

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

*relating to*

Evidence in Eminent Domain  
Proceedings

October 1960

## LETTER OF TRANSMITTAL

To His EXCELLENCY EDMUND G. BROWN  
*Governor of California*  
*and to the Members of the Legislature*

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens. The Commission herewith submits its recommendation and a study on a portion of this subject—evidence in eminent domain proceedings. The study was prepared by the Commission's research consultant, the law firm of Hill, Farrer and Burrill of Los Angeles.

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# RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

## Relating to Evidence in Eminent Domain Proceedings

The principal determination to be made in an eminent domain proceeding is the market value of the property that is to be taken or damaged for public use. The generally accepted view has been that this determination should be based on the opinions of persons qualified to form a reliable opinion of the value of the property, *i.e.*, the owner of the property and expert witnesses.

The California courts have not permitted expert witnesses in eminent domain proceedings to testify concerning many factors that a modern appraiser takes into consideration in determining the market value of the property. For example, it has been held that an expert may not testify on direct examination concerning the income from business property being condemned or the cost, less depreciation, of reproducing the improvements that enhance the value of the property being condemned. Until the decision of the California Supreme Court in *County of Los Angeles v. Faus*<sup>1</sup> in 1957, an expert was not permitted to testify on direct examination about the sales prices of comparable property that he considered in reaching his opinion. Restrictive rules of this sort, which prevent witnesses from revealing all that they rely on to determine value in the market place, have been justly criticized by lawyers, judges and appraisers.

Although the *Faus* case eliminated some problems involved in the determination of market value, it created some uncertainties as well. To eliminate these uncertainties, and to bring judicial practice into conformity with modern appraisal practice, the Commission makes the following recommendations:

1. Evidence of value in eminent domain cases should continue to be limited to the opinions of qualified experts.<sup>2</sup> Since the *Faus* decision, and particularly since the 1959 amendment to Code of Civil Procedure Section 1845.5, there has been uncertainty whether evidence of comparable sales is direct evidence of value upon which the trier of fact may base a finding or whether such evidence is received merely to explain and substantiate opinion evidence. The practical effect of this uncertainty is that trial courts have made conflicting decisions upon the question of whether a jury can find a value completely outside the range of opinion testimony in reliance upon some evidence of comparable sales that has been introduced.

<sup>1</sup> 48 Cal.2d 672, 312 P.2d 680 (1957).

<sup>2</sup> "Expert" as used here means a person qualified to express an opinion concerning the value of the property that is subject to condemnation. In California, the owner of the property is presumed to be so qualified. The Commission does not recommend that this rule be changed. Therefore, the term "expert" in this recommendation refers also to the owner of the property being condemned.

The value of property has long been regarded as a matter to be established in judicial proceedings by expert opinion. If this rule were changed to permit the court or jury to make a determination of value upon the basis of comparable sales or other basic valuation data, the trial of an eminent domain case might be unduly prolonged as witness after witness is called to present such testimony. In addition, the court or jury would be permitted to make a determination of value without the assistance of experts qualified to analyze and interpret the facts established by the testimony and to make an award far above or far below what any expert who testified considers the property is worth—even though the court or jury may know little or nothing of property values and may never have seen the property being condemned or the comparable property mentioned in the testimony. The Commission believes that the net result would be lengthened condemnation proceedings and awards which would often not realize the constitutional objective of just compensation. To avoid these consequences, the long established rule that value is a matter to be established by opinion evidence should be reaffirmed and codified.

2. An expert should be permitted to give the reasons for his opinion on direct examination. An expert's testimony is more meaningful when he can fully explain the reasons for his opinion. If he cannot relate the data relied on in direct examination, the trier of fact may never hear it, for the cross-examiner will ask only about the data most damaging to the expert's opinion.

3. An expert should be permitted to state the facts and data upon which he relied in forming his opinion whether or not he has personal knowledge of such matters. This is the practice at the present time, but it is desirable to make the rule explicit so that it may be clear that the hearsay rule is inapplicable to such testimony when it is introduced solely in explanation of the witness's opinion. It would be virtually impossible to try a condemnation case if all the facts and data introduced in support of opinion testimony had to be established by witnesses with personal knowledge of the facts.

4. In formulating and stating his opinion as to the value of the property, an expert should be permitted to rely on and testify concerning any matter that a willing, well-informed purchaser or seller would take into consideration in determining the price at which to buy or sell the property. Since the court is trying to determine the "market" value of the property, it should consider the factors that would actually be taken into account in an arm's length transaction in the market place.

In modern appraisal practice, there are three basic approaches to the determination of value. These involve consideration of the sales prices of comparable property and other market data, the capitalization of the income attributable to the property, and the cost of replacing or reproducing the improvements on the property less depreciation and obsolescence. Specific statutory recognition should be given to these methods of appraising property for they are relied upon extensively to determine market value outside the courtroom.

While permitting an expert to rely on and testify concerning all factors that would be considered by buyers and sellers generally on

the open market to determine the value of the property, this standard would not permit an expert to rely on personal considerations of the owner of the property or the need of the condemner to obtain the property, for these factors are not relevant to the determination of the actual value of the property on the open market.

Nor should an expert in formulating or stating his opinion be permitted to rely on or testify concerning injuries to the property for which compensation may not be given—such as injuries caused by the exercise of the police power—even though such injuries may actually influence market value. Without this limitation, damages might be awarded indirectly for losses for which a condemnee is not entitled to be compensated.<sup>3</sup>

5. Certain factors that are of doubtful validity in their bearing on value should be specifically excluded from consideration in determining value to remove any doubt concerning the admissibility of an opinion based on these factors under the standards discussed above. These include the following:

(a) Sales to persons that could have acquired the property by condemnation for the use for which it was acquired should be excluded from consideration on the issue of value. Such a sale does not involve a willing buyer and a willing seller. The costs, risks and delays of litigation are factors that often affect the ultimate price. Moreover, sales to condemners often involve partial takings. In such cases valid comparisons are made more difficult because of the difficulty in allocating the compensation between the value of the part taken and the severance damage or benefit to the remainder. These sales, therefore, are not sales in the "open market" and should not be considered in a determination of market value.

(b) Offers between the parties to buy or sell the property to be taken or damaged should also be excluded from consideration. Pretrial settlement of condemnation cases would be greatly hindered if the parties were not assured that their offers during negotiations are not evidence against them. Such offers should be excluded under the general policy of excluding evidence of an offer to compromise impending litigation.

