal 564, 572-73 (1955).

confusion and controversy comes in. May the expert actually testify to comparable prices and the like though his information about these matters rests to some extent upon hearsay?

California, at least prior to Faus, and a number of other jurisdictions are in accord with the holding of Justice Holmes in an early Massachusetts case on this point.[189]

> "An expert may testify to value although his knowledge of details is chiefly derived from inadmissible sources because he gives the sanction of his general experience. But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible." (Emphasis added)

Virtually all courts would adhere to this position if the witness had garnered his information solely from "talk on the street". In other words, if the hearsay is not in any way checked, if the sales prices are not in any other way checked upon, all courts would prevent a witness from testifying about them in any detail.[190] But if the comparable sales data were derived by more than "talk on the street" and by more than a mere recitation in a deed, would such prices be admissible into evidence?

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189. National Bank v. New Bedford, 175 Mass. 257, 56 N.E. 288, 290 (1900). See also, Hammond Lumber Co. v. City of Los Angeles, 104 Cal. App. 235, 247, 285 Pac. 896, 902 (1930).

For a critical attack on the wisdom of this position, see McGuire and Hahesy, "Requisite Proof of Basis for Expert Opinion," 5 Vand. L. Rev. 432, 437 (1952).

190. See, generally, Burke, "The Appraiser-Witness," 38 Neb. L. Rev. 495, 500 (1959); Winner, "Rules of Evidence in Eminent Domain Cases," 13 Ark. L. Rev. 10, 23 (1958-59).

The question is squarely presented by two recent federal cases reaching fairly opposite results. In a 1952 Fourth Circuit case,[191] the court stated that the witness' testimony regarding comparable sales that "he had learned of in his investigation and which he had verified by examination of the land records in the county," should have been permitted into evidence. The court felt that the trial court's exclusion of such testimony based on the hearsay and best evidence rule was erroneous and the jury was entitled to the "facts" supporting the opinion of the witness.

In a 1954 First Circuit case,[192] the court there swung in the opposite direction. It held, under similar facts as the Fourth Circuit case, that recitations in deeds, "talk on the street" or in the real estate trade and computations from revenue stamps were not sufficient to overcome the barrier of the hearsay rule; such prices, therefore, were inadmissible into evidence for any purpose.

The arguments on each side of this question are strong. Supporting the admissibility of such testimony is that by its exclusion, parties to every sale would have to be called and the trial would, at the least, be unduly prolonged. On the other hand, by admitting this testimony, an

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191. United States v. 5139.5 Acres of Land, 200 F.2d 659 (4th Cir. 1950).

192. United States v. Katz, 213 F.2d 799 (1st Cir. 1954).

expert may support his opinion, but true comparability can't be tested by cross examination. One recent circuit court,[193] in order to solve the impasse, adopted the following position:

> "The admission of such testimony [comparable sales] will be subject to the discretion of the trial court, not only as to questions concerning comparability or remoteness, but also as to whether the expert's sources of information are reliable enough to warrant a relaxation of the rule against hearsay evidence."

But leaving this problem to the discretion of the court, which is the essence of the above statement, does not really solve the problem; it ignores the issue and leaves the matter in a state of flux. Rather, it is advanced, it would be more beneficial to make a definite ruling on this question in order to enable counsel and appraisers to prepare themselves for trial. As a general proposition, most experts can be relied upon to investigate the circumstances of sales they rely upon. In such instances where an expert has unduly relied upon hearsay of doubtful validity, that factor can be brought out on cross examination and go to the weight of any opinion of value expressed by him. When the hearsay is entirely unsupported and completely unreliable the court has the inherent power to prevent its use. Accordingly, it is recommended that when an expert offers

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193. District of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 235 F.2d 864, 866 (D.C. Cir. 1956).

evidence of comparable sale prices, these prices are admissible, notwithstanding the rule against hearsay evidence.

This brings us to the last and principal stage of the problem. As might be expected, the confusion concerning the admissibility of this "hearsay" evidence of comparable sales for any purpose has produced further confusion as to the purpose it is admitted, if held admissible at all. As indicated above, those courts which admit such prices into evidence generally consider it independent evidence of value. The Nahabedian case would hold otherwise. But it seems logical and proper that once a court permits such matter into evidence in accordance with the Faus ruling, the jury may consider such information as independent evidence of value.[194] There is hardly any question that a jury, despite any instructions to the contrary, would so consider it as substantive evidence at any rate.

