#36.50 8/19/71

Memorandum 71-63

Subject: Study 36.50 - Condemnation (The "Larger Parcel")

Background Study

Attached to this memorandum is a research study relating to the "larger parcel" concept prepared for the Commission by our original consultants. We believe that the study provides valuable background for discussion of the issues involved in this area of the law, and we urge you to read the study with care. However, the law as to what constitutes the "larger parcel" in California is uncertain, and the staff queries the total accuracy of what is described in the study as the "California position." The California Supreme Court has recently granted a hearing in City of Los Angeles v. Wolfe (a copy of the court of appeal opinion is attached hereto and is reported in 16 Cal. App.3d 989), and we expect, or at least hope, that the final decision in that case will state clearly the rule(s) applying or to be applied in California. We do not believe that it is profitable and we have not attempted to prepare our own detailed analysis of the existing California law but we have summarized in the memorandum some of our thoughts in this regard. We believe that tentative decisions as to what the law should be in this area can and should be made at this time--even in the absence of certain knowledge as to what the California law actually is--and we have proceeded accordingly.

Preliminary Considerations

The basic purpose of the "larger parcel" concept is to delineate those property interests which are so interrelated that, where the condemnor acts with regard to one, the effect on the value of the others may be considered.

Obviously, the concept may be involved in cases of both direct condemnation and inverse condemnation; in determining what guidelines should be established for delineating the "larger parcel," the impact on both types of cases must be considered, and uniform guidelines for each should be provided.

It must also be emphasized that the effect on the value of the "other" property referred to above may be beneficial as well as detrimental. Hence, while it is often the property owner who seeks an expanded view of the larger parcel concept in order to recover damages for loss of value to as much of his property as possible, there are situations where substantial benefits will result from an improvement, in addition to possible damages, and a condemnor will in such situations also seek to establish an expanded "larger parcel" in order to obtain the maximum offset of benefits. This point gains even further importance if, as the staff suggests, a "before and after" measure of damages is adopted and all benefits in effect are offset against both the value of the take and the severance damage to the remainder. See Memorandum 71-64.

Finally, even a cursory review of the cases discloses that claims for business losses and for market depreciation are often intermixed in "larger parcel" cases. As a practical matter, these may often be hard to separate; however, the distinction should and can be made clear in the comprehensive statute. In short, what we are concerned with here is drawing the boundaries around properties which are so interrelated that the value of all is affected by acts directly concerning only one. Conceptually the focus is on the value of the property itself, not on damage to the business conducted on the property.

The Traditional Analysis

Traditionally, analysis in this area has focused on three factors which are said to characterize properties which form a part of a "larger parcel": (1) "contiguity," or physical unity; (2) "unity of title," i.e., common ownership or title; and (3) "unity of use." Whether a particular court adheres to a liberal or restrictive view of the "larger parcel," it generally will purport to concern itself with all three of these factors. Those courts following a restrictive interpretation of "larger parcel" would demand that all three of these factors be present; more "liberal" courts tend to emphasize the factor of use. It seems apparent, however, that the first two factors are but mirror images of each other, and it seems more profitable to consider the issues raised by them together.

Physical Contiguity and Unity of Title

Introduction. As noted above, the "larger parcel" concept delineates those property interests which are so interrelated that, where the condemnor acts with regard to one, the effect on the value of the others may be considered. The cases fall into three basic categories:

(1) those in which no property interests of others intervene between the outer boundaries of the "larger parcel"; that is, cases in which the condemnee's claimed "larger parcel" is composed of physically adjacent fee interests all owned by condemnee;

(2) those in which the condemnee's formal interest in some of the intervening land is less than an unencumbered fee; that is, cases in which the condemnee owns the underlying fee in the intervening land, but the fee is encumbered by an interest in another, or in which another owns the intervening fee encumbered by some formal interest in the condemnee;

(3) those in which the condemnee has no formal interest in intervening land: commonly cases in which the condemnee claims an interest in intervening land of another on a theory of adverse user, or estoppel, or the like, or in which the intervening land is public property in which the condemnee claims a right, such as access in a street, in the nature of a property interest.

There are two general approaches to the question whether condemnee's interests in all the land within the claimed "larger parcel" are the appropriate ones: (1) an easy to administer but formalistic approach which requires that all of the condemnee's interests in all of the land be of a particular, formally-defined type; and (2) a potentially difficult to administer, but utilitarian, approach which places no definitive emphasis on the formal categories of the condemnee's interests (either in the take or in any part of the remainder), but requires that the condemnee's interests in all of the land be susceptible of a "common use" giving them a value in common greater than the sum of their individual values. Both approaches find support in California law.

Summary of existing law. All courts would agree that physically adjacent fees under common ownership satisfy the requirements of contiguity and unity of title. Some courts, however, go farther and hold that only physically adjacent fees can constitute a "larger parcel." This position is the result of the application of two rules commonly treated as distinct but having identical import: (1) a less-than-fee interest connecting two fees cannot render the fees "contiguous"; (2) all parts of the claimed "larger parcel" must be owned in fee since there can be no requisite "unity of title" between fees and lesser interests or between exclusively less-than-fee interests. Thus, for example, two fees with a leasehold lying between them, all commonly owned, can never be a "larger parcel" under these rules since (1) the interests cannot be "contiguous" and (2) there can be no "unity of title" among them.

It seems evident that this formalistic position--whether it results from the application of the rule of strict contiguity or the rule of strict unity of title--begs the question whether there has been an effect on the value of remaining property by narrowing the definition of "property" to include only integrated fee interests. Nevertheless, it appears to be the position taken by the California courts of appeal in direct condemnation cases.

Insistence on this narrow and unrealistic view of "property" in these cases has created sharp conflicts with holdings in inverse cases. For example, in City of Los Angeles v. Wolfe (attached), the court of appeal, citing lack of "contiguity," denied a severance damage claim that was based essentially on loss of customer access where the condemnor took a parking lot physically removed from business premises. However, two years earlier, in United California Bank v. State, 1 Cal. App.3d 1, 81 Cal. Rptr. 405 (1969), the same court granted an inverse claim for loss of customer access where condemnor's street improvements had made it more difficult for customers to reach both the store and a parking lot physically removed from the business premises. Conceptually the cases may be different, but the practical impact of the takings in both cases is so similar that explaining the differences in theory is difficult at best.

The formalistic position of the courts of appeal conflicts, moreover, with the more utilitarian approach which seems to have been taken by the California Supreme Court. The approach of the latter seems to have focused on whether the condemnee had a sufficient interest in all parts of the claimed "larger parcel" to support the asserted "common use." See City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 P. 705 (1915)(involving a leasehold in waterfront property claimed to be part of a "larger parcel" with a fee in distant upland property, the two being connected only by public streets

straddling fees owned by third persons; the opinion clearly assumes that there could have been a "larger parcel" if condemnee had owned some interest in the intervening fees); People v. Ocean Shore R.R., 32 Cal.2d 406, 196 P.2d 570 (1948)(a fee-owned railroad right of way intersected by the fee in a public park; the opinion is based on a discussion of whether condemnee's former railroad operation through the park had created an interest in the park property, the court noting that, if condemnee had had the easement through the park that it claimed, its holdings would have been "contiguous"); People v. Thompson, 43 Cal.2d 13, 271 P.2d 507 (1954)(fee-owned property intersected by a highway, condemnee owning the underlying fee in the highway roadbed; the opinion centers on the question whether condemnee had retained sufficient rights of access between the parts of his property to prevent them from becoming "separate" parcels).

It is notable that, in City of Oakland v. Pacific Coast Lumber & Mill Co., the court took pains to point out that private easements, then existing between the parts of the claimed "larger parcel," did not belong to condemnee. There were, however, public streets connecting the parts of the "larger parcel" in Oakland v. Pacific, in which streets it might be held now that condemnee had some right of access in the nature of an easement. Thus, though as of 1915 the California Supreme Court did not think of the right of access in public streets as a "property interest," the extensive discussion of "access" in Thompson may indicate a change of position as of 1954.

Such apparently was the view of the federal court in City of Stockton v. Miles & Sons, Inc., 165 F.Supp. 554 (1958), where the court applying California law (specifically, relying on the California Supreme Court's opinion in Thompson, supra) held that two business properties, separated by

a fee-owned city street but regularly used in conducting a single business, were a "larger parcel," the taking of part of which necessitated payment of severance damages to the remainder. The condemnee in Miles & Sons had no formal interest in the street and could claim none. The court did not mention the California inverse cases holding that an abutting owner has some right of access in public streets in the nature of an easement, but pointed out that condemnee plainly did have "actual access" (using the term employed in Thompson) across the street and that it was plainly sufficient to maintain the existing "common use." Miles & Sons seems to be a justifiable extension of Thompson. In going a step further than Thompson, however, the case portends wider liability of condemnors in both direct and inverse condemnation cases and somewhat greater complexity of judicial administration.

Unity of Use

The underlying rationale of Miles & Sons--clearly evident also in Thompson--is that: Whether there is a group of property interests which can be damaged (or benefited) by the taking of, or acts done upon, part depends upon whether the interests are subject to a "unity of use" which gives them an incremental unitary value which is interfered with by interference with any of the interests. The rationale is implemented by a rule that the condemnee's interests in all of the land underlying the "larger parcel" need not be fees since it is obvious that a valuable "unity of use" can exist--and modernly commonly does exist--on lesser interests. The rationale can be extended to encompass a "larger parcel" containing land in which condemnee has no formal interest since, as in Miles & Sons, a "unity of use" can exist--and often does exist--under such circumstances.

The rationale is most applicable to cases involving business properties since it is common that particular groups of fee and less-than-fee interests,

or of exclusively less-than-fee interests, have great, and, not infrequently sole, value for use in the conduct of a particular business. In such cases, it simply ignores actual property values to hold that a taking of some of the interests cannot be a taking of "property part of a larger parcel" and creates no liability for severance or consequential damages.

Courts which adopt a "unity of use" rationale have developed a number of corollary rules designed to limit damages to losses of actual, existing values, and to distinguish those losses that are speculative or peculiar to a particular owner. Stated briefly, these rules are as follows:

(1) A claimed "unity of use" must be actual and existing; properties will not be valued according to potential for a future "unity of use." There is an exception to this rule, discussed below as rule (5).

(2) All of condemnee's interests in the land underlying the claimed "larger parcel" must be permanent. Compensation is not paid for disruption of a merely temporary "unity of use"--one which might have been interfered with or destroyed without compensation had the condemnation not occurred. (The logical extension of this rule to cases involving "larger parcels" containing land in which condemnee has no formal interest results in a rule that an interest is not sufficiently permanent if it is a right to use of property which right is dominated by a greater right to dispose of the property in a manner inconsistent with its current use. Thus, in a case where one of condemnee's claimed interests was a right of access in a public street, the interest might be regarded as impermanent--and the "unity of use" insufficient--if a public entity could, for example, by "police power regulation," so limit the right of access without compensation as to render it insufficient for continuing the claimed common use.)

(3) An actual diversity of use between parts of a claimed "larger parcel" negates any claimed "unity of use": properties actually used separately are to be treated as separate properties. (A related rule is the common sense one that great physical dissimilarity of properties may prevent a successful claim that they are susceptible of a common use.)

It would seem, however, that where the condemnee owns adjacent fees currently valuable for development as a unit but presently devoted to individual interim uses, rule (3) should not prevent valuation of the properties at their development potential as a "larger parcel" if condemnee has the right to immediately terminate the individual uses and convey the whole to potential developers. Such cases would seem to fall within the reason of rule (5) below in that the individual uses do not decrease condemnee's ability to convey all the possible interests that the higher use could require. One California case, however, ruled that three adjacent residential lots, rented for residential purposes but valuable as a whole for commercial development, could not be regarded as a "larger parcel" in view of the "separate" residential uses. It was at least possible in that case that condemnee could have terminated the rentals immediately and conveyed the whole for commercial development. See City of Menlo Park v. Artino, 151 Cal. App.2d 261, 311 P.2d 135 (1957). If such was the case, the decision seems to be clearly wrong.

(4) Interests claimed to be in unified use must be interests in physically adjacent land in order to provide the continuous, actual access throughout that would permit a "unity of use": a claimed "unity of use" will be construed to consist only of what the available access would permit.