(c) Offers or options to buy or sell the property to be taken or damaged or any other property by or to third persons should not be considered on the question of value except to the extent that offers by the owner of the property subject to condemnation constitute admissions.

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

<sup>3</sup> This recommendation is not concerned with and makes no change in the elements of damage for which compensation must be made in eminent domain proceedings; it is concerned only with the evidence that may be used to establish the amount of damages for which compensation must be made.



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

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

(d) Valuations assessed for purposes of taxation should not be considered on the question of value. It is well recognized that the assessed value of property cannot be relied upon as an indication of its market value.

(e) Opinions as to the value of comparable property should be excluded from consideration in determining the value of property subject to condemnation on the principle of remoteness because their consideration would require the determination of many other collateral questions involving the weight to be given such opinions which would unduly prolong the trial of condemnation cases. Opinion evidence on value should be confined to opinions of the value of the property being taken or damaged for public use.

6. The foregoing recommendations would supersede the provisions of Code of Civil Procedure Section 1845.5 and that section should be repealed.

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The Commission's recommendation would be effectuated by the enactment of the following measure:

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

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

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

1248.1. (a) The amounts to be ascertained under subdivisions 1, 2, 3 and 4 of Section 1248 may be shown only by the opinions of witnesses

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qualified to express such opinions. Such a witness may, on direct or cross-examination, state the facts and data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion; and his statement of such facts and data is subject to impeachment and rebuttal. The owner of the property or property interest sought to be taken or injuriously affected is presumed to be qualified to express such opinions.

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

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

1248.2. The opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is admissible only if the court finds that the opinion is based upon facts and data that a willing purchaser and a willing seller, dealing with each other with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the price at which to purchase and sell the property or property interest to be taken or injuriously affected, which facts and data may include but are not limited to:

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

(b) The price and other terms of any sale or contract to sell of comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(c) The rent reserved and other terms of any lease which included the property or property interest to be taken or injuriously affected or any part thereof which was in effect within a reasonable time before the date of valuation.

(d) The rent reserved and other terms of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.

(e) The capitalized value of the reasonable net rental value attributable to the property or property interest to be taken or injuriously affected, including reasonable rentals customarily fixed by a percentage or other measurable portion of gross sales or gross income of a business which may reasonably be conducted on the premises, as distinguished from the capitalized value of the income or profits attributable to any business conducted thereon.

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

SEC. 3. Section 1248.3 is added to the Code of Civil Procedure, to read:

1248.3. Notwithstanding the provisions of Section 1248.2, the opinion of a witness as to the amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible if it is based, wholly or in part, upon:

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

(b) The price or other terms of any offer made between the parties to the proceeding to buy, sell or lease the property or property interest to be taken or injuriously affected, or any part thereof.

(c) The price at which an offer or option to purchase or lease the property or property interest to be taken or injuriously affected or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease, unless such option, offer or listing is introduced by a party as an admission of another party to the proceeding. Nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 1248.1.

(d) The value of any property or property interest as assessed for taxation purposes.

(e) An opinion as to the value of any property or property interest other than that to be taken or injuriously affected.

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

(g) The capitalized value of the income or rental from any property other than the property to be taken or injuriously affected.

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

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

SEC. 5. Section 1845.5 of the Code of Civil Procedure is repealed.

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

SEC. 6. This act does not apply to any action or proceeding that has been brought to trial prior to the effective date of this act.

# A STUDY RELATING TO EVIDENCE IN EMINENT DOMAIN PROCEEDINGS \*

## INTRODUCTION

This study deals with the evidentiary problems that arise in condemnation trials. This is the first of a series of studies that will cover the entire field of condemnation law and procedure. In this series of studies we will endeavor to integrate suggestions made in one study with changes likely to be recommended or discussed in subsequent studies. For example, the efficacy of the introduction of testimony involving comparative sales or offers is aided or weakened by the nature of pretrial methods of discovery; these in turn are both affected to a great degree by the method adopted for litigating condemnation actions, i.e., by judge, jury or commission system. The aim, therefore, will be to present an integrated series of studies, each of which, however, may independently be justified.

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

Is the law and procedure in eminent domain biased in favor of the condemnor and against the condemnee? To give a categorical answer to this question would be foolhardy; the nebulous concepts of "just compensation,"<sup>2</sup> "value"<sup>3</sup> and the inherent impossibility of evaluating empirical award data preclude any conclusive answer on this point. Nonetheless, it has been argued that the condemnor has various advantages, including staffs of experienced attorneys,<sup>4</sup> the faculty for obtaining better qualified experts,<sup>5</sup> the very power and authority to condemn in itself—and especially the existence of the market value standard—which combine to deny the condemnee, at least in theory, indemnification for his loss.

The United States Supreme Court has defined "just compensation" as that which entitles the owner "to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily

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

<sup>1</sup> Cal. Stat. 1956, res. ch. 42, at 265.

<sup>2</sup> See *United States v. Miller*, 317 U.S. 369 (1943).

<sup>3</sup> *United States v. City of New York*, 165 F.2d 526 (2d Cir. 1948).

<sup>4</sup> Cf. Hadley, *Highways and Freeways—Some Legal Problems Encountered*, 21 APPRAISAL J. 165, 173 (1953), where the author points out how the Highway Department in this State has amassed numerous and detailed studies showing the effect of road building on abutting property and how the Department familiarizes its appraisers with these studies by taking them on extensive tours in regard to them.

<sup>5</sup> It has frequently been stated that the condemnee is often not in a position to defray the heavy costs necessary to obtain the services of qualified appraisers.

as it would have occupied if its property had not been taken.”<sup>6</sup> On other occasions, however, it has confessed that the standard adopted by the courts is often “harsh” and constitutes a derogation of the indemnity principle.<sup>7</sup> Other authorities, too, have argued that the present practice does not make the owner “whole.” Orgel, after critically examining the market value concept, concludes in these words:

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

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

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

<sup>6</sup> See *United States v. New River Collieries*, 262 U.S. 341, 343 (1923). See also *United States v. Miller*, 317 U.S. 369 (1943).

<sup>7</sup> *United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945) (“the consequences often are harsh”); *General Motors Corp. v. United States*, 140 F.2d 873, 874 (7th Cir. 1944) (“hard law”); *Oakland v. Pacific Coast Lumber etc. Co.*, 171 Cal. 392, 398, 153 Pac. 705, 707 (1915) (“We are not to be understood as saying that this should not be the law when we do say that it is not our law.”); *Newark v. Cook*, 99 N.J. Eq. 527, 538, 133 Atl. 875, 879 (1926) (“That is the law. It works hardships.”).