Furthermore, as indicated above, occasionally juries grant awards either below or above any opinion of value testified to by an expert but within the range of comparable sale prices presented at the trial. At least prior to Faus the rule appeared that the jury couldn't go beyond the range of opinion evidence. A more recent California court has ruled otherwise, however; in

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194. Interviews with the authors and Judge John J. Ford (July 21, 1959); George Hadley (July 16, 1959).

so doing it treated comparable sale prices as independent evidence, interpreting the Faus opinion differently than the Nahabedian court.[195]

Since it is the jury's principal duty to determine compensation and since the court only permits comparable prices to be introduced when it is satisfied as to their trustworthiness, the jury should be allowed to treat such data as independent evidence. This position is taken despite an awareness that generally cases wherein juries go beyond the range of opinion testimony produce unfair and unwarranted verdicts. In such cases, however, the court has the power to grant a new trial notwithstanding the verdict, if it considers that the verdict is not reasonably supported by the weight of the evidence.[196]

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195. See record in Lawndale School Dist. of Los Angeles v. Andres. No. 685,049 (1958).

196. See 1 Orgel 555.

## C. The Income Approach

Except in very rare instances, as pointed out before, evidence as to the net profits or income from business property is held inadmissible as direct evidence in arriving at market value.[197] Not only is such evidence excluded in numerous cases where an expert appraiser often finds its use vital in ascertaining market value, but its general exclusion contradicts the basic theory of value held by almost all economists--the value of income producing property equals the present value of the income it will produce.[198] Because of the difficulty accompanying this approach, however, the courts have deliberately avoided coming to grips with this factor. As was pointed out before, their brothers on the bench in the Commonwealth countries do not have this reticence concerning these matters, difficult and complex as they often are.[199]

There is a striking similarity between the reluctance of the courts to admit comparable sales prices on direct examination in the pre-Faus era and the present policy to block testimony

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197. See 1 Orgel 655; 2 Lewis on Eminent Domain 1273; 134 A.L.R. 1125; 7 A.L.R. 163. See also n. 72 supra.

198. See 1 Orgel 647.

199. See 18 Am. Jur., "Eminent Domain", §345. See also nn. 46-50.

regarding income and capitalization factors on direct examination. This can best be illustrated by the courts' language in two leading cases. In Central Pacific R. Co. v. Pearson, the court said:[200]

> "But, while the opinions of witnesses thus qualified by their knowledge of the subject are competent testimony, they cannot, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the company have been compelled to pay in other and like cases--notwithstanding those transactions may constitute the source of their knowledge. If this was allowed, the other side would have a right to controvert each transaction instanced by the witnesses, and investigate its merits, which would lead to as many side issues as transactions and render the investigation interminable."

Adopting virtually the same rationale, the court in City of Los Angeles v. Deacon stated:[201]

> "To accept a statement of net profits as a fact to be taken into consideration in arriving at market values, of necessity opens the door: To an investigation into the accounting system of those operating the plant; into the costs of installation and replacements; raises questions of efficiency and skill; and leads into innumerable other sideroads and alleys. A witness who has given an opinion as to market value may be asked on cross-examination if he knew of the net profit, and what importance, if any, he attached to it, but such questions are permitted to test the value of the opinion ventured, and not because the sum involved is to be made use of by the court or jury as a basis for computing market value."

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200. 35 Cal. 247,262 (1868).

201. 119 Cal. App. 491,495, 7 P. 2d 378,379 (1932).

The rule of relevancy which now commands the comparable approach field, nonetheless remains a disfavored policy as far as the income approach is concerned.

This restrictive policy has, of course, considerable practical justification and because it does a number of leading authorities in the field have commended the courts' position. For example, Orgel sums up both his and the courts' view on the matter as follows:[202]

> "Deriving the value of real estate from the business profits of an enterprise located thereon is both difficult and dangerous. It is especially dangerous where there is no record of past profits on which to base an inference as to future profits. Even where there is such a basis, it is difficult to apportion or allocate the earnings as between the real estate and the business enterprise.
>
> "The courts have taken the proper course in avoiding this kind of valuation wherever possible because in the hands of unskilled jurors and judges on the one hand and of biased experts, on the other, there is no effective check on the value placed on properties by means of capitalization of earnings. Where actual sales prices are available, they are probably a safer index of the market value of property despite the fact that they raise collateral issues, such as similarity in kind and proximity in time. These issues, difficult as they are, are not as difficult as inferring value by anticipated future profits."