(5) The requirement of actual, existing common use will be waived where the "larger parcel" is composed of physically adjacent fees and there is no actual diversity of use between parts of the "larger parcel." No actual

diversity of use includes the case in which part of the "larger parcel" is used and the remainder is unused. The rule means that where integrated fees are involved it is permissible to value the "larger parcel" according to its potential for common use. The reason of the rule is that in such cases the condemnee can convey every possible interest in the property that could be required for any particular use.

Staff Suggestions

It should be no secret from the foregoing discussion that the staff believes that the existing California law with regard to the "larger parcel" concept is uncertain at best and arbitrarily and unreasonably restrictive at worst. We also believe that the Commission should attempt to improve the situation by formulating rules which delineate all those properties having or capable of having interdependent values. We suggest that such an attempt has the most chance of success if these rules focus on whether the properties are susceptible of a common use which gives the whole an incremental value exceeding the sum of the individual values of the parts. More concretely, we suggest that the following guidelines be adopted and that the staff be directed to draft statutory provisions implementing these guidelines:

(1) All property integrated by an actual, existing use may be valued together.

(2) All property susceptible of a potential common use may be valued together. A corollary to this rule is that physical dissimilarities or existing diverse uses may preclude the asserted common use.

(3) The property owner must have interests in property sufficient to connect all parts of the "larger parcel." The staff does not suggest that these interests need all be "formal" interests. We would, for example,

consider rights of access to a public street a sufficient connecting interest assuming, of course, that the right was adequate to service the asserted use.

Implicit in these guidelines is the view that the "larger parcel" concept is not involved where the property owner has no interest in the property taken. Whether a claimant owns a particular interest, or whether an interest exists, presents a distinct issue, determination of which may or may not necessitate a further determination of whether claimant's interests form a "larger parcel" interfered with by condemnation.

There are details that must be considered in drafting statutory provisions along the lines recommended. For example, procedurally the delineation of the "larger parcel" should be determined early in the proceedings so that both sides are at least valuing the same properties. This will require a procedure for properly raising and deciding the issue. These matters can be considered at subsequent meeting; for the present, we feel that we need preliminary guidance as to the basic approach to the issue.

Respectfully submitted,

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Legal Counsel

[Civ. Nos. 36110, 37092. Second Dist., Div. Five. Apr. 22, 1971.]

CITY OF LOS ANGELES, Plaintiff and Respondent, v. ROBERT LEE WOLFE et al., Defendants and Appellants.

SUMMARY

The City of Los Angeles brought an action to condemn a privately owned parking lot. The owner of the lot also owned a medical office building 250 feet from the lot. He permitted the occupants of the building to park in the lot without charge. In the condemnation proceedings he sought to recover damages for the reduction in income from the office building that he expected to result from loss of the parking lot. The trial court ruled that he was not entitled to recover such severance damages. (Superior Court of Los Angeles County, Richard A. Barry, Judge.*)

The Court of Appeal affirmed the decision, citing the well-established California rule that contiguity is essential to the recovery of severance damages. Since the owner here had no interest in the land between the parking lot and the office building, the court held he was not entitled to severance damages. (Opinion by Kaus, P. J., with Stephens, J., concurring. Dissenting opinion by Reppy, J.)

HEADNOTES

Classified to McKinney's Digest

(1) **Eminent Domain § 72—Damages to Contiguous Land—Necessity That There Be Contiguity.**—In condemnation proceedings severance damages can only be predicated on a showing of unity of title, unity of use and contiguity; thus, the owner of a medical office building and a private parking lot that was used by the occupants of the office building was not entitled to severance damages for the diminution in value of the office building caused by condemnation of the parking lot, where the parking lot was 250 feet away from the office building.

*Assigned by the Chairman of the Judicial Council.

and where the owner owned no interest of any kind in the real property between the building and the parking lot.

{See **Cal.Jur.2d, Rev.,** Eminent Domain, § 147.}

(2) **Eminent Domain § 151—Pleadings—Cross-complaint.**—In proceedings to condemn a parking lot that was used by the occupants of a near-by medical office building owned by the owner of the parking lot, the owner's cross-complaint in inverse condemnation to recover for the loss in income from the office building that was anticipated as a result of the condemnation, claiming the same damages to which he would be entitled as severance damages, if such were allowable, did not tender any issues that were not resolved by the trial court's ruling that he was not entitled to severance damages.

(3) **Eminent Domain § 177—Decisions Appealable.**—In a condemnation proceeding, an interlocutory ruling that no severance damages could be recovered by the owner of a parking lot used by the occupants of a near-by office building that he also owned, was not appealable.

COUNSEL

Chester A. Price, Jr., for Defendants and Appellants.

Roger Arnebergh, City Attorney, James A. Doherty, Assistant City Attorney, and Lambert M. Javelera, Deputy City Attorney, for Plaintiff and Respondent.

OPINION

KAUS, P. J.—(1) This appeal from a judgment in an action to condemn a privately owned parking lot for the purpose of providing publicly owned off-street parking, raises the question of the continued vitality of the rule that the condemnee may not recover severance damages suffered by a noncontiguous parcel. (*Oakland* v. *Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 396-400 [153 P. 705]; *People* ex rel. *Dept. Public Works v. Dickinson*, 230 Cal.App.2d 932, 934 [41 Cal.Rptr. 427].)

The facts are extremely simple. Appellant owns a medical office building on Weyburn Avenue in Westwood Village. Several years before the instant condemnation, he acquired a private parking lot for the use of his

tenants, who, together with their employees, have been permitted to park there. He made no separate charge for this amenity. In the superior court he made an adequate prima facie showing that loss of the parking lot would have an adverse effect on the income from the medical building.

The parking lot is located on Broxton Avenue. It is about 250 feet from the office building, if one walks through a public alley and across a parking lot. If one walks only along streets, the distance is about 550 feet. Several privately owned parcels are between the parking lot and the building, as are, of course, the alley and the streets. It is not contended that appellant owns any interest of any kind in the real property between the building and the lot, except, of course, that he and his permittees have the right to use the public streets and alleys, which right they share with everyone else. else.

On these facts the trial court ruled that appellant was not entitled to severance damages occasioned by the anticipated loss of income from the medical building.[1] The rule that severance damages can only be predicated on a showing of unity of title, unity of use and contiguity is well established in California and has been consistently applied. (*Oakland* v. *Pacific Coast Lumber & Mill Co., supra, People* ex rel. *Dept. Public Works* v. *Fair*, 229 Cal.App.2d 801, 804-808 [40 Cal.Rptr. 644]; *People* v. *Bowers*, 226 Cal.App.2d 463, 465 [38 Cal.Rptr. 238].) We see nothing in the pronouncements of the Supreme Court which encourages us to believe that it has invited a reexamination of the rule at this appellate level. In *People* v. *Ocean Shore Railroad*, 32 Cal.2d 406, 423 [196 P.2d 570, 6 A.L.R.2d 1179], there is a dictum to the effect that ". . . [t]here may be a right to an award of severance damages in some cases where the property, though not physically contiguous, is being devoted to an existing unity of use." This dictum was followed by *People* v. *Thompson*, 43 Cal.2d 13, 21-26 [271 P.2d 507]. There the parcel taken had been separated from the remaining parcel by the Coast Highway. The condemnee had retained title to the underlying fee and, before the condemnation, had had unlimited access to-and-fro across the highway. Such access was to be greatly restricted by the contemplated improvement. The Supreme Court was not awed by the width and physical character of the Coast Highway and treated it the way it would have treated any other easement. "If the only easement over defendants' land had been an occasionally used pedestrian trail there would

[1]The court did rule that the defendants were not precluded from presenting evidence that the adaptability of the parking lot "for its highest and best use to determine its value requires consideration of the joining of said Parcel with defendant's o her land [the building] for purpose of a common use." This ruling is obviously not the equivalent of the allowance of severance damages. (*Yolo Water & Power Co.* v. *Hutson*, 182 Cal.'48, 54 [186 P. 772]; *People* v. *Loop*, 127 Cal.App.2d 786, 797 [274 P.2d 885].)

be few if any who would assert that the right of way or easement for the trail constituted such a division of the land as to render its several parts noncontiguous. The change in degree of the burden of the easement from a seldom used trail to a paved and heavily traveled state highway is great, even though the highway still admits of completely free access at all points from one area of defendants' land to the other; but the degree of furtherance of separation of the land is much greater when the change is from a mere unfenced roadway to a fenced freeway which completely precludes access from one part of defendants' land to the other except by the use of a service road and of the roadway joinder, than is caused by a change from a trail to an unfenced roadway." (*People* v. *Thompson, supra,* 43 Cal.2d at pp. 25-26.)

By no stretch of the imagination does that case support an extension to the situation at bar. Instead of a continuous fee ownership, albeit burdened by a heavily used easement, we are faced with a gap 250 feet wide in which appellant owns no interest whatever.

(2) The trial court permitted appellant to file a cross-complaint in inverse condemnation in which he claims the same damages to which he would be entitled as severance damages, were such allowable. The trial court ruled properly, we believe, that the cross-complaint did not tender any issues which were not resolved by its ruling that appellant was not entitled to severance damages.[2]

The "cross-complaint" merely provides appellant with an opportunity to rearrange the argument to the effect that he is entitled to severance damages. Having rejected the point, we cannot, tongue in cheek, grant under one label what we have denied under another.

(3) Appellant filed a separate notice of appeal from the interlocutory ruling that it was not entitled to severance damages. That ruling is not appealable as such and that appeal (2nd Civil No. 36110) must be, and hereby is, dismissed.

The judgment, the appeal from which is second civil number 37092, is affirmed.

Stephens, J., concurred.

REPPY, J.—I respectfully dissent, firmly in one respect, cautiously but still fairly confidently in another; firmly as to the majority concept that

[2]No judgment on the cross-complaint was ever entered. We interpret the trial court's ruling to mean that the cross-complaint, though filed, became merged in the issues already before the court and was, therefore, nothing but appellant's answer under a different label. We agree.

looking toward a ruling favorable to the Wolfe interests somehow involves an uninvited reexamination of a solid Supreme Court position. It is my belief that the Supreme Court did not close the door on exceptions to strict physical contiguity and that succeeding decisions of the Court of Appeal (and one federal court applying California law) recognized this, even though some of them may not have considered their particular facts as meriting the designation of exceptional. It is my feeling that the composite of decisions shows a purposeful opening for the unusual case and an entry into that opening to a degree which, itself, did not purport to be the limit. I believe that a legitimate area of inquiry is therefore open to reviewing courts and that it is proper for them to determine whether a certain set of circumstances would qualify a given case as an exception to the normal rule. I think that if there was any invitation from the Supreme Court it was one to recognize occasional sets of peculiar circumstances which should deserve exception from the basic standard. The caution I mentioned is in respect to how far exceptions to a strict physical contiguity concept should extend.

An examination of several of the decisions in the line of authority will, I trust, show some support for my idea.

The first case, of course, is *Oakland* v. *Pacific Coast Lumber & Mill Co.* (1915) 171 Cal. 392 [153 P. 705]. I do not see this case as a 100 percent solid stand for strict physical contiguity. It is to be noted that there is an alternative ground for the decision. The court's secondary ruling is, in effect, that, even if unity of use and ready access constituted unity of property, only business losses were claimed which did not qualify as severance damages. Thus, the decision is neither a to-the-hilt or a barbed thrust. None of the succeeding cases, by any means, are definitely committed to an absolute rule of complete physical contiguity.

The next in line to which I wish to make reference is *Atchison, Topeka & Santa Fe Ry. Co.* v. *Southern Pacific Co.* (1936) 13 Cal.App.2d 505 [57 P.2d 575] (overruled on another point in *County of Los Angeles* v. *Faus*, 48 Cal.2d 672, 680 [312 P.2d 680]). Two pieces of railroad property were joined by a spur track. The uses of the two parcels were not compatible; one was for a station which the railroad commission was requiring to be abandoned; the other apparently for some disconnected use. The dissimilarity of use was stressed in the opinion; the case could have been disposed of on the basis that absolute contiguity was lacking, the connection by the spur track being insufficient.