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

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

<sup>10</sup> See REPORT OF MASSACHUSETTS SPECIAL COMMISSION RELATIVE TO CERTAIN MATTERS PERTAINING TO THE TAKING OF LAND BY EMINENT DOMAIN, HOUSE NO. 2738 (1956); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 67 nn.12, 113, 115 (1957); *Recommendation and Study relating to Reimbursement of Moving Expenses When Property Is Acquired for Public Use*, REC. & STUDY CAL. LAW REVISION COMM’N C-1 et seq. (1960).

In the 86th Congress, a Bill, H.R. 1066 (1959), was introduced to establish a commission to study the adequacy of compensation for real property acquired by the United States. It declared, “Because many owners and tenants whose land is required for public works projects of the United States have not been able to move, relocate, and reestablish themselves and their families or business without loss, and because that inability denies persons and firms the equal protection of law, creates hardships, and in some instances places an inequitable burden on former owners and tenants or local communities, it is necessary to study the present methods of determining compensation, the adequacy thereof, and whether or not the procedures with respect thereto should be defined by statute to assure a clear definition of the rights of all concerned.”

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

<sup>11</sup> See, e.g., Act of July 12, 1957, § 304, 71 Stat. 300; Act of July 14, 1952, § 401 (a), 66 Stat. 624; N.Y. Sess. Laws 1957, ch. 798, § 1. And see Wis. Laws 1959, ch. 32, § 32.09 (effective April 6, 1960). See generally Pearl, *Review of Efforts To Minimize Losses in Condemnation*, 26 APPRAISAL J. 17 (1958).

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

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

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

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

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

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

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

<sup>16</sup> See Graubart, *supra* note 12.

<sup>17</sup> The argument that condemnation awards are excessive has brought about two major investigations of statutory procedures and court practices in New York City. In 1932 as a result of the WALLSTEIN study, note 13 *supra*, the New York City Administrative Code relating to condemnation was drastically changed. See discussion *infra*. More recently, in 1958, the Mayor of New York appointed a special commission to investigate condemnation practices and procedures as a result of frequent revelations as to exorbitant condemnation costs. See N.Y. Herald-Tribune, June 19, 1958, p. 1; N.Y. Times, June 19, 1958, p. 33. The commission had not, at the writing of this instant study, filed its report.

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

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

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

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

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

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

<sup>21</sup> CAL. CONST. art. I, § 14; see *Reardon v. San Francisco*, 66 Cal. 492, 6 Pac. 317 (1885).

<sup>22</sup> 23 Cal.2d 390, 144 P.2d 799 (1943).

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

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

<sup>25</sup> See discussion in text at A-26 *et seq.*, *infra*.

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

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

<sup>28</sup> See *Olson v. United States*, 292 U.S. 246, 257 (1934); see also the opinion of Mr. Justice Douglas concurring in part, in *United States v. General Motors Corp.*, 323 U.S. 373, 385 (1945) ("promises swollen verdicts"); *United States v. 3,544 Acres of Land, etc.*, 147 F.2d 596, 598 (3d Cir. 1945); *Eagle Lake Improvement Co. v. United States*, 141 F.2d 562, 564 (5th Cir. 1944); *Housing Authority of Shreveport v. Green*, 200 La. 463, 474, 8 So.2d 295, 299 (1942); *Bailey v. Boston & P.R.R.*, 182 Mass. 537, 539, 66 N.E. 203, 204 (1903); *Sawyer v. Commonwealth*, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902); *Sauer v. The Mayor*, 44 App. Div. 305, 308, 60 N.Y. Supp. 648, 650 (1899).

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

<sup>29</sup> See generally Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

<sup>31</sup> Such an argument was raised though rejected in *Bacich v. Board of Control*, 23 Cal.2d 343, 350, 144 P.2d 818, 823 (1943) ("On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost."). Compare *Davis v. County Commissioners*, 153 Mass. 218, 225, 26 N.E. 848, 850 (1891).

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

### THE MARKET VALUE STANDARD

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

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

Approximately 500 different definitions of market value appear in *Words and Phrases*.<sup>37</sup> There is, in fact, a genuine dispute over the meaning of this term.<sup>38</sup> The controversy, however, is not so much what the term reasonably connotes as it is what the elements are that bring it about. That is to say, in regard to the standard definition of market value—"the price that can be obtained under fair conditions as between a willing buyer and a willing seller when neither is acting under necessity, compulsion, or peculiar and special circumstances"<sup>39</sup>—disagreements mainly concern the factors that must be considered to determine this hypothetical result rather than the "ideal" itself. True, there are conflicts as to whether this standard presumes that price which an "informed" buyer would consider or merely that price which the "average" buyer, whether he be informed or not, would consider. Moreover, there are conflicts as to whether the definition implies an average price or the highest price obtainable in the market. Both of these points are reasonably well resolved in California; in this State, both the *informed* buyer and the *highest* price he could get are elements of the standard.

<sup>32</sup> United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266, 280 (1943).

<sup>33</sup> U.S. CONST. amend. V; CAL. CONST. art. I, § 14. All but two states have similar provisions in their constitutions. In those states, New Hampshire and North Carolina, this requirement has been read into the state constitutions by the courts.

<sup>34</sup> 1 ORGEL 79-89.

<sup>35</sup> See Acquisition of Land Act, 1919, 9 & 10 Geo. 5, ch. 57, § 2. See also PA. STAT. ANN. tit. 26, § 101 (1958); TEX. STAT., REV. CIV. art. 3265(2) (1948); WASH. REV. CODE §§ 8.04.112, 8.12.140 (1956).

<sup>36</sup> Rose v. State 19 Cal.2d 713, 737, 123 P.2d 505, 519 (1942); Sacramento So. R.R. v. Hellbron, 156 Cal. 403, 104 Pac. 979 (1909); People v. Al. G. Smith Co., 86 Cal. App.2d 308, 194 P.2d 750 (1948). See also Spencer v. The Commonwealth, 5 Commw. L. R. 418 (Austl. 1907).

<sup>37</sup> 26 (a) WORDS & PHRASES, *Market Value*, 66-110 (1953).

<sup>38</sup> 1 ORGEL 93 *et seq.*

<sup>39</sup> Maher v. Commonwealth, 291 Mass. 343, 348, 197 N.E. 78, 81 (1935).



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

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

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

### ALTERNATIVES TO MARKET VALUE STANDARD

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

#### Value to Taker

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

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

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

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

#### Value to Owner

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

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

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

<sup>41</sup> *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 81 (1913).