In essence, therefore, the objection to the introduction of this measure of evaluation is its difficulty in explaining and understanding and its lack of a checking rein. Formidable as these objections are--and they may not be easily minimized--it would appear that neither Orgel nor the courts

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202. 1 Orgel 696.

would oppose the introduction of this formula wherever its use is proper and feasible; nor can it be doubted that modern business practices have forced the courts to ease up on this tight-fisted restriction; nor can it be denied that regardless of judicial reservation, the market place does not sidestep the issue because of its difficulty.

While it is quite correct that courts will reject evidence as to income and profits to prove the market value of the property, the full picture is far from black and white; gray is the prominent color. First of all, if the business as well as the property is being taken there is but little restriction on the use of the capitalization method.[203] Secondly, some courts have shown a tendency to admit income data, not for the purpose of determing the value of the property as it exists, but to point out its highest and best use.[204] Of course, this differentiation (if it truly be one) would escape even that rare juror who takes a 150 I.Q. into the box with him. Other courts,

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203. Anderson v. Chesapeake Ferry Co. 186 Va. 481, 43 S.E. 2d 10 (1947); Cal-Bay Corp. v. United States, 169 F. 2d 15 (9th Cir. 1948); United States v. 340 Acres of Land, 64 F. Supp. 117 (S.D. Ga. 1946).

204. See e.g., Housing Authority v. Lustig, 139 Conn. 73, 90 A. 2d (1952); New Jersey Hwy. Authority v. Rue, 41 N.J. Super, 385, 125 A. 2d 305, 307 (1956); United States v. 340 Acres of Land 64 F. Supp. 117, 120 (S.D. Ga. 1946).

like California, bring about similar results by allowing this data to come out on cross examination for the purpose of going to the witness' credibility.[205]

But the vagaries surrounding this subject are even more marked. As well settled as it is that income and profits of a business cannot be shown for the purpose of proving value, it is by the same token fairly well settled that rental income can be shown and the capitalization formula employed when the property is essentially rental type.[206] The basic distinction in the treatment between rentals and profits is that the appraiser can generally utilize rentals with greater confidence than profits. The major distinction advanced by the courts, however, is that the condemnor does not take over the business but only the real property and therefore profits of the business are extraneous.[207] The weakness and fallacy of this major premise, however, is that the real purpose of showing profits is not to prove a separate element of damage but rather to reflect the value of the real property itself.

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205. City of Los Angeles v. Deacon, 119 Cal. App. 491, 7 P. 2d 378 (1932).

206. See Winner, "Rules of Evidence in Eminent Domain Cases," 13 Ark. L. Rev. 10, 18 (1958-59); 1 Orgel 703; 5 Nichols 228.

207. See Matter of Board of Water Supply, 121 Misc. Rep. 204, 207, 201 N.Y.S. 88 (1923); City of Chicago v. Farwell, 286 Ill. 415, 423, 121 N.E. 795 (1919).

Even if the distinction between rentals and profits were valid in theory, from a practical point of view such a distinction is often merely a semantic one. For the element of personal management in rental property is a factor that often affects the income of such property; yet courts, quick to stress the personal element involved in business profits, ignore or minimize this factor when dealing with rental property. And while California appears to be in the minority,[208] the majority of courts permit profit data to be shown when farm lands are involved.[209] Obviously, the element of personal management is significant even when the most ordinary type farm is being dealt with.

The tenuous distinction between income derived from the property itself and income derived from the enterprise located thereon has, with the advent of modern commercial activity, reached a breaking point. And in trying to resolve the law with the market place, there appears to be a recent tendency to face the realities of the market place. This can no better be depicted than by pointing out those cases where courts have admitted into evidence gross income figures in such instance where rentals in gasoline station operations involve leases primarily

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208. See Stockton & C.R.R. Co. v. Galgiani, 49 Cal. 139 (1874).