The first important succeeding Supreme Court case is *People* v. *Ocean Shore Railroad* (1948) 32 Cal.2d 406 [196 P.2d 570, 6 A.L.R.2d 1179]. It states that, although "contiguity is *ordinarily* essential. . . . [t]here may

be a right to an award of severance damages in *some cases* where the property, though not physically contiguous, is being devoted to an existing unity of use,"[1] (p. 423—italics supplied), advising, however, that "such damages are *ordinarily* limited to contiguous property. . . ." (P. 423—italics supplied.) As the majority opinion says, this is dictum, because a negative decision turned on the absence of legal access between the two segments of property.[2] The dictum, however, I feel was not idle but purposeful, indicating a philosophy intended for cognizance by the profession. That others saw it this way is indicated by the quotation and restatement in succeeding cases of the clause indicating that such damages are only *ordinarily* limited to contiguous property and leaving room for the extraordinary case. Such references certainly raise the item above the category of dictum. It is to be noted that the Supreme Court took pains to point out that it was "not disputed that defendant would be entitled to severance damages if the roadbed were contiguous, as would be the case if defendant had . . . an existing easement . . . through the park." (P. 414.) A vehicular road going through the park did not provide it for railroad purposes. In our case, of course, a route for pedestrian travel is involved and public streets, alleys and parking lots provide that.

Next comes *People* v. *Thompson* (1954) 43 Cal.2d 13 [271 P.2d 507], also discussed by the majority. Of first importance is the fact that this is one of the decisions which repeats the *Ocean Shore* phraseology to the effect that contiguity is only ordinarily essential. Further, it is to be noted that the Supreme Court felt that the preexisting main state highway was a substantial barrier despite the property owners' right of access across it. It made the comparison between a hypothetical "seldom-used trail" (to be considered as a practicality no barrier at all) and "a paved and heavily traveled state highway," and termed it great. Nonetheless, it considered the areas on each side unified even though the unity of use was not strong (farming and marsh land on one side, beach on the other), because there existed the ability to have access across the highway legally at any given point. In proper perspective, I feel, that the owners' holding of the fee under the highway easement was no aid to the unity of use or to the access and did not make for practical contiguity. I think it must be said that even as much unity of use as the Supreme Court found in *Thompson* was important

[1]"Unity of use" has been defined as "a connection or relation of adaptation, convenience, and actual and permanent use [such] as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of parcels left, in the most advantageous and profitable manner in the business for which they are used." (*City of Stockton* v. *Marengo*, 137 Cal.App. 760, 766 [31 P.2d 467].)

[2]The property involved was two parts of a once united railroad bed which were separated by a park, the track route across which either had never been effectively gained as an easement or had been abandoned.

as seen from the court's reference to cases wherein no unity of property was found, despite absolute contiguity, because of diversity of use. The indication of the ensuing cases is that the stronger the unity of use or purpose and the more imperative the cause therefor, the less is to be the insistence upon strict physical contiguity, providing the connection between the two areas under consideration is the closest feasible and permanent access exists.

Chronologically, a federal decision is next in line: *City of Stockton* v. *Miles and Sons, Inc.* (1958) 165 F.Supp. 554. This case started in the California superior court and was removed on grounds of diversity, the defendant having been a Nevada corporation. Involved was a trucking terminal comprising two city blocks. A fee-owned city street passed through the property. Trucks freely crossed it both ways. The federal court, of couse, applied state law. The city contended for the rule of strict physical contiguity. The federal court felt that the unified use in *Thompson* was weaker than that which it had before it. Clearly it considered that the California decisions up to then authorized its inquiry into whether the particular facts before it permitted it to consider the situation as not ordinary. Of course, the court observed that under federal law there was no problem since unity of use would have been controlling.[3]

The next intervening California case to which I wish to make reference is *People* v. *Chastain* (1960) 180 Cal.App.2d 805 [4 Cal.Rptr. 785]. There State Highway 99 bisected parts of the defendant's ranch property, and, as in *Thompson*, condemnation was instituted to make it into a limited access freeway. However, the precondition in *Chastain*, rather than being one of unlimited crossover access at any point up and down the highway, was one of only four traversing places along several miles of highway. Despite this reduced degree of access, and probably because of a greater

[3]Federal law and that of some jurisdictions is that while contiguity is a factor to be considered, it is not determinative and that unity of title and unity of use may make physically distinct pieces of land, as combined, a single "larger" parcel, so that any part of each would be considered part of that larger parcel. (See *People* ex rel. *Dept. Public Works* v. *Fair*, 229 Cal.App.2d 801, 804 [40 Cal.Rptr. 644]; *Baetjer* v. *United States*, 143 F.2d 391; *Essex Storage Electric Co.* v. *Victory Lumber Co.*, 93 Vt. 437, 108 A. 426; *Valley Paper Co.* v. *Holyoke Housing Authority*, 346 Mass. 561, 194 N.E.2d 700; *City of Quincy* v. *V. E. Best Plumbing & Heating Supply Co.*, 17 Ill.2d 570 [162 N.E.2d 373].) The rationale is stated in *Baetjer* v. *United States*, *supra*, at page 395: "Integrated use, not physical contiguity, therefore, is the test. Physical contiguity is important, however, in that it frequently has great bearing on the question of use. Tracts physically separated from one another frequently, but we cannot say always, are not and cannot be operated as a unit, and the greater the distance between them then the less is the possibility of unitary operation, but separation remains an evidentiary, not an operative fact, that is [,] a subsidiary fact bearing upon [,] but not necessarily determinative of the ultimate fact upon the answer to which the question at issue hinges."

degree of unity of use, the court treated the areas on either side of Highway 99 as a single parcel.

Chronologically, the next case to be considered is *People* v. *Bowers* (1964) 226 Cal.App.2d 463 [38 Cal.Rptr. 238]. The parcel involved was one of 98 acres. The preceding owner granted a lumber company a strip running through it from north to south, 50 feet wide by 2250 feet long, reserving no crossover rights. The lumber company fenced both sides. Defendants were deeded the north 22½ acres through which the strip ran. They used it for grazing purposes. There were three acres on the seaward side of the strip and 19½ on the landward. The three acres were being taken for a public park. The Court of Appeal ruled that the defendants had no easement by implied reservation and that it could not adjudicate one by necessity because the lumber company was not a party. It points to the *Thompson* rationale as resting on the access factor. In *Bowers* this was lacking. There was just as much nonaccess as if the strip had been 500 feet wide, said the court. If there had been access, it seems that the Court of Appeal in *Bowers, supra,* would have found the defendants' areas to be a single parcel; their common grazing use would have made that unity strong enough.

Next comes *People* ex rel. *Dept. of Public Works* v. *Fair, supra* (1964) 229 Cal.App.2d 801. It is to be noticed with more than just passing interest that in this case the *condemning body* was urging that strict contiguity was not essential. Such a holding would have allowed it to offset special benefits accruing to a parcel on one side of State Highway 101 (owned in fee by the state and being enlarged) against severance damages suffered by a parcel on the other side, both of which parcels were under common ownership and use (orchard farming). The state urged that together they constituted a single "larger parcel." The trial court treated the parcels as separate. However, it is noteworthy that a public authority itself, when the concept was running in its favor, was willing to embrace the "constructive contiguity" theory. The Court of Appeal gave an explanation of how its viewpoint of *People* v. *Thompson, supra,* 43 Cal.2d 13, differed from that of the federal court in *City of Stockton* v. *Miles and Sons, Inc., supra,* 165 F.Supp. 554;[4] but, as I see it, there really was no fundamental difference. It was simply a matter of a varying analysis as to the degree of access. The rationale of the *Thompson* case clearly is that the separation of the tracts by the highways did not render them independent parcels where there was an existing unity of use and an actual means of access between them. If

[4]*Stockton* specifies the owner's actual lawfully used means of access. *Fair* stresses the "legal right to unlimited access back and forth across the roadway from any point" on the properties abutting on either side of it.

there had been no such access, it would seem that the severence damages would not have been allowed. (See *Stockton* at page 564 thereof.) Note that in *People* ex rel. *Dept. of Public Works* v. *Fair, supra*, the access from one area to the other was limited to one traversing road.[5] It is significant that *Fair* cites *People* v. *Ocean Shore Railroad, supra*, 32 Cal.2d 406, as setting up a basis for a qualification or exception to strict contiguity. (P. 805.) Moreover, the *Fair* court observes that the *Stockton* judgment "may have been proper under its peculiar circumstances." (P. 807.)

In rather short order comes *People* ex rel. *Dept. of Public Works* v. *Dickinson* (1964) 230 Cal.App.2d 932 [41 Cal.Rptr. 427].[6] The parcels there were owned separately by two individuals who were partners. The use of both areas was by the partnership. They were 500 feet apart and joined only by a private easement. The Court of Appeal observed that the single parcel requirements are stated to be "unity of title" and "unity of use" and citing *Ocean Shore, supra*, "*ordinarily*, contiguity." (Italics supplied.) Unity of title was lacking because the partnership lease showed that the partners retained individual ownership. Moreover, the Court of Appeal had to doubt the veritability of contiguity because, by reason of inadequacy of proof, the private easement could have been in gross and terminable. It declined to state what position it would have taken if the proof had been that the easement was appurtenant and, presumably, permanent. Of significance, further, is the observation of the court in *Dickinson* that "[t]here is no doubt that by the *Thompson* case the importance of unity of use was enhanced." (P. 935.) What would be the point of such language unless it was the consideration of the court that at times the strength of unity of use would overcome the need for strict physical contiguity?

The final case to which I wish to refer is *People* ex rel. *Dept. of Public Works* v. *Nyrin* (1967) 256 Cal.App.2d 288 [63 Cal.Rptr. 905]. The Court of Appeal again states that "ordinarily contiguity" is necessary for severance damages. (P. 292.) It is significant that the court observes that what constitutes a single parcel may involve issues of fact. This could pertain to the matter of the strength of use making the extent of contiguity a lesser requirement. It is worth noting also that this case involves the parking

[5]Apparently a user went off of one area on to the public-crossing-thoroughfare (Tully Street) at some distance back from the highway, used Tully Street to cross Highway 101, and then left Tully Street to get to the other area at a point somewhat distant from Highway 101.

[6]*Dickinson* points out that the ruling in the *Santa Fe* case (*Atchison, Topeka & Santa Fe Ry. Co.* v. *Southern Pacific Co.*, 13 Cal.App.2d 505 [57 P.2d 575]) is somewhat weakened by the fact that the railroad station was to be abandoned, not because of the condemnation proceeding, but by order of the railroad commission.

lot factor, and the treatment of the court indicates that unified use based on zoned parking requirements is very important and could be a decisive feature. Moreover, the arbitrariness of a requirement of strict physical contiguity in the situation wherein the strength of unity of use is in parking facilities, particularly when required by municipal ordinance, is made clear in *Nyrin*. Severence damages to the hospital property were principally based on the loss of parking spaces.

Turning to the case at hand, I call attention to the fact that there was no trial in a real sense. The court held only what was designated as an interim trial, conducted, apparently, in the judge's chambers. The actual evidence introduced was very sparse and left many important factors undeveloped. The trial court's ruling for strict physical contiguity unquestionably accounted for the Wolfe interests not presenting any further evidence of the nature discussed hereinafter.

One way or another, there is available for us to think about this much factual material: When the Wolfe interests built the medical building in 1951, it had on-site parking facilities adequate to meet existing statutory requirements. The circumstance is assumed by both parties that between 1951 and 1959 the city increased the parking space requirements for buildings such as that of the Wolfe interests.[7]

In 1959 the Wolfe interests acquired the parcel sought to be condemned for the sole purpose of providing additional parking spaces for the medical building. One of the Wolfes, without contradiction, testified that this acquisition brought the building within the parking requirements of the then existing zoning ordinance; that, as a matter of practical fact, without parcel 3, there would be insufficient parking for the building's tenants; that since the tenants require all day parking, the hourly parking lot nearby would not satisfy their needs; and that providing adequate off-street parking is a most important factor in renting office space in the area and the lack of such facilities would materially affect the value of the building.

The congested nature of Westwood can be inferred from Wolfe's testimony and from the fact that the "public necessity" for which parcel 3 was condemned was for use as public off-street parking. In a congested commercial neighborhood the successful operation of a medical building could well depend on the availability of accessible parking to tenants. Although the medical building site and the parking lot do not touch, they are cer-

[7]Apparently, the ordinance in question was No. 111,049 (1958) amending Municipal Code of the City of Los Angeles, Zoning, section 12.21A 4(c). Judicial notice of these can be taken pursuant to Evidence Code sections 452 subdivision (b), 455 subdivision (a) and 459 subdivisions (a) and (c). (See also *Jordan* v. *County of Los Angeles*, 267 Cal.App.2d 794, 798 [73 Cal.Rptr. 516].)

tainly physically proximate. Indications are that it can be shown that the Wolfe interests purchased the lot most closely available at a feasible price. The parcels are approximately 250 feet apart; the two routes of travel, as indicated, are on property accessible to the public, feasible and presumably permanent.