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

<sup>43</sup> *Id.* at 374-76.

<sup>44</sup> LAURANCE, COMPULSORY PURCHASE AND COMPENSATION 62 (1952); MINISTRY OF RECONSTRUCTION, SECOND REPORT OF THE COMMITTEE DEALING WITH THE LAW AND PRACTICE RELATING TO THE ACQUISITION AND VALUATION OF LAND FOR PUBLIC PURPOSES 8 (Scott Rep. 1918). The basic reason for this standard was the public distrust of private railroad enterprises. See note 42 *supra*. Cf., Watkins, *Appraisal Practices in Great Britain*, 21 APPRAISAL J. 251, 253 (1953).

<sup>45</sup> LAURANCE, *op. cit. supra*, note 44.

<sup>46</sup> Cf. *W. Rought, Ltd. v. West Suffolk County Council*, [1955] 2 All E.R. 337 (C.A.); Acquisition of Land Act, 1919, 9 & 10 Geo. 5, ch. 57, § 2; Watkins, *Appraisal Practices in Great Britain*, 21 APPRAISAL J. 251, 253 (1953).

<sup>46a</sup> *Ibid.*

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

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

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

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

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

<sup>47</sup> [1951] Can. Sup. Ct. 504, [1951] 2 D.L.R. 465 (1951).

<sup>48</sup> *Id.* at 508, [1951] 2 D.L.R. at 468.

<sup>49</sup> *Id.* at 507-08, [1951] 2 D.L.R. at 467-68.

<sup>50</sup> *Diggon-Hibben Ltd. v. The King*, [1949] Can. Sup. Ct. 712, 715, [1949] 4 D.L.R. 785, 787 (1949); *Lake Erie & No. Ry. v. Brantford Golf & Country Club*, 32 D.L.R. 219, 229 (Can. 1916); *The King v. Northern Empire Theatres*, [1951] Can. Exch. 321, 324 (1951).

<sup>51</sup> See generally Todd, *The 10% Allowance in Assessing Compensation Payable for Property Expropriated Under Statutory Authority*, 2 U.B.C. LEGAL NOTES 623 (1958).

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

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

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

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

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

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

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

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

<sup>53</sup> *Winchester v. Cox*, 129 Conn. 106, 26 A.2d 592 (1942) (park); *Idaho etc. Ry. v. Columbia etc. Synd.*, 20 Idaho 568, 119 Pac. 60 (1911) (college campus); *Newton Girl Scout Council v. Massachusetts Turnpike Authority*, 335 Mass. 189, 138 N.E.2d 769 (1956) (recreational camp); *In re Simmons*, 127 N.Y. Supp. 940, 944 (Sup. Ct. 1910) (church). See *Housing Authority of Shreveport v. Green*, 200 La. 463, 474, 8 So.2d 295 (1942).

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

<sup>55</sup> 91 Ga. App. 881, 87 S.E.2d 671 (1955). The court admitted that the market value formula is the general measure of damages. However, unlike almost any other case at that time, it did not state that special conditions need to exist to set market value aside. Rather, the general standard was to be discarded if it failed to give fair and reasonable value to the owner.

<sup>56</sup> *Id.* at 884-85, 87 S.E.2d at 675.

<sup>57</sup> *Jacksonville Express. Authority v. Henry G. Du Pree Co.*, 108 So.2d 289 (Fla. 1958).

<sup>58</sup> *Id.* at 291.

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

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

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

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

<sup>59</sup> *United States v. Miller*, 317 U.S. 369, 375 (1943).

<sup>60</sup> WALLSTEIN, *REPORT ON LAW AND PROCEDURE IN CONDEMNATION* iv (1932).

<sup>61</sup> Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 73 (1957).

<sup>62</sup> Market value, like the appraiser in condemnation cases, may often be characterized as "that scoundrel who stands between the landowner and sudden wealth."

<sup>63</sup> *Cf.* 1 BONBRIGHT, *op. cit. supra* note 24, at 447-49; 1 ORGEL 79.

<sup>64</sup> *Ibid.*

These matters shall be examined in subsequent studies.<sup>65</sup> For now, it is important to keep these distinctions in mind.

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

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

### JUSTIFICATION FOR STATUTORY CHANGES

In subsequent portions of this study a number of proposals requiring statutory enactment will be considered. Each will be examined in detail. Here it is proposed to summarize the reasons and generally to justify major statutory revisions involving evidentiary rules even though there is little (though some) precedent for statutory enactment in this field.<sup>66a</sup> Admittedly, most states have few, if any, statutory provisions relating to the rules of evidence in condemnation. The principal reasons for this situation may be briefly summarized. First, it has been only in recent years that eminent domain in this country has grown to major propor-

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

<sup>66</sup> See Acquisition of Land Act of 1919, 9 & 10 Geo. 5, ch. 57, § 2.

<sup>66a</sup> Wisconsin adopted a detailed statute outlining the various factors that may be compensated for in condemnation and indicating the type of evidence that is admissible in a condemnation proceeding. The statute includes capitalization and reproduction data among other numerous factors. Wis. Laws 1959, ch. 32, especially § 32.09.

tions, thus magnifying the problems involved.<sup>67</sup> Second, the courts have frequently maintained that matters of just compensation are for judicial, not legislative, determination.<sup>68</sup> In most cases, this position should not affect evidentiary rules; however, it may have had the effect of restraining legislative action in the field even though legislative action would be permissible. Last, there exists among some members of the bench and bar, including some members who are familiar with this field of law as well as the far greater number who are not, the belief that methods of proving valuation do not lend themselves to statutory control.

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

(1) It is clear, as indicated by most of those who are familiar with the field,<sup>69</sup> that the courts, California's included, are uncertain as to the proper methods of presenting evidence in condemnation actions.

(2) Because of the recent and celebrated case of *County of Los Angeles v. Faus*,<sup>70</sup> which instituted a major change in the evidentiary rules in condemnation cases in this State, a great deal of uncertainty and further confusion has resulted. This can best be resolved by legislative action. The general pattern of uncertainty compounded by the *Faus* case has produced and will probably continue to bring about extensive and expensive litigation.