209. 5 Nichols 228; Denver v. Quick, 108 Colo. 111, 113 P. 2d 999 (1941); Reisert v. City of New York, 174 N.Y. 196, 66 N.E. 731 (1903). See generally, 1 Orgel 679-86.

or solely based upon sales.[210] At least one other court has indicated a willingness to admit income data resulting from the operations of a parking lot.[211] Then, too, the question arises in valuing shopping center property and numerous other property, the rentals of which are based to a great extent upon gross receipts. This type of lease represents a major trend in modern real estate transactions.[212] While there have been no reported cases on this particular problem, in at least one very recent California case the trial court permitted gross receipts figures on a month-to-month lease basis to be shown for the purpose of proving market value.[213]

Not only do the above type leases fail to fall clearly into either the "income from property" or the "income from business" category, but numerous other type business properties such as garages, department stores, restaurants, drugstores,

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210. See e.g. St. Louis Housing Authority v. Bainter (Missouri) 297 S.W. 2d 529, 535 (1957); State v. Hudson Circle Service Center, Inc., 46 N.J. Super. 125, 134 A. 2d 113, 118,(1957).

211. Ribach v. State, 38 N.Y.S. 2d 869 (1942).

212. Winner, "Rules of Evidence in Eminent Domain Cases." 13 Ark. L. Rev. 10, 20 (1958-59).

213. People v. Stevenson & Co., Case No. 705457 (Parcels 2A & 2B) (Superior Ct. Los Angeles County, August 1959).

etc.[214] actually form a spectrum between the extremes. Throughout this spectrum all property values are to some extent affected both by the physical property itself and personal management involved. But in many, if not most instances, a prospective purchaser would seek to ascertain, almost immediately, the income that is presently being derived from its use.

The dilemma that this established distinction creates is exemplified in California cases. The Deacon case supra is authority for the position that profits (and inferentially income figures) from businesses can not be testified to on direct examination. More recently, in People v. Dunn, [215] the court reaffirmed the Deacon position. At the same time it did state that income from rentals is a proper element to be considered in arriving at value. In 1952, in People v. Frahm,[216] the sub-lessee of the condemned property who conducted a restaurant on the premises, had a lease wherein he paid his lessor 10% of the gross receipts of the restaurant. The trial court permitted him to show the net profits he made for the purpose of ascertaining a fair market value of the leasehold interest predicated upon a capitalization of a fair percentage applied to the net profits

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214. See Dunn, "Some Reflections on Value in Eminent Domain Proceedings," 24 Appraisal Journal 415, 416-418 (1956).

215. 46 Cal. 2d 539, 297 P. 2d 964 (1956).

216. 114 Cal. App. 2d 61, 249 P. 2d 588 (1952).

in order to show the market value of the lease. In affirming this action, the appellate court said:[217]

> "The testimony to which the appellant objects regarding the facts in connection with the actual operation of this business, was properly admitted as being a part of the foundation for the opinion expressed as to the value of the lease. . . The actual experience of the respondents in running this business, and the general conditions surrounding that operation would greatly affect the saleability of that lease, and had an important bearing on its market value."

The above rationale of the court, carried to its logical conclusion, would allow all income data to be presented on direct examination in order to show value as long as a prospective purchaser would take such profits into consideration. The court itself, however, did not, of course, draw these conclusions.

A further examination of each of the grounds advanced by the courts in rejecting income data casts further doubt as to the strictness of the rule they have adopted. Most courts when confronted with this question state that to take these factors into consideration in determining value would open the gates to speculative and conjectural awards.[218] Certainly, the

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217. The opinion fails to show any evidence other than income that was used by the condemnee--lessee to show value. Bearing in mind that the court in San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 Pac. 277 (1891), excluded in expert's opinion which was based upon the capitalization approach, though his testimony did not contain estimated income, it can be seen that Frahm is a major deviation from Neale.