Once the lot was actually acquired and put to use, the city might well have been in a position to prevent the Wolfe interests from ceasing to use the lot as parking for the medical building. This conclusion is reachable by analogy with decisions holding that if a nonconforming use is relinquished, the building must thereafter conform (see *Burke* v. *Los Angeles*, 68 Cal. App.2d 189 [156 P.2d 28]; 8a McQuillin, Municipal Corporations (3d ed.) §§ 25.189-25.199, pp. 36-52). A nonconforming use pertains until it is discontinued. Termination of a nonconforming use is controlled by the circumstances and intent of the owner. The policy of the law is for elimination of nonconforming uses. (McQuillin, *ibid*, § 25.189, pp. 36-37.) Generally there can be no resumption of a nonconforming use which has been relinquished. (McQuillin, *ibid*, § 25.198, p. 50.) A conforming use cannot be changed to a nonconforming use. (McQuillin, *ibid*, § 25.202, p. 62.) The same result would seem to follow from application of Los Angeles Municipal Code section 12.21 A4 (m) which was in effect when the Wolfe interests acquired and commenced the use of the lot for additional parking. It provides that parking space being maintained in connection with an existing building shall be maintained as long as the building remains. Therefore, at the time of the taking, the unity of use of the building and lot was, in a sense, required by law.[8]

Also, the city, in requiring that parking be provided for such buildings, demands that it be provided within 750 feet of the property measured along streets, walks, alleys or private easements. (Municipal Code of the City of Los Angeles, Zoning, § 12.21 A 4(g).) Thus, the city itself takes cognizance that the principle of unity of use and proximity is a practical substitute for physical contact. This is a recognition that it may be impossible to obtain physically adjacent parking facilities and that actual physical adjacency is not necessary or significant. The fact that the parking lot satis-

[8]Since the devotion of the parking lot (parcel 3) to general public parking is the act of the city and not that of the Wolfe interests, although the city may well be estopped from requiring the Wolfe interests to obtain replacement parking (see *Fontana* v. *Atkinson*, 212 Cal.App.2d 499, 507 [28 Cal.Rptr. 25]), they should not be debarred from pointing in this case to what, at the time of suit, was tantamount to enforced unitization of the two properties. If the Wolfe position were declared to be correct, but the condemnation action for some reason was not carried through, the Wolfe interests certainly would be held to have devoted the parking lot to compliance with the ordinance and could not claim the right to revert to a nonconformance status for their medical building.

fies the city's requirements for proximity should be given considerable weight in the evaluation of the factors to be considered in making the determination if this is an exceptional case wherein unity of property exists by reason of strong unity of use and "constructive contiguity," entitling the Wolfe interests to such severance damages as they can prove.

I think that a full trial should be held. Therefore, I would reverse the judgment and remand the case to the trial court for further proceedings, and, of course, I would like to see the Supreme Court take a look at this case.

A STUDY RELATING TO THE "IARGER PARCEL" IN EMINENT DOMAIN*

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

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

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

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A STUDY RELATING TO THE "LARGER PARCEL" IN EMINENT DOMAIN

I. INTRODUCTION

A commentator has noted that there is a strange coincidence in the arrangement of subjects in Law Encyclopedias:[1] Eminent Domain lies between "Embezzlement" and "Equity." This commentator goes on to point out that the Supreme Court has indirectly emphasized this paradox; Justice Brandeis once wrote:[2]

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. ... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding."

Justice Holmes, however, in Pennsylvania Coal Co. v. Mahon, admonished:[3]

> "We are in danger of forgetting that a strong public desire to improve the public conditions is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

This dilemma, as we have seen in prior studies, has been especially encountered in severance cases. And it reflects itself in the subject of this study--the larger parcel--in a unique way. For the "larger parcel" concept is a "buckle" between the treatment of damages on the one end, and the treatment of benefits on the other. A liberal interpretation of the

larger parcel will tend to increase the condemnee's award insofar as he will likely receive a greater amount in damages. But it can just as easily decrease the condemnee's award by offsetting benefits that a restrictive definition of the larger parcel would prevent.[4] The question throughout this study, therefore, is what constitutes the larger parcel. That question, like many others related to severance cases, defies a definite and clear-cut answer.

Section 1248 of the Code of Civil Procedure, on the books now in virtually the same form for 90 years, the court, jury or referee to ascertain and assess:[5]

> "2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned...
>
> "3. Separately, how much the portion not sought to be condemend and each estate or interest therein, will be benefitted..."

We are initially met, therefore, with the question as to what is meant by the word "parcel." On first impression, it is likely that the average individual would consider a parcel of land to be a unified piece of land measured by known metes and bounds and usually owned by the same person or persons. Such lay view, however, is not necessarily the accurate one, either in law or the market place, particularly in modern society.

The courts are divided on the determination of the "larger parcel" concept. Some would restrict the word "parcel"

to its "ordinary"meaning. For example, a 1915 California case rejected the liberal definition of the word and concluded that an examination of the above-quoted terminology of Section 1248 necessitates a restricted application of the "larger parcel" concept:[6].

> "This very language limits in terms the award of damages to the property taken and the resultant damages to contiguous property injured by severance of the property taken" [Emphasis added.]

On the other hand, a Massachusetts court, a number of years later, examined the word "parcel" as it exists in the condemnation statutes of that state and concluded as follows:[7].

> "St. 1926, c.365, under which the extension of Bay State road was undertaken, is silent as to the measure of damages. Reference must be had to G.L. c.92, §80, and chapter 79, §12. The section last cited provides that 'in case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made.' ...
>
> "The statutory word parcel, like the cognate words tract and lot, has no invariable meaning. In different connections these words may vary in scope." [Emphasis added.]

In both the California and the Massachusetts cases the condemnee sought damages to the "remainder" when the part of the "parcel" taken was separated by land owned by third persons. It is probably not surprising to learn that the California court denied, and the Massachusetts court approved damages in the

case before each of them. The approach to the "parcel" is the crux of this study.

II. THE TRINITY APPROACH TO THE LARGER PARCEL.

Virtually all courts in determining whether and to what extent there exist severance damages or benefits view three factors. The larger parcel is all that land which (1) has a unity of use; (2) is contiguous (or has physical unity); (3) has common ownership (or title). Whether a particular court adheres to a liberal or restrictive view of the larger parcel, it usually concerns itself with all three of these factors; however, those following a restrictive interpretation of "parcel" almost invariably demand all three of these factors be present. The liberal position, on the other hand, generally gives primary and paramount consideration to the unity of use factor. One California Court, stating the restrictive view has said:[8.]

> "To recover severance damages there must be unity of title ... contiguity ... and unity of use. ..."

This brief and rigid position, though not necessarily reflected in the cases cited by the same court, may be compared to the less definitive but more liberal position as expressed in a recent North Carolina case.[9.] There the court denied the existence of the rigid trinity and stated:

> "There is no single rule or principle established for determining the unity of

> lands for the purpose of awarding damages or offsetting benefits in eminent domain cases. The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential. The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis."

It seems that the rigid position--that which requires the existence of physical unity as well as unity of use and which also necessitates that the entire "parcel" be owned in fee by the same person or persons--was formulated and enunciated in the mid-Nineteenth Century. The social, industrial and economic setting to some extent justified such a rigid position. Commercial, industrial and agricultural development usually was confined to local self-sufficient units. The modern freeway, the diversification and specialization that is the hallmark of today's economy and the present communications system in general were almost nonexistent a hundred years ago.

Today agricultural units, commercial establishments and industries are spread over wide areas encompassing within their geographical purview lands owned by others or properties in which the owners have various types of interest, not simply the fee ownership. A parking lot on one side of the street is often an integral, and indeed an indispensable, part of a department store on the other side of the street. The taking of the parking lot can easily and often cause severe, if not

total, damages to the "remainder" across the street. But in these cases, as in similar types of instances, many courts refuse to recognize that the two pieces of property are one "parcel". The word "parcel" to a number of courts is still limited to its Nineteenth Century definition.

But many courts, some more directly than others, have recognized that the modern economic picture necessitates a "restatement" of the concept of a "parcel". For example, in a 1959 Kansas case, Ives v. Kansas Turnpike Authority,[10] the court allowed severance damages despite the fact that the "remainder" was a mile distant from the point of taking and was not contiguous with the part taken. The court in doing so had to overrule prior case law which it did by stating:

> "Be that as it may, the Wilkins case was decided in 1891, and the condemnation in the case before us was in 1955. Courts take judicial notice of the fact that in the intervening sixty-four years revolutionary changes in the economics and practices of farming have taken place. If the Wilkins case be construed as authority for the proposition that contiguity of tracts is essential in every case where the question now before us is involved--we are of the opinion that it is outmoded and not in harmony with the modern rule, and to that extent is hereby disapproved and overruled."

Throughout the remainder of this study, we shall constantly be discussing the unity of use factor. There are some particular problems connected with the unity of use where the courts are in disagreement. These shall be pointed out. But on the whole, virtually all courts are in agreement that,

for there to be a larger parcel, there must be unity of use. However, the courts are in strong disagreement on the other two factors: contiguity and title. We shall therefore examine these latter two aspects of the trinity separately to point out the sharp differences that exist and shall deal with the unity of use factor in a general, rather than in a specific manner.

A. Contiguity

1. The Restricted View

While most courts are willing to recognize that in applying the three criteria for determining the larger parcel paramount importance is to be given to unity of use, some courts insist that absolute contiguity is essential. As Nichols states:[11.]

> "Actual contiguity between two separate parcels is ordinarily essential to merit consideration as a unified tract. Actual physical separation by an intervening space between two parcels belonging to the same owner is ordinarily ground for holding that the parcels are to be treated as independent of each other, but it is not necessarily a conclusive test. If the land is actually occupied or in use the unity of the use is the chief criterion. When two parcels are physically distinct there must be such a connection or relation of adaptation, convenience and actual and permanent use as to make the enjoyment of one reasonably necessary to the enjoyment of the other in the most advantageous manner in the business for which it is used, to constitute a single parcel within the meaning of the rule. Accordingly, a public highway actually wrought and travelled, a railroad, a canal, or a creek running through a large tract devoted to one purpose does not necessarily divide it into independent parcels, provided the owner has the

legal right to cross the intervening strip of land or water. But a public highway will ordinarily divide the land of a single owner into separate parcels, even if both parcels are used for the same purpose, if the use upon each parcel is separate and independent of that upon the other.

"Two distinct parcels separated by intervening private land but used together for the same purpose cannot be considered as one tract, even if they are connected by a private way over the intervening land, unless they are so inseparably connected in the use to which they are devoted that the injury or destruction of one must necessarily and permanently injure the other." (Emphasis added)

A number of courts that adhere to the strict requirement concede that property separated by intervening private land may be considered as an entire parcel providing the various parts are "inseparably connected"; however, no case has been found wherein a court, adhering to the rigid standard of contiguity has defined or set forth what constitutes an inseparable connection. Some courts that follow the strict construction of the concept of "parcel" make an exception in instances where an existing street or highway severs the "parcel"; in many instances, however, this exception is allowed only if the condemnee owns the underlying fee in the road.[12.] This type of distinction, as will be pointed out later, is highly questionable.

The position of many courts on these points is set forth by a very recent Rhode Island case where the court stated: [13.]

> "Quite a different situation is presented when, as here, the two parcels in question are unequivocally separated from each other by fixed and definite boundaries, such as a highway. In such a case it is generally held that the two tracts can be considered as one only when they are so inseparably connected in the use to which they are applied that the taking of one necessarily and permanently injures the other."

The restricted position - which now appears to be the minority one - is best exemplified by two fairly recent Illinois cases. In City of Chicago v. Equitable Life Assurance Society,[14] the condemnor took a portion of the Society's land for a free parking area. The land was used as a private parking lot of the Society's lessee, Wieboldt Stores, the store buildings standing across the street from the part condemned. Both the lessee and the Society claimed that the taking of the parking area greatly depreciated the value of the land across the street. The court refused to allow severance damages, taking the position that the parking area was distinct and independent from the property across the street. It stated:

> "The defendants contend that the court also erred in refusing to permit evidence in support of their cross petition. With this we cannot agree. In order to recover damages in an eminent domain proceeding for property not actually taken, it must appear that this and the condemned land are contiguous, that is, they are either physically joined as a single unit or so inseparably connected in use that the taking of one will necessarily and permanently injure the other."