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

(4) As a general proposition, codification tends to clarify; therefore, all engaged in the field, including the courts as well as appraisers, will be put on notice as to the scope and limitations of various aspects

<sup>67</sup> See, e.g., Dolan, *Market Value—the "Informed Guess,"* 20 APPRAISAL J. 330, 336 (1952) ("During the past ten years more federal condemnation cases have been filed in a single year in New York City than were filed in the entire past history of the federal courts in this area.") See also STAFF OF SUBCOMMITTEE ON HOUSING, HOUSE COMMITTEE ON BANKING AND CURRENCY, 84TH CONG., 2D SESS., SLUM CLEARANCE AND URBAN RENEWAL (Comm. Print 1956); 1956 HOUSING AND HOME FINANCE AGENCY ANN. REP.

The extent of condemnation in California may be seen in the number of such cases litigated in Los Angeles County. From July 1, 1953, to June 30, 1959, there were 382 condemnation cases filed in that county alone, fairly representing the annual number of such actions in recent years. (Data supplied by Harold J. Ostly, Los Angeles County Clerk.)

<sup>68</sup> See *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893) ("The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation."); *Dore v. United States*, 119 Ct. Cl. 560, 581-83, 97 F. Supp. 239, 242-44 (1951). See also 1 NICHOLS 347; 3 NICHOLS 157.

<sup>69</sup> See REPORT OF MASSACHUSETTS SPECIAL COMM. RELATIVE TO CERTAIN MATTERS PERTAINING TO THE TAKING OF LAND BY EMINENT DOMAIN 3, 14 (1956); Graubart, *Theory Versus Practice in the Trial of Condemnation Cases*, 26 PA. B.A.Q. 36 (1954); Lewis, *Eminent Domain in Pennsylvania*, Preface to PA. STAT. ANN. tit. 26, at 33-34 (1958); Interview between Judge John J. Ford and authors, July 21, 1959. See also remarks made at American Society of Appraisers, Education Seminar, *Recent Decisions in the Law* on May 23, 1959, by Day & Gleaves (to be published).

<sup>70</sup> 48 Cal.2d 672, 312 P.2d 680 (1957).

of this area of the law.<sup>71</sup> And, obviously, clarification will make the basic standard—market value—more efficacious.

(5) Because modern concepts of appraising have changed and many of the legal concepts in the field have not kept pace with business practices, the introduction of statutory provisions may help to bridge this gap. Fifty years ago one author stated: "The method of presenting testimony as to values . . . is far from satisfactory."<sup>72</sup> The method is thus at least fifty years outdated.

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

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

### THE PRESENTATION OF MARKET VALUE

Two criteria should control the introduction or exclusion of evidence to prove market value. First, the matter to be introduced must be *relevant* to the question of compensation. Second, the evidence offered must to some extent conform with the auxiliary probative policy or, in other words, *expediency*.<sup>73</sup> Considerations affecting the latter criterion include materiality, the degree of confusion such testimony would create for a jury, the amount of time it would take to present such matter and the number of collateral issues involved and, finally, the trustworthiness of such evidence. Often these two criteria are in conflict with each other. In reality, the principal issue in the evidence problem is just this conflict.

This conflict, of course, cannot be resolved by selecting for all factual situations one of the two alternatives and employing that criterion to the exclusion of the other. Experience has shown, however, that these controversies tend to fall into a number of major and distinguishable categories. Each such category will be examined in light of both criteria. The recommendations hereinafter made are based on the probability or improbability of obtaining expediency *and* insuring just compensation at the same time.

### Trinity Reappraised

There are three basic methods of appraising real property for the purposes of ascertaining its market value. They are (1) the market

<sup>71</sup> Compare Pearl, *Appraiser's Guide Under Law Allowing Moving Costs*, 21 APPRAISAL J. 327, 330 (1953). There the author points out how often appraisers "subconsciously" allow for moving costs. A 1952 federal statute made provision for such costs. In light of that statute, the author adds, ". . . suffice to say that henceforth defense projects, large and small alike, will be removed from the pale of such influences, objective or subjective. All will know and be ever mindful that by the payment of his expenses in moving a fair and specific contribution is being effected towards making the seller truly 'whole.'"

<sup>72</sup> LLOYD, *EARLY COURTS OF PENNSYLVANIA* 271 (1910).

<sup>73</sup> See *County of Los Angeles v. Faus*, 48 Cal.2d 672, 312 P.2d 680 (1957); *People v. Cava*, 314 P.2d 45 (Dist. Ct. App. 1957) (appeal dismissed on rehearing).



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

The principally utilized method of the trinity approach is the comparative sales method. Patently, the main problem in using this method is the determination of "comparative." In this regard, the appraiser may need to consider, among other things, the proximity of time and location between the subject property and the "comparable" sale, and often he must go beyond this and consider the differences in zoning, terrain, adaptability and other factors depending on the particular property. There are other serious difficulties and shortcomings to the comparative approach. These arise in situations where controls or restrictions interfere to an unusual degree with the free operation of market forces. Furthermore, market information is often lacking or incomplete. Even when market information is available, there is an inherent risk involved in the subjective process of adjusting and evaluating the differences in the time of sale, location and other characteristics of the two properties. Also, care must be taken to eliminate the isolated, forced or capricious sale not representing true market value.

The second method of valuation is the capitalization approach. Capitalization is the process of arriving at value by determining the principal amount that will earn the indicated income at the appropriate return.<sup>74</sup> This approach obviously can be used to evaluate only income or potential income property. And this approach, too, has its shortcomings. First of all, it may not be applicable in instances when and to the extent income derived is due to the business conducted on the

<sup>74</sup> See SCHMUTZ, cited in McMICHAEL, APPRAISING MANUAL 109-10 (2d ed. 1942):

"By the capitalization method is meant the estimation of value based upon the earning capacity of property, present and future. It is axiomatic in real estate appraising that, while it takes brick, mortar, lumber, and labor to create a building, once the structure is erected, a buyer or owner is not interested in the number of bricks in the building nor their costs per thousand nor the labor cost in combining these into the whole. His only interest is in the amount of income the structure will produce. Nor can it be said that this income is from either the land or the improvement for the simple reason that it is the resultant of the combination of the two, and any attempt to segregate the income must necessarily be highly arbitrary. In the capitalization method the depreciated present value of the improvement is estimated. Next, the gross income or reasonable expectancy is estimated; then expenses are estimated, including interest on the capital invested in the building as well as depreciation; then the difference between the income and expenses is the surplus productivity or income imputable to the land which, capitalized at the proper rate of interest, will produce the capitalized land value, which when added to the present building value will show the capitalized value of the property. It is apparent that the estimation of value by the capitalization method is, to a large extent, mathematical or actuarial. However, the one factor that requires more than ordinary judgment in its selection is the rate of capitalization. If a 4 percent rate were used, the land value found would be just twice that if an 8 percent rate were employed. Even the difference of 1 percent, as between 6 percent and 7 percent, will produce a difference of 17 percent in land value resulting therefrom. The importance of the selection of the proper interest rate for capitalizing land value may be shown in the accompanying table. It is assumed that the net income imputable to the land is \$6,000 per year. Then—