218. See Sauer v. Mayor, 44 App. Div. 305, 60 N.Y.S. 648 (1899).

capitalization method involves a considerable amount of guesswork. Nonetheless, these same problems do not appear to have caused any major stumbling block when the condemnor takes not only the real property but the business as well.[219] And in other fields of law courts have been able to determine compensation and damages based upon the capitalization approach.[220] More significant, courts have been able to measure compensation via the income approach in condemnation cases. In England and Canada courts utilize the income approach as long as profits tend to prove the value of the property even though this might be partially affected by personal management factors.[221] And, finally, a number of jurisdictions in this country permit business profits to be shown in order to measure damages in partial takings; one state, Florida, specifically provides for this by statute.[222]

A second major reason advanced by the courts for refusing to allow profit data to be admitted is that the condemnor takes the real property, he does not take the

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219. See n. 203, supra. See also Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

220. See 67 Yale L. J. 61, 71-72, n. 48 (1957). See also 1 Orgel 658.

221. See 18 Am. Jur. "Eminent Domain," §345. See also nn. 46-50 supra. Federal courts apparently are more willing to entertain evidence as to income factors. See e.g., United States v. Waterhouse, 132 F. 2d 699 (9th Cir. 1943).

222. See Dallas v. Priolo, 150 Tex. 423, 426-27, 242 S.W. 2d 176, 179 (1951); In re Slum Clearance, 332 Mich. 485, 495, 52

business.[223] While this argument might have some validity when the issue involves incidental losses (and the special study on incidental losses questions the appropriateness of this reasoning even in those instances), this argument should have little weight in ascertaining the market value of the property taken. For the purpose of introducing profit data is not to compensate the condemnee for lost profits, in this context, rather it is to ascertain market value, that is, what the property would sell for on the open market. And, unlike the opinion as expressed by the California court in De Freitas v. Suisan City,[224] generally the income approach does not aim to "furnish a conclusive" measure of market value; it is only an element in determining market value.

Courts also maintain that comparable sales are a better index of value. This point has already been discussed at length and it is felt that while this assertion is often true, it frequently is erroneous even in cases wherein true comparability can be established. Further, in nonresidential, commercial property where the capitalization approach is most conducive, comparability is far more difficult to establish than it is in

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N.W. 2d 195, 199-200 (1952). Cf.; Herndon v. Housing Authority, 261 S.W. 2d 221, 223 (Tex. Civ. App. 1953); 6 Flo. Stat. Ann. §73.10. See also Ind. Ann. Stat. §3-1706.

223. Mitchell v. United States, 267 U.S. 344, 345 (1925); United States ex rel. TVA v. Powelson, 319 U.S. 266, 282 (1943). See also n. 207 supra.

224. 170 Cal. 263, 149 Pac. 553 (1915).

residential, non-investment type realty. Lastly, the inherent difficulties involved in the capitalization method basically reflect the complexity of many modern real estate transactions. It is not, therefore, a case of the tail wagging the dog. Seldom can the courthouse be less complex than the market place.

Senate Bill 1313, introduced in the 1959 session of the legislature and referred to above[225] addresses itself to this point. It calls for the admission of evidence to show market value when, among other things, such evidence will show "if income-producing property, the income potential of the property based in part upon its recent history." In light of the discussion thus far, this study is in essential accord with the purpose and language of that Bill in this regard. The purpose of course, for allowing evidence of income or rentals into evidence is to establish a basis upon which a witness predicates his opinion of fair rental or income attributable to the real estate; such an opinion is the starting point for the witness' capitalization study.

As long as the <u>court</u> deems that a reasonable purchaser would be significantly concerned and would seek to ascertain such information--as the Bill would seem to indicate--such legislation would not only be proper but necessary in order to determine market value.

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225. See p. 50

## D - Reproduction Approach

The third of the major methods of ascertaining market value is the summation approach, usually referred to as the reproduction less depreciation or simply the reproduction approach.[226] Perhaps because of its apparent simplicity, the majority of the jurisdictions have admitted reproduction evidence for the purpose of proving market value.[227] Thus, because of the simplicity goal, which is also the supposed hallmark of the market data approach, reproduction evidence is usually accorded greater favor than the capitalization approach which because of its readily admitted complexity is generally treated with disfavor by the same courts. Paradoxically, appraisers appear to have greater reservations concerning the justifiable utility of this method in many of those instances wherein the courts have expressed no such reticence.[228] Despite their misgivings about this approach, appraisers would be quick to assert

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226. The "Replacement" valuation approach is where the structure is replaced by another but different type of structure of equal utility; reproduction, on the other hand, denotes a replica. More often than not courts, however, include the replacement theory of value in terms of reproduction. Following their example, this study refers to the summation method as the reproduction approach. See n.73 supra.