The defendants admitted and recognized that the store and parking properties were not physically connected but went on

to argue that they were inseparably connected and, therefore, should be considered as contiguous. To this the court stated:

> "On at least two prior occasions we have had the opportunity to consider similar statements of fact. In White v. Metropolitan West Side Elevated Railroad Co., 154 Ill. 620, 39 N.E. 270, 272, the appellant owned property on both sides of Tilden Street in Chicago and, although only a portion south of the street was being condemned, he contended that since the tracts have been purchased for a common use, they were contiguous and should both be considered in the eminent domain proceedings. In refusing to accept this theory, we said: 'If by the construction and operation of the railroad on the lot south of Tilden street the property of appellants lying north of that street will be specially damaged, and the damages sustained by appellants are not common to the public, they have a complete remedy in an action at law to recover all damages sustained; but where proceedings are instituted under the eminent domain act to condemn one lot or tract of land, the owner cannot bring into that proceeding another tract of land, not contiguous and not connected with the land condemned, no portion of which has been taken, and recover such consequential damages as he may have sustained. But it is said the two tracts of land were purchased to be used for one purpose as one tract of land. Whatever may have been the intention or purpose in purchasing the two tracts of land can make no difference. The two tracts of land must be considered as they existed when the proceeding was instituted. At that time they were separated by a public street. They were in no manner connected, and never could be connected without the consent of the city, which may never be obtained."
>
> . . . . . .
>
> "A similar question arose in Metropolitan West Side Elevated Railroad Co. v. Johnson,

> 159 Ill. 434, 42 N.E. 871, where a strip was condemned for highway purposes through a residential subdivision. Again we held that, although recovery could be had for damages to contiguous property not taken, those parcels which were separated from the condemned area by public streets or alleys were not a proper subject of the eminent domain proceedings. We can see no reason why we should arrive at a different result in the present case."

It is difficult to envision a situation save actual physical contiguity wherein properties could be more inseparably connected and wherein one lot could more easily be considered but part of the larger "parcel". The dissenting opinion asserted that the properties were so interrelated as to warrant their consideration as a single unit:

> "On this record, I consider the land not taken (the store property) so close in proximity, so integrally connected, and so unified in use with the land taken (the customer parking lot), as to permit evidence of damage to the land not taken.
>
> "While it is often said that the tracts must be 'contiguous', it is generally recognized that physical touching or its lack is not conclusive. For the basic test is unity of use. See 6 A.L.R. 2d 1197-1237. To say here that the store property is used for retail merchandising while the parking property is not, strikes me as unrealistic. The lot is, of course, used for parking - but for store customers. In a crowded metropolitan area, this may be not only 'convenient and beneficial' but vital. It seems clear that the parking lot is an integral part of the Wieboldt retail operation, and if as a result of condemning the parking property the market value of the store property declines, there should, in justice be compensation for land damaged but not taken. Illinois Constitution, art. II, sec. 13, S.H.A."

The Illinois court reaffirmed its position in 1959 in City of Quincy v. V. E. Best Plumbing & Heat Supply Co.[15] There, in connection with the acquisition of an off street parking facility, the city condemned a lumber yard belonging to a lumber company. The company's mill property was located three blocks away from this lumber yard and it claimed severance damages to its mill property even though it was located three blocks away. The trial court permitted the introduction of evidence concerning such damages and, as a result, the lumber company received an award of $30,000 as damages to its mill property. The Supreme Court of Illinois reversed this award. In so doing, it stated:

> "We have previously determined that in order to recover damages in an eminent domain proceeding for property not actually taken it must appear that this and the condemned land are contiguous, that is, they are either physically joined as a single unit or so inseparably connected in use that the taking of one will necessarily and permanently injure the other. City of Chicago v. Equitable Life Assurance Society of the United States. 8 Ill. 2d 341, 134 N.E. 2d 296."
>
> . . . . . .
>
> "We fail to see how the mere facts that there was little or no duplication of use or facilities upon each property, that all sales were made from the lumber yard, that the office was only on the lumber yard property, and that the operations conducted on each property were an integral part of the one unified business, render one property necessarily and permanently damaged by the taking of the other. Such an assumption would presuppose that no area or site was available at all to re-establish

> the lumber yard operation and facilities. The owner has not met this burden and these properties are not proved to be contiguous within the requirements laid down by this court. The most that can be said is that these properties are convenient and beneficial to one another, as were the properties in the City of Chicago v. Equitable Life Assurance Society, 8 Ill. 2d 341, 134 N.E. 2d 296. They cannot, for the purpose of this proceeding, be considered as a single property."

Throughout these cases adopting the restricted view of the larger parcel, there is often an implicit and at times an explicit feeling that to allow severance damages for property not contiguous with that taken would, in effect, accord the condemnee business losses. There are times when the liberal position produces this result, but in the vast bulk of these cases, the liberal position affords the condemnee not business damages but an actual and recognized depreciation in the market value of the "integrated"property. A department store or other retail establishment, particularly today, is greatly dependent upon parking facilities. A willing buyer would seldom purchase such an establishment without adequate parking space. Merely because the parking facility is across the street does not change this economic fact of life. The taking of the parking area manifestly may depreciate the market value of the retail establishment. Similarly, industrial firms, like lumber companies, often maintain warehouses and other storage areas in the general vicinity of the principal plant. These nearby facilities are usually an integrated part of the whole

operation. A willing purchaser would seldom buy one part of the operation without buying the other. The storage area appreciates the value of the plant; the taking of the storage area depreciates the "remainder". Moreover, mining properties are usually located in close proximity to their manufacturing and processing plants. For example, rock and gravel enterprises usually locate and build their processing plants in the same vicinity as are the mineral deposits. At times the plant is separated from the deposit area by highways or intervening privately owned lands. But all the lands owned and operated by the rock and gravel companies are inseparably connected. The taking of the lands containing the mineral deposits directly causes depreciation in the value of the nearby plant. A buyer would not purchase one without the other. In all the above type of cases, adherence to the restrictive view of the larger parcel, is not realistic.

2. The Liberal View

The liberal position regarding contiguity recognizes that, as a general rule, physical contiguity is necessary in order to establish the larger parcel. It is, however, a requisite that is readily discarded when the facts of the particular case realistically call for a recognition that contiguity is of less importance to the manner in which property interests are bought and sold on the market than is the property's location, relation to the other land, and

integration and use with other proximately located property. Unity of use, therefore, is the paramount consideration - and if such unity exists, contiguity is ignored.

This position is well set forth in a leading federal case involving the question of the larger parcel. In Baetjer v. United States[16], the Court of Appeals for the First Circuit was faced with the following facts: The condemnee, a trust association, owned some 30,000 acres of land, two-thirds of which was located on the island of Puerto Rico and the remainder on a smaller island located ten miles off the coast of Puerto Rico. On both of these islands, the condemnee owned and operated sugar mills, docks, warehouses and railways which it argued were all devoted into an integrated whole to the business of growing and refining sugar. The main processing plant was in Puerto Rico but many of the other facilities connected with the business operation were located on the smaller island. The federal government condemned a significant portion of the condemnee's property located on the smaller island. The appellate court, overruling the trial court, held that the condemnee's property on the island of Puerto Rico had been severed in a legal sense, when the government condemned the lands belonging to the condemnee on the smaller island. The court said:[17].

> "Integrated use, not physical contiguity, therefore, is the test. Physical contiguity is important, however, in that it frequently

> has great bearing on the question of unity of use. Tracts physically separated from one another frequently, but we cannot say always, are not and cannot be operated as a unit, and the greater the distance between them the less is the possibility of unitary operation, but separation still remains an evidentiary, not an operative fact, that is, a subsidiary fact bearing upon but not necessarily determinative of the ultimate fact upon the answer to which the question at issue hinges."

The court went on to note that the condemnee should be allowed only the depreciation in the market value of the remainder and that business losses, as such, remain non-compensable.

One of the early state court cases in this country adhering to the liberal position is a Vermont case, Essex Storage Electric Co. v. Victory Lumber Co.[18] In that action, the condemnor condemned a piece of land adjoining the Victory Lumber Company's mill. The lumber company sought damages to the "remainder" which was a tract of land separated from the mill by a parcel of land owned by a third person. Despite the fact that the intervening property was owned by a private party, the Vermont Supreme Court held for the condemnee. It stated:

> "The argument is that it is only contiguous lands that can be considered as one piece in the assessment of damages in condemnation cases, and, inasmuch as the hardwood does not stand on land contiguous to the land taken, nothing can be allowed for its depreciation. While there are cases apparently supporting this claim, and expressions are to be found in our own cases consistent with it, contiguity is not always the controlling question. Generally speaking, the rule contended for by the plaintiff affords a correct basis for the

> assessment of damages, but it does not in all cases. Where two or more pieces of real estate, though separated even by an intervening fee, are used as one enterprise, and constitute fairly necessary and mutually dependent elements thereof, they are in the eye of the law a single parcel, and the taking of one necessitates payment for the injury to the others. To state the proposition in its usual form, the damages in such cases are to be assessed by comparing the value of the whole enterprise before the taking with the value of what remains of it after the taking."

Another New England case, often cited by commentators, took a similar position. In Trustees of Boston University v. Commonwealth.[19] the Supreme Judicial Court permitted the condemnee to recover for severance damages to the remainder despite the fact that the remainder was not contiguous with that part of the property taken but was diagonally across a public street. Adhering to a liberal view of the word "parcel", the court held it is proper to allow for the diminished value of such property since all the University land involved was adopted for the use of a site for university purposes and was not so fit after the condemnation action. In taking this position, the court noted that the English cases tended to favor the condemnee's position:[20]

> "The English cases tend in favor of the petitioner. Holditch v. Canadian Northern Ontario Railway, [1916] 1 A.C. 536, affirming Canadian Northern Ontario Railway v. Holditch, 50 Canada S.C. 265, arose under a statute which provided for "full compensation * * * to all persons interested, for all damage by them sustained by reason of the exercise of such powers." The Privy Council held that this

> language did not permit an award of damages for injury to other lands of the petitioner, divided from the lands taken by public ways, unless 'the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance' (Horton v. Colwyn Bay & Colwyn Urban District Council, [1908] 1 K.B. 327), but that the question, whether the lands are so connected or related as to constitute a single holding, depends on the circumstances. The same principle was applied in Sisters of Charity of Rockingham v. The King [1922] 2 A.C. 315."

It is interesting to note that the liberal English position on this matter is consistent with the positions taken by the courts in that country on related damage and benefit questions. Because of the highly developed industrial and commercial economy in that country, England for many years has taken a realistic view of the market and of the factors that shape market value. As other studies in this series have indicated, American courts apparently have only recently begun a reappraisal of the many rigid rules that formerly were laid down in an era quite different from the modern one.[21.]

A 1959 Kansas case, Ives v. Kansas Turnpike Authority,[22.] appears to have adopted a vanguard position. In that case, the condemnee owned two tracts: One 80 acres and the other 160 acres were located one mile distant from each other at their nearest points. The condemnor took some 45 acres of the 80 acre tract but nothing from the 160 acre tract. For over 17 years the two tracts had been farmed as one unit. The court

nonetheless, held that the two tracts could be considered as one unit and the condemnee should be allowed severance damages to the 160 acre tract. The court went on to point out that the rule that it was adopting "is founded on logic and every-day justice" but, added the court, the decision in that case was not to be

> "construed as 'opening the doors' to far-fetched and unfounded claims on the part of condemnees in all cases where they happen to own other nearby tracts which it may be said are incidentally or remotely affected by the taking -- rather it is confined to the facts before us which conclusively establish the integrated use of the two tracts to be such that in the eyes of the law they are considered as 'one 240-acre farm unit' for the purpose of assessment of damages."

Before leaving this section and discussing the California position, it is well to emphasize again that the liberal rule regarding the larger parcel not only affects the scope of damages but also the scope of benefits. An example of this is a very recent North Carolina case[23]. where the condemnor sought to include a non-contiguous tract of land as part of the larger parcel when another tract of land across a public street was being condemned. As the court expressed it:

> "It must be assumed that the respondent desired the inclusion of tract No. 3 because it proposed to offer evidence that this portion was benefitted by the Expressway. It is evident that petitioners desired it excluded for the reason that, in their opinion, they could show no substantial damage to this area by construction of the Expressway."