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

property rather than to the property itself. This is one of the major reasons courts are strict in excluding such data. Second, the capitalization method not only is based on an intricate and detailed process but also is heavily based on non-concrete, elastic and subjective factors, and a small variation in the capitalization rate can have an enormous effect on the value of the property. Furthermore, other subjective factors enter into the utilization of the capitalization method such as the selection of the vacancy, management and other expense factors and the rate of depreciation. For these reasons—basically because it tends to confuse the court and jury and often raises “collateral” matters—courts generally, as will later be shown in detail, exclude the presentation of an income analysis; although in most instances rents may be capitalized to show the value of rental property.<sup>75</sup>

The summation analysis, or reproduction less depreciation approach, is the third method of estimating value. This method estimates (1) the value of the land considered as vacant and available for improvement in addition to (2) the depreciated replacement cost of the improvements.<sup>76</sup> A property usually cannot have a value in excess of its cost of reproduction—the price at which an equivalent and at least equally desirable holding can be acquired;<sup>77</sup> thus, in most instances the summation method represents the highest value the property can have on the market. At a minimum, it serves as a check on the other methods of appraising.<sup>78</sup> Yet, like each of the other approaches, this method has its drawbacks, which the courts are quick to indicate. Foremost among the drawbacks is the difficulty of ascertaining whether the physical structure is adapted to the land. Certainly a very new and expensive residence amidst a slum area is not susceptible to the reproduction approach. Furthermore, another drawback is the difficulty in determining the proper amount of depreciation. Is it functionally as well as physically depreciated and, if so, to what extent? And how do you measure such depreciation? Is the structure now obsolete? These are difficult questions that plague this approach, not only for the courts but for appraisers as well. The courts, however, often tend to take the path of least resistance and effort; they often exclude the introduction of such data.

The above discussion of the three basic methods of appraising property is admittedly brief. In subsequent pages we will examine each method more fully in an attempt to indicate what statutory changes should be made. But even this brief review permits us now to show that the present tendencies and rulings of the courts are not attuned to the existing complexities of the market, and we may query: What price simplicity?

It is advanced herein that the dual tendency of the courts to limit the presentation of market value to the comparative sales approach and to label this method the “best evidence” constitutes an unwarranted and often erroneous simplification of the value problem. Such an approach

<sup>75</sup> See generally 18 AM. JUR. *Eminent Domain* § 345 (1938); Diamond, *Condemnation Law*, 23 APPRAISAL J. 564, 575-77 (1955); Note, U. ILL. L.F. 291 (1957).

<sup>76</sup> AMERICAN INST. OF REAL ESTATE APPRAISERS, HANDBOOK FOR APPRAISERS 3 (1954).

<sup>77</sup> 2 ORGEL 1-3; Falloon, *Appraisal Fundamentals and Appraisal Terms*, 19 APPRAISAL J. 106-07 (1951).

<sup>78</sup> *Ibid.*; Diamond, *Condemnation Law*, 23 APPRAISAL J. 564, 571 (1955).

is blind to the advancement of appraising techniques<sup>79</sup> and, more so, to the market place. In an effort to achieve expediency and simplicity, it reconstructs a Procrustean bed; if the subject does not fit comfortably—and with *comparative* ease—upon the ready-made bed, then the victim's head or feet are cut down to the convenient size. There is no justification for the existence of such a limited area of approval when the advancements in appraising techniques are fairly reliable (if not simple) and when the market place is oblivious to such judicial restrictions.

Buying and selling in the mid-twentieth century is far different in the market place from the way it is viewed from the courthouse. This assertion can be supported no better than by the testimony and writings of those long engaged in the appraising as well as the real estate field. We begin by quoting extensively an appraiser with many years' experience who stresses that the courts' interpretation of value no longer accurately reflects value and that value today is derived and molded by many more factors than comparable sales.<sup>80</sup>

The courts generally adhere to the theory that only sales of comparable real estate may be introduced as evidence of value. What creates the sale, what knowledge buyers and sellers possess, and how they acquire such knowledge, so far as the present interpretation by the courts is concerned, are deep psychic mysteries that cannot be introduced as evidence.<sup>81</sup>

\* \* \*

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

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

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

Many other contrasts could be cited in Chicago or any other large city in the country. This phenomenon of one site being worth more, sometimes much more, than another site only a short distance away, is not peculiar to any one city or any one time. It is one of the basic truths of real estate economics.<sup>82</sup>

\* \* \*

The large chain store organizations, national in scope, do not determine the value of a location they wish to acquire, by purchase

<sup>79</sup> Interview of Charles Shattuck by authors, August 7, 1959; interview of Nate Libott by authors, July 17, 1959.

<sup>80</sup> Dunn, *Some Reflections on Value in Eminent Domain Proceedings*, 24 APPRAISAL J. 415, 416-418 (1956).

<sup>81</sup> *Id.* at 416.

<sup>82</sup> *Ibid.*

or lease, merely by asking for sales prices within a mile or half-mile of the location. Long ago they established methods of value determination by a scientific analysis of such factors as:

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

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

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

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

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

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

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

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

One of the wisest and most successful real estate dealers in the country recently said, "No one knows the value of a corner." The truth of that statement is evident in any city, large or small, in the country. At one period a corner is not worth any more than land half way down the block. At another period, it may be worth much more.<sup>83</sup>

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

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

A theory held in the courts which disqualifies income as evidence of value, is that one man may succeed in business where another may fail. This may have been true in the "horse and buggy" days but it is not necessarily true today, because those who set the rents and those who pay the rents know the potential business volume for a given location and know, also, that any good management can reach that volume.<sup>84</sup>

Realtors, too, have proclaimed that modern real estate transactions are of such a nature as to make present court procedures in this field analogous to a comparison of present agricultural methods with Millet's "Man With a Hoe." One of California's leading real estate investors, Mr. Ben Swig, has recently written on the matter, emphasizing the present relationship between real estate investment and taxation and depreciation factors. Supporting his position with a number of concrete examples, Mr. Swig states:

There was a time, a few years ago, when an investor could tell by its location just what a piece of property was worth in a retail business section of a city. The number of shoppers could be clocked from given points, and that location determined which was considered to be "100%." Real estate brokers and investors could set the value of the land per foot in a great many cities in the United States. It was possible to know how much rent the

<sup>83</sup> *Id.* at 416-417.