227. See Winner, "Rules of Evidence in Eminent Domain Cases," 13 Ark. L. Rev. 10, 21 (1958-59); 2 Orgel 9-10; 56; 5 Nichols 244.

228. Idem. See also Harvey, "Observations on the Cost Approach", 21 Appraisal Journal 515 (1953).

times when this approach is the only meaningful method of ascertaining value.[229]

But while the majority of courts are perhaps at times open to criticism for their unsophisticated acceptance of the reproduction approach, the California position, representing a distinct minority, is vulnerable insofar as it often summarily excludes such data on direct examination even in instances when appraisers who are aware of the dangers and pitfalls of this approach would argue that its consideration is quite helpful in the quest for market value. Though the California position is not devoid of ambiguity,[230] it is fairly clear that the courts in this state exclude reproduction data on direct examination excepting only in those instances when there would be no feasible alternative -- particularly in situations where the property involved is service type and is not ordinarily bought and sold on the market.[231] Thus, the court in Vallejo & N.R. Co. v. Home

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229. Interview with Charles Shattuck and authors, August 7, 1959; interview with Nate Libott and authors, July 17, 1959. See, generally, Kaltenbach, Just Compensation, "Separate Consideration of Specific Elements," Spec. Bulletin No. 4 (1959).

230. See 172 A.L.R. 255-56.

231. See Los Angeles v. Klinker, 219 Cal. 198, 25 P. 2d 826 (1933).

Savings Bank stated:[232]

> "The general rule is against the admission of this class of evidence for any purpose. The market value of the land, together with the improvements thereon, viewed as a whole and not separately, is the general rule."

Aside from the erroneous view as to what the general rule actually is, the California court's holding necessitates a further analysis.

There seem to be three misconceptions as to the reproduction approach which are held by the courts who summarily reject such evidence. The first concerns the purpose for introducing such evidence. Contrary to the misgivings of the California courts, such evidence is not introduced for the purported purpose of establishing the standard of value; it is not, and seldom is alleged to be, the conclusive test of value. Rather, the reproduction approach, except in situations wherein unique or service type property is involved, is merely one of the elements which "fairly enter into the question of market value".[233] As the Connecticut court acutely suggested:[234]

> "The divergence of opinion upon the admissibility of replacement value of a building taken in condemnation proceedings may have arisen from the failure to distinguish between the measure of damage and the elements of damage."

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232. 24 Cal. App. 166, 140 Pac. 974 (1914). But see Joint Highway Dist. v. Ocean Shore R. Co., 128 Cal. App. 743, 18 P. 2d 413 (1933) for possible distinction.

233. In re Blackwell's Island Bridge, 198 N.Y. 84, 91 N.E. 278 (1910).

234. Campbell v. New Haven, 101 Conn. 173, 125 A. 650 (1924).

If this distinction were kept in mind, a good deal of the trepidation held by the California courts might be removed.

A second misleading factor that has unduly brought about the rejection of reproduction data is the failure to differentiate between original cost and reproduction cost less depreciation. As the Supreme Court has stated, "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost."[235] With this statement there can be no quarrel. Nonetheless, since reproduction costs automatically reflect the changes in prices of labor and materials, this otherwise valid objection is inapplicable. Yet, it seems that some courts have failed to appreciate this differentiation when they have rejected reproduction data.[236]

A final factor which incorrectly closes the door to reproduction data is the view that since the value of the improvements and land should not be separately evaluated it is improper to show the value of the improvements independently.[237] While there is merit in the argument that market value should result from the value of the land as enhanced by the improvements, this

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235. United States v. Toronto, Hamilton & Buffalo Nav. Co. 338 U.S. 396, 403 (1949).

236. See e.g. United States v. 70.39 Acres of Land, 164 F. Supp. 451, 488-89 (S.D. Calif. 1958). See, generally, 172 A.L.R. 244.