Despite the fact that the "remainder" was not presently being used, the court concluded that it was nonetheless part of the larger parcel and permitted its inclusion for the purpose of offsetting special benefits assumedly resulting from the construction of the improvement. In so ruling, the court said that:

> "The law will not permit a condemnor or a condemnee to 'pick and choose' segments of a tract of land, logically to be considered as a unit, so as to include parts favorable to his claim or exclude parts unfavorable."

As indicated throughout this study, the courts adhering to the liberal position are in tune with the realistic operations of the market place. Whether and to what extent the California courts are in step with the modern rule is the subject of our next inquiry.

3. The California View

Until a few years ago, it was quite clear that California adhered to the restrictive view of the larger parcel; indeed, California was the leading exponent of this position and its cases were often cited by other courts. Now, however, there is some room for doubt as to how stringently California abides by its former position. Recent cases in this state seem to indicate that California still adheres to the rigid rule, though with some judicial qualms resulting in some judicially created jerry-built distinctions.

The strict contiguity requirement was set forth by the California Supreme Court in Oakland v. Pacific Coast Lumber & Mill Co.[24] in 1915. In that case, the city condemned a warehouse in which the defendant had a leasehold interest. The latter argued that because the warehouse and a mill several blocks away were used as a unit, it was entitled to severance damages for the reduction in the value of the land on which the mill stood. In essence, the defendant sought the adoption of the unity of use criterion to the exclusion of others in ascertaining the larger parcel. The trial court rejected the defendant's position. On appeal the Supreme Court of California strictly construed §1248 of the Code of Civil Procedure and stated:

> "And we are satisfied that the ruling was correct. Certainly it was correct in that it could not be said, within the physical terms and definitions of a 'parcel', that noncontiguous upland, separated by hundreds of feet of other private property from tide and submerged lands, could with the latter form a single parcel. Nor, indeed, is this contention very seriously argued. It is insisted, however, that a liberal definition should be given to 'parcel', and that unity of use should be regarded as the controlling and determinative factor in the solution of this question whenever it arises. But if unity of use is the controlling consideration, it can matter not how far in fact the pieces of land are separated. A factory may be in one country, its warehouse in another, its principal sales agency in a third; any interference with any of the three properties would of necessity be an interference with the unity of use of them all, and if appellant's position is sound, damages to the other two

> may be recovered for a taking of or an injury to the third. Indeed, this is but another way of phrasing the real contention of appellant, as quoted above from its brief, that business is property, and when the taking by the state or its agencies interferes with, impairs, damages, or destroys a business, compensation may be recovered therefor. We are not to be understood as saying that this should not be the law when we do say that it is not our law."

Though the defendant argued in the alternative that it should be accorded business losses, it did not rely solely on that line of reasoning but emphasized that the taking of the warehouse depreciated the market value of the mill. The court, however, interpreted the claim as one for business damages. While at times these items may be difficult to distinguish, it does not necessarily follow that business losses and market depreciation are inseparable in these type of situations. When the "remainder" of a larger parcel is damaged because of the taking of a part of the parcel, resultant damages can be directly attributable to depreciation in the market value of the realty and improvements thereon and need not be attributed to, and rightly should not be attributed to, the business located thereon.

The rigid position regarding contiguity as set forth in the Oakland case has been repeated by California courts on numerous occasions. For example, in Atchison, Topeka & Santa Fe R. Co. v. Southern Pacific Company[25.] the court emphasized that actual physical contiguity is essential. Without

analyzing the problem any further other California courts have apparently approved the Oakland rule. See:

City of Stockton v. Marengo;[26.]

East Bay Municipal Utilities Dist. v. Kieffer;[27.]

City of Menlo Park v. Artino;[28.]

County of San Mateo v. Christen.[29.]

The first possible breach in this rigid position is found in a 1948 case decided by the Supreme Court of California, People v. Ocean Shore Railroad, Inc.[30.] In that case the court found neither actual contiguity nor unity of use. The property involved was a strip of land which had formerly been the roadbed of defendant's railroad, and the strip served to link areas of land otherwise separated. However, the railroad, after discontinuing its operations, was found to have abandoned its easement over the strip. The court, therefore, held that there was no physical contiguity in addition to unity of use, and denied severance damages to the remaining land. The court, however, stated:

> "It is next urged that the whole roadbed is susceptible to a common use which is inherent in its nature, that the parcels north and south of Sharp Park were inseparable in use, that there was a unity of use and that the whole roadbed, although not physically contiguous, would be considered in the nature of a single parcel for purposes of severance damages. Under section 1248 of the Code of Civil Procedure, however, contiguity is ordinarily essential, and the owner is not entitled to severance damages for injury to other separate and

> independent parcels. See City of Oakland v. Pacific Coast Lumber & Mill Co. 171 Cal 392, 398, 153 P 705; Atchison T. & S. F. Ry. Co. v. Southern Pac. Co. 13 Cal App 2d 505, 520, 57 P 2d 575; City of Stockton v. Ellingwood, 96 Cal App 708, 745, 746, 275 P 228. There may be a right to an award of severance damages in some cases where the property, though not physically contiguous, is being devoted to an existing unity of use. See Southern California Edison Co. v. Railroad Comm. 6 Cal 2d 737, 59 P 2d 808; Monongahela Navigation Co. v. United States, 148 US 312, 13 S Ct 622, 37 L Ed 463." (emphasis added)

The cases cited by the court, indicating that physical contiguity is not necessarily involved, the taking of public utility facilities and, in these instances, courts generally are willing to ignore the contiguity requirement.[31]

The assertion in the Ocean Shore case that contiguity is "ordinarily" essential is dictum and, in addition, was not further explained. This phraseology was quoted, however, by a subsequent case that is of considerable importance. In People v. Thompson,[32] the state was condemning a strip of a farm and slough in an effort to replace an existing highway with a modern freeway. The highway, Route 101, bisected the defendant's land. The part west of the highway was vacant beach property bordering the Pacific Ocean and the part east of the highway was part farm land and part swamp. The state condemned the 12 acre strip paralleling the highway on the east. The road was to be constructed on this strip for northbound traffic and the old road was to be retained for southbound traffic.

The principal question in the case was whether the defendant was entitled to severance damages for the reduction in value of the remaining land. The state admitted that the defendant was entitled to severance damages but only for the decrease in the value of the landward property rather than the seaward property.

Although the case involved a number of technical and tangential points, the court apparently reaffirmed the Oakland position regarding the larger parcel and the necessity for contiguity. It assumed that contiguity had to exist in order to accord the defendant severance damages. But the court was able to find contiguity by holding that the existing highway was not owned in fee by the state but rather that the state merely had an easement and that the underlying fee was owned by the adjacent property owner. Thus, contiguity, the court indicated, existed.[33].

The court also seemed to suggest that the right of the property owner to cross back and forth between the parts of his property was impaired and that for this loss of access, the property owner should be compensated. In adopting this second line of reasoning, the court apparently ignored its prior decisions that circuity of travel and diversion of traffic, as such, were non-compensable. The result of this holding suggests that an owner whose land is crossed by a highway easement has greater protection against the police power than the usual abutting land owner.[34].

While the result of the case is one that is approved by the consultants, the rationale employed is somewhat questionable. It does not seem sound or realistic to distinguish these types of cases based upon the factor as to whether the property owner owns the underlying fee in a public street. The court, of course, faced with the Oakland rule, considered it more appropriate to "find" contiguity in order to distinguish rather than overrule the holding in the Oakland case. It is true that some courts in other jurisdictions have made similar distinctions[35]. but such fine lines are hardly ever taken into consideration by buyers and sellers on the market and, indeed, few of them would ever be cognizant of this legal distinction.

Another important facet of the Thompson case is the fact that there was not a present, existing unity of use between the severed portions of the property. We shall later return to this point but note it now to point out that because of this fact, the court probably needed to find contiguity in order to hold for the condemnee. Paradoxically, a straightforward renunciation of the Oakland rule, coupled with a finding that there was no contiguity, would probably have denied the condemnee severance damages in question, based upon the fact that there was no present existing unity of use.

In a 1960 District Court of Appeals case, People v. Chastain,[36]. the court reaffirmed the Thompson case insofar as that case held that the loss of the right of access of a

property owner to go back and forth across the highway between the two portions of his property is a compensable damage. Since in the Chastain case there existed a prior unity of use, it was not necessary for the court to determine the question of contiguity; indeed, it is possible that the property owner did not own the underlying fee and that there was not contiguity.

The California position regarding contiguity, therefore, is far from crystal clear. But a careful analysis of the cases strongly suggests that the courts still adhere to the Oakland position which makes actual physical contiguity necessary to the existence of the larger parcel. In limited situations they may try to circumvent this imposed restriction. The Thompson case, as reinforced by the Chastain decision, is an indication that the California courts may attempt, if at all possible, to award condemnees for severance damages via an indirect route. Yet, even in these limited areas, such judicial legerdemain not only is confusing but is also somewhat inconsistent with holdings in similar types of cases that deny abutting property owners damages resulting from the proper exercise of the police power. The California approach, therefore, is both outdated and internally inconsistent. Moreover, in a great many instances it is likely to lead to an inequitable result.

The restricted approach to the larger parcel, as exemplified by the Oakland case and the many cases both in California and elsewhere that follow that rationale, can no longer be justified. It is not in tune with the market place nor, indeed, with many modern courts that recognize that streets or intervening properties are quite often factors which in no way impair the value of the total properties or the practice of selling or buying them as a unit; indeed, a street, rather than dividing the property, often is a factor which unites property and enhances its value.

Modern commercial and industrial establishments, as indicated throughout this study, tend at an increasing rate to operate as integrated parts throughout a general area and are tending less to operate upon one site measured by rectangular metes and bounds. The method of buying and selling cannot be reduced into neat square packages for the sake of simplicity. Condemnation law must accept the law of the market. To do less is to deny just compensation.

The Oakland case, however, is undoubtedly correct when it states that by completely discarding the contiguity rule, courts will be "opening the doors" to farfetched and unfounded claims on the part of condemnees. This fear, however, may be alleviated by imposing two restrictions on the liberal rule. First, a statute rectifying and overturning the

present rigid rule could indicate that only property in the proximate vicinity of the part taken could be considered in ascertaining the larger parcel. While, at times, this restriction may block an otherwise justified claim, it is believed that in the vast bulk of cases the "remainder" will be in the general neighborhood. Accordingly, if such a rule and such a limitation is adopted, there is no great threat that the courts and condemnors would be subject to speculative and imaginary claims for compensation based upon the larger parcel concept.

The second limitation that should rightfully be imposed upon a liberal view involves the interpretation of unity of use. There is language in the Ocean Shore case which might possibly suggest that in order to establish the larger parcel, there must be a present unity of use.[37] However, that case can also be read as holding that a present unity of use is only necessary when properties are not contiguous.[38] Indeed, the Thompson case states that it is not necessary for there to be a present unity of use, providing the property is contiguous. The Thompson court indicated that if the property is contiguous, as was found in that case, then there need only be no disunity of use, i.e., the use of one part of the parcel in a way that is inconsistent and not in conformity with the use of the other part. The question, therefore, is whether there need be a present unity of use in order to establish the larger parcel

when the properties in question are not contiguous.

In the Baetjer case discussed above and in one or two other cases, it is suggested that a present unity of use is not necessary even though the properties are not contiguous.[39] Most courts adhering to the liberal position, however, apply the restriction that when properties are noncontiguous, there must be a present existing unity of use in order to claim damages to the larger parcel.[40] This limitation upon the liberal position, though it does not and should not exist when the properties are actually contiguous, appears to be a sound one. In addition to the first restriction to the liberal rule (as suggested above), this second limitation should completely dispel the fears as expressed in the Oakland case that the adoption of the liberal concept of parcel will "open the doors" to unfounded claims. Since the property claimed to be part of a larger parcel must be in the proximate vicinity of the part taken and since both portions of the property must be presently devoted to an existing unified use, it is doubtful that unfounded claims for damages would be successful.

B. TITLE

1. The Restricted View

In addition to unity of use and contiguity, there is one further element "needed" to establish the larger parcel - unity of title. This third criterion is generally accepted by the majority of courts and is undoubtedly a proper one, at

least to the extent that it requires the condemnee, in defining his larger parcel, to establish an interest both in the part taken and an interest in the remainder he claims to have been damaged. To do otherwise would patently permit an individual to obtain compensation for the taking or damaging of property in which he has no interest whatsoever.