<sup>84</sup> *Id.* at 417-18.

properties would produce and the "value" of the real estate could be determined very readily. The same situation applied to office buildings.

But in the last few years things have changed tremendously.

\* \* \*

People are much more conscious of their tax problems than they have ever been before. I know of a great many investors who will buy property on a very low yield, and in some instances without any income at all, providing they can take enough depreciation to offset other income they may have. . . .

Today a great many investors are buying tax benefits in preference to real estate investments and whole concepts of real estate investment buying are rapidly changing.

[W]hat people are buying today is not entirely real estate but also they are buying financing and tax benefits.

This new point of view also affects the seller. Many an investor today is obliged to sell his property after a certain number of years because he takes accelerated depreciation and has no more depreciation left; if he has a mortgage on it, the amortization on the mortgage catches up with him and he has to sell his property because all of his income is taxable. He immediately looks for new investments, tries to sell his property and buy a new property from which he can take a great deal more depreciation.<sup>85</sup>

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

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

He was perfectly satisfied. Why? Because the property was subject to an unusually high amount of depreciation—as much as \$270,000. This new owner was in the 90% income tax bracket, so he was able to deduct approximately \$216,000 from his ordinary income. The building was under a long lease to a topflight concern, so its future was bright. And it made no great difference that the investment yielded no direct cash-in-hand benefits.<sup>86</sup>

It is just such factors as these that challenge the tendency of the courts to resort solely and finally to the comparative sales approach. Recognizing this limitation, still another appraiser has stated:

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

<sup>85</sup> Swig, *How the Picture Has Changed for Real Estate as an Investment*, 24 PROP. MANAGEMENT J. 2 (Dec. 1958).

<sup>86</sup> *Ownership*, published by the Shattuck Co., Los Angeles, p. 2 (Aug. 1959).

More and more we find that there are no business transactions of any kind where the deal or the price or terms agreed upon have not been strongly influenced by income tax effects or implications.

If space permitted, it would be easy to relate quite a number of rather fantastic transactions of recent years which, while affecting the title to real estate, were in fact income tax transactions rather than real estate transactions.

Another factor which throws transaction prices all off for comparison purposes as a real estate transaction is the present liberal financing through V.A. and F.H.A., long-term minimum down payment, low interest rates in the residence field, the lease-purchase transactions in the commercial field, and those other business property loans which are made by insurance companies permitted by their state laws to lend up to 75% of value and in some states even to 100% of value under certain conditions.<sup>87</sup>

It is for such reasons as these that appraisers insist on exploring the full gamut of factors that influence market value, including the utilization of the entire trinity approach. And whether the courts admit or exclude this pertinent data, many appraisers, at least indirectly, take such factors into consideration; for in good faith they cannot arrive at market value without doing so.<sup>88</sup> Even though we may sympathize with the appraisers in this regard for the dilemma they encounter, it is questionable whether the legerdemain they resort to is the best way of solving the problem.

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

It seems equally clear that in estimating the value of the property for this use, i.e. what a willing buyer would have to pay a willing seller to purchase it, the witness should be allowed to take into consideration what it would cost to develop the property in this way and what income could be expected from it when developed. Certainly such matters would be considered by any business man in selling, buying or valuing the property; and when the court adopts the standards of the market place in making valuations there is no reason why it should close its eyes to how the market place arrives at and applies the standards. As was well said by the late Judge Henry G. Connor, one of the great judges of this Circuit, "It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse."

Artificial rules of evidence which exclude from the consideration of the jurors matters which men consider in their everyday affairs

<sup>87</sup> Kniskern, *The Difficulties and Menaces in Professional Practice*, 23 APPRAISAL J. 334, 339-40 (1955).

For detailed treatment of income tax effects on comparability, see Considine & O'Bryan, *Income Tax Pitfalls in Appraising*, 22 APPRAISAL J. 256, 415, 590 (1954).

<sup>88</sup> Interview of Nate Libott by authors, July 17, 1959; interview of Charles Shattuck by authors, August 7, 1959.

hinder rather than help them at arriving at a just result. In no branch of the law is it more important to remember this, than in cases involving the valuation of property, where "at best, evidence of value is largely a matter of opinion."<sup>89</sup>

But such language and action, as will be seen, does not represent the prevailing judicial pattern of decision. The usual practice is to limit the presentation of market value to comparable sales.<sup>90</sup>

It possibly may be argued that comparative sales, by being a market phenomenon, will reflect the many and sundry variables, tangible as well as intangible, that affect sales; that is, the subjective factors, too, will adjust themselves in the very prices buyers and sellers exchange property for.<sup>91</sup> This is true, but only to a limited extent. Mainly because two pieces of property (particularly investment and industrial property) are seldom truly comparable, appraisers generally conclude that these "extra-judicial" factors do not necessarily reflect themselves in the market data approach.<sup>92</sup>

Perhaps of at least equal importance is an inherent inconsistency in the market value definition. That definition seems to contemplate the inclusion of *all* types of buyers and sellers. Yet, the courts have indicated that each party must be considered informed,<sup>93</sup> or at least he must be considered so from a practical point of view. Often, however, the *informed* buyer at any one particular time is not reflected, or adequately reflected, in comparative data. Past "comparative" sales may have been made by *uninformed* buyers and sellers.

In the 1959 Session of the California Legislature, Senate Bill No. 1313 was introduced with the above considerations obviously in mind. This bill, which was referred to the Senate Judiciary Committee, was worded as follows:

#### SENATE BILL No. 1313

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

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

<sup>89</sup> *United States v. 25.406 Acres of Land, etc.*, 172 F.2d 990, 993, 995 (4th Cir. 1949). See also *Cade v. United States*, 213 F.2d 138 (4th Cir. 1954); *United States v. 443.6 Acres of Land, etc.*, 77 F. Supp. 84 (S.W.D.N.D. 1948).

<sup>90</sup> *Cf. De Freitas v. Town of Suisun City*, 170 Cal. 263, 149 Pac. 553 (1915); *City of Los Angeles v. Deacon*, 119 Cal. App. 491, 7 P.2d 378 (1932).

<sup>91</sup> See Becker, *Market Data Analysis*, 23 APPRAISAL J. 486-87 (1955). See also SCHMUTZ, *CONDEMNATION APPRAISAL HANDBOOK* 8, 24 (1949): "Since market value, or market price, is a figure presumed to be established in the market, it follows that market value is presumed to be a market phenomenon. For this reason, actual sales are the best evidences of market value. . . . In valuation, for purposes of eminent domain, the goal of the estimate is 'market value' or 'fair market value.' If there are adequate sales data to indicate the probable market value of the property under appraisal, then it is not necessary to make studies of capitalized value and depreciated cost."