237. See Vallejo case supra. See, generally, 1957 U. Ill. L.F. 294.

concept should not serve as an exclusion for employing an initial separate treatment of the land and the improvements. There is no valid reason why an expert may not appraise each separately and then establish their integral value of market worth. The leading case supporting the admissibility of reproduction data is In re Blackwell's Island Bridge,[238] In that case the New York court said:

> "The learned Appellate Division has laid down the rule that, in condemnation proceedings, evidence of the structural value of buildings should not be received, and that the landowner must be confined to proof of the value of his land as enhanced by the value of the structures thereon. This is doubtless the rule applicable to certain cases, but we think it is not, and should not be, a rule of universal application. All proceedings prosecuted under the right of eminent domain are based upon two fundamental facts. The first is that the owner's land is taken from him theoretically against his will, and the second is that the owner is not permitted to fix his own price, but must be content with just compensation. The latter is a burden to which the owner must submit, but it is also a right which he may enforce. What is just compensation? In some cases the value of expensive structures may not enhance the value of the land at all. An extremely valuable piece of land may have upon it cheap structures which are a detriment rather than an improvement. A man may build an expensive mansion upon a barren waste, and, in such a case, the costly building may add little or nothing to the total value. In the greater number of cases, however, when the character of the structures is well adapted to the kind of land upon which they are erected, the value of the buildings does enhance the value of the land. In such cases it is true that the value of the land as enhanced by the value of the structures is the total value which must be the measure of the owner's just compensation when his property is condemned for public use. As to that general proposition there can be no disagreement. But how is the enhancement of the land by the structures which it bears to be proven? If all

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238. 198 N.Y. 84, 91 N.E. 278 (1910)

> buildings were alike, the rule laid down by the Appellate Division would be one of convenient and universal application. It is common knowledge, however, that buildings not only differ from each other in design, arrangement, and structure, but that many which are externally similar and are situated upon adjoining lands, are essentially different in the quality and finish of the materials used and in the character of the workmanship employed upon them. It must follow that such differences contribute in varying degrees to the enhancement in the value of the land, and we can think of no way in which they can be legally proved except by resort to testimony of structural value which is but another name for cost of reproduction, after making proper deductions for wear and tear. This may be by no means a conclusive test as to the market value of premises condemned for public use. But that is not the question at issue. The question is whether evidence of structural value is competent to show market value, when the buildings are suitable to the land. There are instances, of course, when precisely similar buildings upon identical parcels of land may have the same potential market value just as the price of commodities like cotton, flour, or potatoes is regulated by the law of supply and demand without reference to cost of production in particular cases. When that is true, the market value may be the value of the land as enhanced by the value of the buildings, without reference to structural value. But when a building has an intrinsic value, which must be added to the value of the land in order to ascertain the value of the whole, the owner may not be able to establish his just compensation unless he is permitted to prove the value of his land as land and the value of his buildings as structures. By adding to each other these two quantities the result is really the value of the land as enhanced by the buildings thereon."

The court in that case was undoubtedly aware of the complex problems involved in the reproduction approach. The problems of adaptability, depreciation -- functional and physical, and obsolescence are as difficult as they are elusive. A failure to properly weigh these factors has often led to excessive or depreciated awards. Because of the danger of excessive awards,

Orgel has suggested and some courts have on their own permitted reproduction data only in the absence of comparable sales or evidence of earning power of the property.[239] The drawback that such a policy would have is that reproduction less depreciation would only rarely be a permissible approach save for service or unique type of property. But the policy of admitting reproduction data despite the existence of alternative methods of valuation is not only the majority position, but one adhered to by appraisers well aware of the dangers inherent in this method of evaluation. If the expert is competent and has carefully done his work, these dangers are greatly minimized. The fear that the bias of experts is too formidable to overcome is apparently held by Orgel and others. To this factor we shall turn our attention in a subsequent study. For now, it is advanced that reputable appraisers consider this method often to be a valid approach to market value; at a minimum it can serve to check and support the other approaches to value.

On this subject the opinion of Judge Carter in the Convair case[240] is extremely interesting. In that case the court clearly held that comparable sales were the best evidence of value; and, as such, it went on to reject reproduction data as direct evidence of value. As indicated before at some length, we

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239. 2 Orgel 57.

240. United States v. 70.39 Acres of Land, 164 F. Supp. 451 (S.D. Calif. 1958).

are in disagreement with the rigid conclusion. Yet, the opinion with considerable candidness goes on to examine the propriety of admitting an opinion of value based on reproduction data though rejecting any elaboration or explanation of the manner in which the opinion was formed. Judge Carter writes:

> "Is it inconsistent not to permit defendants to put into evidence, the dollars and cents value of 'reproduction cost', as bearing on fair market value, yet permit defendants to ask their expert generally, whether he considered this as a factor? We do not think so."