But to hold that the condemnee must have some interest in both the property taken and in the property damaged is not to say he must necessarily have title in both pieces of property. We are, therefore, confronted with the problem as to whether or not title per se - and not simply an ownership of a property interest - is to be a sine qua non in establishing the larger parcel. The general rule in the United States, with some notable exceptions, is that in order to establish the larger parcel, unity of title is necessary. The leading case setting forth this requirement is United States v. Honolulu Plantation Co.[41] In that case, the federal government sought to condemn some 740 acres which the defendant held under long-term leases. A third party owned fee title to the leased property. The defendant owned some amounts of land in fee which were not being condemned. Each of the leases contained a condemnation clause. The question was whether the defendant should be allowed severance damages due to injury to the larger parcel. The court said:

> "As to these individual parcels of land, fee title was vested, respectively, in other estates and individuals. Plantation had long

> leases on each parcel, and a clause of each lease divested any interest or estate of Plantation upon condemnation. This condition subsequent destroyed any property interest of Plantation therein. The landowner received all compensation for the property. Therefore, this situation falls squarely upon the principle followed by the Trial Court as to the Oahu Sugar Company lease, and upon this ground alone this award must be reversed."

The court, therefore, decided this case based upon the simple fact that there was a termination clause in the lease and, consequently, the lessee had no interest in the condemnation award. The court, however, went on to state:

> "Although, disposition has thus been made of errors, claims and theories of the experts, it behooves us to consider whether Plantation is entitled to compensation, without regard to the clauses of the respective leases . . . It is the estates in the separate parcels which must be connected. If, therefore, the fee owner of one tract holds lesser tenure in the tract taken, there can be no additional compensation for this reason. The explanation is that the fee is the integer. The condemnor takes the particular ground. The whole structure of rights imposed upon this ground are destroyed. Compensation is paid by the parcel. Of course, a lease upon one parcel of land cannot be a part of the fee simple estate of another parcel." (emphasis added)

While the position above, as expressed by Judge Fee, is dictum, it does represent the prevailing rule. This rule has also been expressed in the various texts as follows:[42]

> "Tracts held by different titles vested in different persons cannot be considered as a whole where it is claimed that one is incidentally injured by the taking of the other for public use. This is the rule although the owner of the tract taken holds an interest in the property claimed to be damaged and although the two tracts are used as one."

A number of cases, mostly in other jurisdictions, have rigidly and strictly adhered to the title requirement. For example, in a Tennessee case, Tillman v. Lewisburg & N.R. Co.[43], a railroad condemned a right of way through land owned by a husband and wife as tenants by the entirety. The wife was unable to recover damages to a tract of land owned by her, individually, lying across the turnpike from the other tract and used in connection with it based upon the fact that there was no unity of title.

Similarly in an Indiana case, Glendenning v. Stahley,[44] the defendant owned a tract of land lying north of the proposed road and he and his wife owned a tract lying south of it as tenants by the entirety. The taking was on one of the two tracts. There the court ruled that in determining the amount of special damages sustained, severance damages could not be granted one fee owner for the taking of the property owned by different proprietors. On virtually the same facts, an Iowa court also denied severance damages.[45]

In McIntyre v. Board of County Commissioners,[46] the defendant T. W. McIntyre owned the westerly 80 acres and his wife, Ruby, owned the easterly 80 acres of property which was operated as a single farm by their son. In an acquisition for highway purposes across both the east and west 80 acre tracts, the defendants contended that the farm was to be considered as one entire unit for the purpose of

ascertaining severance damages. The trial court held that each 80-acre tract was a separate unit, and this ruling was upheld on appeal when the court held:

> "It is true that in a great majority of the adjudicated cases the taking was from only one of the tracts used in conjunction with another tract or tracts owned by another but used together as one unit, while in the case before us we not only have a diversity of ownership of the two tracts used and operated as one farm unit, but we also have a taking from each tract in question. However, the same general principle must apply, i.e., the pieces of land alleged to be a single tract must be owned by the same party, and one owner is not entitled to recover compensation for land taken from him because of alleged damages resulting to that portion of his land remaining on account of the taking of land belonging to another even though, as under the facts of this case, the two tracts had been farmed and operated as a unit."

And in State v. Superior Court,[47] the Washington Supreme Court denied severance damages since there did not exist a unity of title regarding the parcels in question. Parcel "A" was in the name of Harry A. Morrison, part of which was being taken in the condemnation action. Jeannette Wirt and Irene Morrison owned adjacent tracts ("B" and "C"). The latter parties sought to receive damages for the taking of Harry A. Morrison's tract, basing their case upon the fact that there was an oral agreement that legal title to all three tracts was to be held jointly by the three parties. The court first concluded that, due to the parol evidence rule, the defendants could not claim an interest in that tract which was being taken. It further said:

> "The fact that the three tracts are used as one farm, inasmuch as the ownership is divided, does not entitle the owners (relators) of adjacent tracts (tracts "B" and "C") to damages. If Harry A. Morrison has, in addition to his ownership of Tract "A", an interest short of actual ownership in tracts "B" and "C" owned by the relators, and vice versa, each relator, owners of tracts "B" and "C", have an interest in tract "A" to which Harry A. Morrison has title, that would not entitle relators to recovery of damages to any tract except the one over which the private way of necessity was condemned, which in the case at bar is over the tract owned by Harry A. Morrison . . . the damages for taking a right of way are based on ownership of land actually taken and are limited to lands held under the same title."

In property law and in the law of security transactions, the concept of title has undergone a major re-evaluation thus far in the 20th Century. The courts are more prone today to view the concept of title in its realistic context and to recognize that interests in property are matters of substance, not matters of form. The market place, too, views property by its utility and its relationship with other properties, not by bare naked "title". In view of this transformation both in the legal approach and in the economic approach to property, it is questionable whether the rigid position, as exemplified by the above cases, is a proper one.

2. The Liberal View.

Not all courts, however, rigidly apply the title per se criterion. Given unity of use, many courts are willing to include within the larger parcel tracts of land

wherein there is no unity of title but there is a realistic unity of ownership. In many instances, particularly in the modern economy, individuals may own in fee one parcel and have a long-term leasehold in an adjacent parcel; and both parcels may be, and often are, put to a common unified use. In numerous instances, commercial, industrial and agricultural operations are based upon long-term lease arrangements wherein the "owner" conducts the business by acquiring contiguous leaseholds. The use of leases has become increasingly widespread because of favorable tax considerations, e.g., the sale lease-back arrangement. The formation of shopping centers and other similar commercial ventures is often accomplished by the making of a group of long-term leases, to avoid large capital outlays for land. To the buyer in the market a parcel unified by leases is of no less economic importance and, perhaps even more beneficial, than a parcel unified by fee ownership.

Some courts have recognized this fact of life. For example, in Arizona, where the applicable condemnation statute is exactly the same as in California,[48] the high court of that state in a unanimous decision granted severance damages to the larger parcel despite the fact that all segments of that parcel were not owned in fee by the condemnee. In State v. Carrow,[49] the Highway Commission commenced to take the property in question in 1933 but the trial did not come about until 1939. The defendants operated a cattle business

over the following lands, parts of which were taken by the condemnation:

(a) Patented lands owned by the defendants;

(b) Lands owned by railroad company but leased to defendants on a year to year basis;

(c) State lands leased to the defendants for 5 years; and

(d) Land belonging to the United States (in which the defendants had a permit at the time of the trial but did not have one prior thereto).

The defendants claimed damages to all the interests listed above due to the construction of embankments, barbed wire fences, etc. on some of the property. While there were numerous types of interest involved in this damage action, the trial court failed to differentiate between these various interests and allowed defendants to receive full damages subject only to an apportionment among the various interest-holders (Arizona at that time had an apportionment statute). In upholding the right of the defendants to receive severance damages for injury to the "larger parcel", despite the fact that some of these parcels were not owned in fee by the defendants, the court said:

> "There are cases which held that non-contiguous pieces of land are not included in statutes of this nature as being portions of a 'larger parcel', damaged though not taken by condemnation, when the intervening pieces of land are

> in different ownership. State v. Bradshaw L. & L. Co., 99 Mont. 95, 43 P. 2d 674. While we know of no cases precisely in point, we think the more equitable rule is that when the 'larger parcel' at the time of the condemnation is held and used by one party for a common purpose, even though his title thereto varies both in quality and quantity, that it is fairly within the terms of the subdivision." [Ariz. statute §27-915 (1) (2) which is the exact language of §1248 (1)(2)]. (emphasis supplied)
>
> In Corpus Juris Secondum, it is stated:[50]
>
> ". . . . the fact that several tracts are owned by different persons does not preclude them as being regarded as one where they are contiguous and are used in common by the owners under a contract or other arrangement and the tract is more valuable by reason of that use than if used separately."

Under the liberal rule as thus stated, it is quite clear that unity of title is not essential where a common lessee uses contiguous property owned by others. Thus a party holding two separate leases on contiguous pieces of property owned by different persons is allowed severance damages if the taking of part of one leasehold damages the adjoining leasehold interest.

In an 1884 Illinois case, the condemnee owned ten lots and had a lease on four others. He operated them all in common. The court held that a taking by a railroad company of a right of way across the leased lots severed the property and entitled the condemnee to recover the depreciation done to the remainder of the property during

the balance of the term of the lease.[51] Similarly, in County of Smith v. Labore,[52] an 1887 Kansas case, a father and two sons each owned a quarter section of land. These three tracts adjoined each other and were used as grazing land by the three members of the family who were partners in the cattle business they conducted upon all three properties. The water was on the land of the father. A highway was laid across the land separating the water from the grazing land of the sons. In holding that the separation of the grazing land from the water injured the value of the land as a whole the court said:

> "We suppose it will be admitted that any one of the Labores would have a right to an award of damages for all the loss which he might sustain by reason of having his own grazing land separated from his own stock water. But that is not precisely the case. In this case the grazing lands of Lewis W. Labore and Arthur C. Labore were separated from the stock water on the land of C. C. Labore. But still the right of Lewis W. Labore and Arthur C. Labore, under the written contract with C. C. Labore, to use the stock water on C. C. Labore's land, made their lands more valuable than they otherwise would be, while the rights of C. C. Labore, under the contract, to use the land of the other two Labores, for pasturing his cattle thereon, made his land more valuable than it otherwise would be. This right made his stock water immensely more valuable to him, because he could use so much more of it at a profit. Now, may the Labores be deprived of all these benefits and profits and the enhanced value of their lands resulting therefrom, without their having any remedy? May not each be awarded damages for the loss of value as to his own land: May not each be awarded damages for the difference in value of his own land with the

> road, and without the road, where he suffers loss, although a portion of this enhanced value may be the result of his having the right to use the lands of others?"

Two very recent South Dakota cases indicate that the courts in that state are also not in accord with the title per se doctrine.[53]

3. The California View.

California, at the present time, appears to ally itself with the prevailing rule that unity of title is a necessary requisite in establishing the larger parcel. While there has been no case where the facts as presented to the California court have definitely established the rigid requirement, in a number of cases the courts in this state have indicated that "title" is a prerequisite. For example, in City of Menlo Park v. Artino,[54] the court stated in passing:

> "To recover severance damages there must be unity of title, San Benito County v. Copper Mountain Min. Co., 7 Cal. App. 2d 82, 45 Pac. 2d 428; City of Stockton v. Ellingwood, 96 Cal. App. 708, 275 p. 228, ..."

Neither the Copper Mountain Min. Co. nor the Ellingwood cases strictly support the proposition stated in the Artino case.

There is a possible indication in County of San Benito v. Copper Mountain Mining Company,[55] that a legal right rather than fee interest in a contiguous piece of property used in common with the property taken will

enable the condemnee to receive severance damages. There the appellant claimed that it should have been given an instruction in accordance with Section 1248(2) regarding severance damages. The land that was being condemned was entirely surrounded by land owned by the United States. Its claim for severance damages was based upon the fact that the defendant mining company had mining claims in the vicinity of the land sought to be condemned and that for operating its said mines it was necessary to have use of water that flowed across the land that was being condemned. The court denied severance damages, saying:

> "There is no showing that the said Copper Mountain Mining Company is the owner of, or has acquired any right to the use of this water. The property for which severance damages are claimed is owned by other than the one whose land was sought to be condemned. Appellants cite no authorities to the effect that severance damages may be awarded to one who is not the owner of the land sought to be condemned and we have found none that uphold this doctrine." (Emphasis supplied.)

Clearly the court concluded that had the appellant had a "right" this would have been sufficient to allow for severance damages. A "right", obviously exists in a leasehold.