We cannot agree. If an expert places considerable store and trust in this method and if, as is often the case, such details come out on cross examination, why should not the jury "be let in" on his methods on direct examination? If the expert is clearly wrong or on weak ground in so formulating market value, this can be shown on cross examination. And if such methodology is clearly inapplicable, the court may exclude such data.

Judge Carter supports his stand on arguments reminiscent of the pre-Faus era. He indicates how collateral matters will arise and how prolonged trials will become if such data is permitted into evidence. But these arguments were not only laid to rest in the Faus case but were likewise buried by Justice Holmes with an appropriate epithet, ". . . so far as the introduction of collateral issues goes, that objection is a purely practical one -- a concession to the shortness of life."[241] Judge Carter then

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241. Reeve v. Dennett, 145 Mass. 23, 28, 11 N.E. 938, 943-44 (1887).

adds that a detailed explanation of the expert's method regarding the reproduction approach would "prejudice" the jury. It is difficult to see how this follows but it obviously begins from the base that anything but comparable sales is surplusage. Appraisal theory is not in accord.

It is advanced that statutory provision be made admitting into evidence on direct examination "the value of the land together with the cost of reproducing the functionally equivalent improvements thereon less whatever depreciation such improvements shall have suffered, functionally or otherwise and provided such improvements are adaptable to the land." This language is somewhat more restrictive than that contained in SB 1313. These further restrictions are, however, necessary and the application of such restrictions should be handled by the court in the same manner as the court exercises its authority when dealing with the market data and capitalization approaches. The pre-trial devices will need to be utilized to a considerable extent regardless of the approach, however. As indicated a subsequent study will discuss methods of strengthening such pre-trial practices.

V

TENTATIVE EVIDENCE STATUTE

1. Admissible Evidence Pertaining to Compensation

Upon the trial, the following evidence shall be relevant, material and competent upon the issues of market value, damages and special benefits:

(a) Evidence of the price and other terms upon any sale [1] and evidence of the rent reserved and other terms upon any lease,[2] relating to any of the property taken or to be taken or to any other comparable property in the vicinity thereof if:

(1) Such sale or lease was made within a reasonable time before or after the date of valuation;[3]

(2) It was freely made in good faith.[4]

(b) Any other evidence which in the opinion of the court a reasonable, well-informed prospective purchaser or seller of real property would take into consideration, in deciding whether to purchase or sell the property and what price to pay[5] including but not limited to evidence of:

(1) The value of the property as indicated by

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1. See pp 45-53, 79-80
2. See pp 53-54
3. See pp 54-57
4. See pp 63-65
5. See pp 33-44

the capitalization of its fair income attributable to the real estate as distinguished from any business conducted thereon;[6] and

(2) The value of the land, together with the cost of reproducing the functionally equivalent improvements thereon, less whatever depreciation such improvements shall have suffered, functionally or otherwise, and provided such improvements are adapted to the land.[7]

(c) The evidence mentioned hereinabove in subparagraphs (a) and (b) shall be admissible on direct or cross examination and shall be treated as independent evidence of value.[8] It shall not be barred by the rule against hearsay provided such evidence is testified to by a witness qualified to express his opinion of value.[9]

2. Inadmissible Evidence Pertaining to Compensation

Notwithstanding the provisions of paragraph 1 no evidence shall be admitted on direct or cross examination of:

(a) The price and other terms upon any acquisition of any property if such acquisition was made by any person or

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6. See pp 96-107
7. See pp 108-116
8. See pp 85-95
9. See pp id.

body having the power of eminent domain;[10]

(b) Any offer made between the parties to the action, or on their behalf, to buy or sell the property sought to be condemned or any part thereof;[11]

(c) The price at which an offer or option to purchase or lease was made,[12] or the price at which property was optioned,[13] offered or listed for sale or lease,[14] [except to the extent that options, offers or listings to sell or lease the subject property shall constitute admissions against interest];[15]

(d) The assessed valuation of the subject property or comparable property.[16]

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10. See pp 57-62
11. See pp 71-62
12. See pp 72-73, 77-78
13. See pp 73-79
14. See pp 81-84
15. See pp 76-77, 79
16. See pp 81-85