In the Ellingwood case[56], two brothers owned contiguous tracts of land, each in their separate names. The plaintiff argued that, since the tracts were in the names of different defendants, there is no unity of ownership and, consequently, severance damages under the larger parcel concept cannot be granted. The court first held that, since California

law did not allow partnerships to hold property in their own names but that the law required that the individual partners hold the property, in reality there was common ownership and, therefore, there was the necessary unity permitting severance damages. The court said:

> "In view of equity, it is immaterial in whose name the legal title to the property stands, whether in the name of one partner or the names of all."

The court then discussed the Oakland v. Pacific Coast Lumber Company case which stated that unity of use should not be regarded as the controlling factor. This the court admitted but said further that unity of use should, nevertheless, be considered. It added that unity of use itself, is not sufficient; that there must be contiguity. Lastly, the Ellingwood court said:

> "The question of ownership also enters into consideration. The partnership being the owner, the different governmental subdivisions all being contiguous and there being unity of use, we conclude the trial court did not err in considering the whole tract as one parcel."

Clearly, the case would seem to suggest three fundamental points:

(1) That the court will view the question of severance damages in light of equitable principles;

(2) That it is not fee title ownership that is controlling but an interest recognized in

the law to be a legal interest; and

(3) If, as the Kilingwood case holds, a single parcel can be created by a partnership agreement, there seems to be no valid reason why a single parcel cannot be created by lease agreements.

The case of East Bay Municipal Utilities Dist. v. Kieffer,[57] has been cited for the proposition that California requires unity of title to exist in order to establish the larger parcel.[58] Careful examination of the case, however, does not sustain that view. In the Kieffer case the defendant owned two parcels of property and had an option on a third strip. In his answer, the defendant claimed damages by reason of a severance of lands under option from lands owned by him which were taken. The lower court struck out this answer as it related to such damages and, on this basis, the defendant appealed. The appellate court said that a single parcel was not created from the three parcels insofar as "an option is not a transfer of property. No title was conveyed thereby. It is a mere right of election . . . to accept or reject a present offer within the time therein fixed." The court went on, however, to say that:

> "Since the appellant had no interest in the lands under option, it is axiomatic that he was not entitled to damages by reason of their severance from the lands that were taken, if such taking may be termed a severance. Of course, if the lands under option had been held under a contract obligating the defendant to purchase them, a different rule would apply." (Emphasis supplied)

Clearly, the court looked for an "interest" in the adjacent land and found that an option was not such an interest. A lease, however, is an interest of the same type as a contract to purchase which the court said would produce a different result if it existed. Since a contract to sell does not create legal title in the buyer, it is not fee title which is necessary in order to receive severance damages to injury done to the larger parcel but rather it is a legal interest such as a lease or a contract which is needed.

And another case cited to uphold the position that this state clearly demands that all the property be owned in fee, People v. Emerson,[59] also fails to support that assertion. In that case, the state condemned a 3.4 acre strip of land through the center of certain range land. The only water available for cattle on the range was some two miles away from the land in question. Prior to the taking, the cattle reached the water by the use of a crossing leading to the spring on the other side of an old highway, but after the taking were prevented from doing so. Neither the crossing nor the water spring were on the property of the defendants. The court ruled against severance damages in this instance, on the basis that the condemnee had no ownership in the crossing or spring. The court did go on to indicate that had the defendant had a property interest on the land owned by another, the result would probably be different. The defendant tried to show in this case that he had an easement on the cattle crossing or a lease on it as well as a lease on the water spring.

Directing itself to this contention, the court said:

> "Defendants urge an easement existed through a cattle crossing and suggest a lease on it and the spring. The evidence is insufficient to support an easement and only vaguely hints at leases. If such easement or leases exist, they should be proven by competent evidence."

The Emerson case, in reality, strongly hints that the condemnee (and, by necessary inference, the condemnor for the purpose of showing special benefits) need only show an interest in adjacent land (plus, of course, unity of use) in order to establish the larger parcel.

In light of California authority, it appears that the courts in this state have indicated in dictum that fee title per se is necessary; but on a more thorough analysis of the cases, the courts seem to have left the door open for a contrary ruling.

4. Recommendations.

It would appear that a revision and/or clarification of the restriction imposed by many courts regarding unity of title is in order. The necessity for such a revision "is founded on logic and everyday justice".[60]

As indicated before, there are a multitude of instances where business operations are conducted by combining adjacent properties not only in fee but in fee-leasehold or a series of leasehold arrangements. From a realistic point of view, these latter combinations actually are considered on the market as supplying the unity of ownership that is a

requisite for establishing a larger parcel. Fee, in and of itself, has no greater effect on market operations than long-term leases combined together or combined with fee-owned property. To make an impractical distinction which is in direct conflict with the rules of the market place cannot be justified.

A simple example will illustrate the incongruous results that come from a rigid requirement that fee title, and fee title alone, is necessary. A well-known Los Angeles department store, Bullock's, actually is not owned in fee by a single owner. Instead, the department store, occupying a number of contiguous lots in the downtown area, is actually united by at least five leaseholds of a long-term duration. To say that the taking of one lot and one leasehold will not, in law, constitute damages to the "remainder" is to draw an arbitrary and unjust distinction that has support neither in logic nor in fact. Similar illustrations could be drawn but the point should be readily clear to all concerned.

Of course, it is recognized that to claim damages to a larger parcel, the condemnee must be able to show a legal interest in the remainder, but that interest need not be fee title; a leasehold or an easement is of equal economic and practical utility and value. Accordingly, as some commentators have suggested,[61] the unity of use should be the prime consideration; if the condemnee has a legal interest in the "remainder" and that remainder is in the proximate vicinity of the part taken and there is an existing unity of use (if

the parts are not contiguous), the entire property should be treated as one "parcel" - whether for the purposes of ascertaining damages or for determining special benefits.

FOOTNOTES

(1) Jahr, "Compensable Damages Due to Construction of Limited Access Highways," INSTITUTE ON EMINENT DOMAIN, 77, 92-93 (1960).

(2) Olmstead v. United States, 277 U.S. 438, 479 (1928).

(3) 260 U.S. 393, 415-16 (1922).

(4) See Barnes v. North Carolina State Hwy, Comm., 109 S.E. 219 (1959); Louisville & Nashville R. Co. v. Chenault, 214 Ky. 748, 284 S.W. 397 (1926); Enfield and Mansfield, "Special Benefits and Right of Way Acquisition", 25 APPRAISAL JOURNAL 551 (1957).

(5) The statute was originally enacted in 1872. Since that time it has been subject to minor changes, none of which affects the quoted text. It has been adopted in a number of western states since that time, and, it seems, that it was itself borrowed from similar statutory provisions in eastern states.

(6) Oakland v. Pacific Lumber and Milling Company, 171 Cal. 392, 153 P. 705 (1915).

(7) Trustees of Boston University v. Commonwealth, 286 Mass. 57, 190 N.E. 29 (1934).

(8) City of Menlo Park v. Artino, 151 C.A. 2d 261, 311 P. 2d 135 (1957).

(9) Barnes v. North Carolina State Hwy. Comm., 109 S.E. 2d 219 (1959).

(10) 184 Kan. 134, 334 P. 2d 399 (1959).

(11) 4 NICHOLS ON EMINENT DOMAIN §14.31 [1]. See also AM. JUR., "Eminent Domain" §270; Annot., 6 A.L.R. 2d 1197 (1949).

(12) Ibid.

(13) Sasso v. Housing Authority, 111 A. 2d 226 ( ).

(14) 8 Ill. 2d 341, 134 N.E. 2d 296 (1956).

(15) 17 Ill. 2d 570, 162 N.E. 2d 373 (1959).

(16) 143 F. 2d 391 (1st Cir. 1944), cert. den., 323 U.S. 772.

(17) Id. at 395.

(18) 93 Vt. 437, 108 Atl. 426 (1919).

(19) 286 Mass. 57, 190 N.E. 29 (1934).

(20) Id. at 190 N.E. 31.

(21) See, e.g., "The Reimbursement for Moving Expenses When Property is Acquired for Public Use", "Incidental Losses in Eminent Domain", "Evidence in Eminent Domain Proceedings." (this series)

(22) 184 Kan. 134, 334 P. 2d 399 (1959).

(23) Barnes v. North Carolina State Hwy. Comm., 109 S.E. 2d 219 (1959).

(24) 171 Cal. 392, 153 P. 705 (1915).

(25) 13 C.A. 2d 505, 57 P. 2d 575 (1936).

(26) 137 C.A. 760, 31 P. 2d 467 (1934).

(27) 99 C.A. 240, 278 P. 476 (1929).

(28) 151 C.A. 2d 261, 311 P. 2d 135 (1957).

(29) 22 C.A. 2d 375, 71 P. 2d 88 (1937).

(30) 32 C. 2d 406, 196 P. 2d 570 (1948).

(31) See Annot., 6 A.L.R. 2d 1179, 1234, et seq. (1949). In the California Edison Company case, the condemnee was allowed severance damages for the taking of part of its system; these damages extended over ten counties and the taking actually involved only a specific unit. See also Note 8 STAN. L. REV. 113 at n. 12.

(32) 43 C. 2d 13, 271 P. 2d 507 (1954).

(33) See Note, 8 STAN. L. REV. 113 (1955) at 119; Kaltenbach, JUST COMPENSATION (Cal. 1) §2-1.01.

(34) See Note, 8 STAN. L. REV. at 120, 121.

(35) Annot., 6 A.L.R. 2d 1179, 1210-1213.

(36) 180 C.A. 2d 805, 4 C.R. 785 (1960).

(37) 32 Cal. 2d at 424.

(38) See Del Guercio, "Severance Damages & Valuation of Easements" CALIFORNIA CONDEMNATION PRACTICE 61, 67, (Continuing Education of the Bar) (1960).

(39) 143 F. 2d at 394-395.

(40) See Annot., 6 A.L.R. 2d at 1203, 1227, 1234; City of Chicago v. Equitable Life Assurance Society, 8 Ill. 2d 341, 134 N.E. 2d 296 (1956): See, especially, Cole Investment Co. v. United States, 258 F. 2d 203 (9th Cir., 1958).

(41) 182 F. 2d 172 (9th Cir., 1950).

(42) 18 AM. JUR., "Eminent Domain" §271.

(43) 133 Tenn. 554, 182 S.W. 597 (1915).

(44) 173 Ind. 674, 91 N.E. 234 (1910).

(45) Duggan v. State, 214 Iowa 230, 242 N.W. 98 (1932).

(46) 168 Kan. 115, 211 P. 2d 59 (1949).

(47) 10 Wash. 2d 262, 116 P. 2d 752 (1941).

(48) Ariz. Statute §27-915 (1) (2).

(49) 57 Ariz. 429, 114 P. 2d 891 (1941).

(50) 29 CORPUS JURIS SECONDUM, "Eminent Domain" §140.

(51) Chicago & E. R. Co. v. Dresel, 110 Ill. 89 (1884).

(52) 37 Kan. 480, 15 Pac. 577 (1887).

(53) State Hwy. Comm. v. Fortune, 91 N.W. 2d 675 (S. Dak. 1958); State Hwy. Comm. v. Bloom, 93 N.W. 2d 572 (S. Dak. 1958).

(54) 151 C.A. 2d 261, 311 P. 2d 135 (1957).

(55) 7 C.A. 2d 82, 45 P. 2d 428 (1935).

(56) 96 C.A. 708, 275 Pac. 228 (1929).

(57) 99 C.A. 240, 278 Pac. 476 (1929).

(58) See, e.g., Del Guercio, "Severance Damages & Valuation of Easements", CALIFORNIA CONDEMNATION PRACTICE 61, 67 (Continuing Education of the Bar) (1960).

(59) 13 C.A. 2d 673, 57 P. 2d 955 (1936).

(60) See Ives v. Kan. Turnpike Authority, 184 Kan. 134, 334 P. 2d 399 (1959). See also Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910) where Justice Holmes stated that constitutions deal "with persons not tracts of land" and Miss. and Rum River Boom Co. v. Patterson, 98 U.S. 403, 407 (1879) where the Court said:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties."

(61) Enfield & Mansfield, "Special Benefits and Right of Way Acquisition", 25 APPRAISAL JOURNAL 551, 553 (1957). Cf., Kaltenbach JUST COMPENSATION, "What Constitutes the Entire Parcel" (Spec. Bull. #9, 1959 Series.)