<sup>92</sup> See note 88 *supra*.

<sup>93</sup> See *Sacramento So. R.R. v. Heilbron*, 156 Cal. 408, 104 Pac. 979 (1909).



cost of, functionally or otherwise, replacing the condemnee's property and, if income-producing property, the income potential of the property based in part upon its recent income history.

One thing is clear: Senate Bill No. 1313 elevates the rule of relevancy to an unchallenged position, and it relegates the policy of expediency to an inconsequential status. Whether such an extreme position is proper needs analysis. The ensuing discussion examines in detail many of the problems this bill seeks to solve as well as those which it possibly may create.

### The Market Data Approach

The courts and others frequently refer to comparable prices as the "best evidence" of market value.<sup>94</sup> There are three reasons for this. First, comparable prices are the easiest way to ascertain market value without accompanying confusion.<sup>95</sup> Second, in an area of the law where bias of expert witnesses is a troublesome problem, the results of this method are less likely to be influenced by biased considerations which sometimes have an extraordinary effect upon a market value figure.<sup>96</sup> Third, despite its inherent limitations and at times its misleading results, *if sales are truly similar*, then the best indication of what a condemnee could actually get on the market for his property can usually be derived by this method.

The drawbacks in proclaiming this method the "best" are, however, too formidable to be ignored. Real property is unique, including the "tract house development" type. Even if truly similar in structure, problems of determining similarity in time of sale and vicinity remain vexatious. In addition, the problems connected with ascertaining a "free and open" sale are, at the least, weighty and, at the most, unanswerable. And at least in theory, the value of income property to an economist is what income property will produce, not what its sales price is.

Whatever the limitations of the comparative approach, because of its keystone position in ascertaining market value and because of its obvious relevancy, the admission of comparable sales prices into evidence in condemnation cases is, without question, a necessity for the determination of market value. The rule in *County of Los Angeles v. Faus*,<sup>97</sup> therefore, is to be commended insofar as it has broadened the base for proving market value. There is no question that the *Faus* decision correctly held in favor of relevancy as against expediency.<sup>98</sup>

Succinctly, in 1957 the Supreme Court in the *Faus* case held that California would henceforth permit comparable sales prices to be introduced on direct examination to indicate value. Prior to the *Faus* decision, this State belonged to a dwindling minority of states that exclude

<sup>94</sup> See *United States v. 329.05 Acres of Land, etc.*, 156 F. Supp. 67, 71 (S.D.N.Y. 1957) ("Sales of the same property or those of comparable character in the same neighborhood in recent times constitute the best evidence upon which to establish value in a condemnation proceeding.") *United States v. 5139.5 Acres of Land, etc.*, 200 F.2d 659, 662-63 (4th Cir. 1952); *United States v. 70.39 Acres of Land, etc.*, 164 F. Supp. 451, 489 (S.D.Cal. 1958); *St. Louis, K. & N.W. Ry. v. Clark*, 121 Mo. 169, 25 S.W. 192 (1893); SCHMUTZ, note 91 *supra*; Dolan, *Federal Condemnation Practice—General Aspects*, 27 APPRAISAL J. 15, 22 n.47 (1959); *Market Value vs. Economic Worth*, 20 APPRAISAL J. 9, 10 (1952).

<sup>95</sup> 5 NICHOLS 277; 1 ORGEL 696.

<sup>96</sup> See generally Dolan, *Market Value—the "Informed Guess,"* 20 APPRAISAL J. 330 (1952) and note 95 *supra*.

<sup>97</sup> 48 Cal.2d 672, 312 P.2d 680 (1957).

<sup>98</sup> *Cf. People v. Cava*, 314 P.2d 45, 47 (Dist. Ct. App. 1957) (appeal dismissed on rehearing).

comparable prices from introduction on direct examination, principally because they tend to introduce collateral matters and impair the expedient progress of the trial.<sup>99</sup>

One appraiser states that prior to the *Faus* decision, the parties were "playing a complete game."<sup>100</sup> And Mr. Justice Ashburn, in his concurring opinion in the District Court of Appeal in the *Faus* case, clearly describes the nonsensical procedure that was the pattern in pre-*Faus* condemnation actions.<sup>101</sup> The one thing that the juries wanted to know, the one thing that would help them to reach a meaningful verdict, and the only thing they could unquestionably comprehend was clearly barred to them by the law. However, a certain amount of sales information could be brought in by skilled counsel in the guise of testing the

<sup>99</sup> See 5 NICHOLS 277 where it is stated:

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

See also 1 ORGEL 582-586.

<sup>100</sup> Interview of Nate Libott by authors, July 17, 1959. See Note, *Evidence: Admission of Testimony of Sale Price of Similar Realty in Valuing Real Property in Condemnation Proceedings*, 46 CALIF. L. REV. 630 (1958); Note, *Admissibility of Prices Paid for Other Properties as Proof of Damages in Eminent Domain Proceedings*, 31 So. CAL. L. REV. 204 (1958); Note, *Eminent Domain: Valuation of Land Taken: Evidence of Prices Paid for Similar Property*, 5 U.C.L.A. L. REV. 151 (1958).

<sup>101</sup> *County of Los Angeles v. Faus*, 304 P.2d 257 (1957), *superseded*, 48 Cal.2d 672, 312 P.2d 680 (1957):

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

"The jury, having the case submitted to it upon the least enlightening evidence, is in for a real surprise when the instructions are given. Ever since adoption of the rule excluding other sales on direct it has been stated repeatedly that such sales, though the prices are given on cross-examination, are not evidence of value, are to be considered only upon the imputation of lack of information or trustworthiness of the witness. The jurors are so instructed. They know that sales are the basis on which mankind universally values properties; they have many of the pertinent sales before them; when they hear the judge instruct that those sales are not any evidence of value the jurors who are still listening begin to wonder what is the matter with the judge; but those who are listening, as well as those who are not, pay no attention to that instruction and proceed to do the job the best way they can despite the barriers placed in their path by the court. This whole picture is unrealistic." *Id.* 304 P.2d at 269-70.

credibility of the witness.<sup>102</sup> The situation is described by a condemnation expert in Pennsylvania who strenuously calls for a departure from the minority rule adopted in that state.<sup>103</sup> Pointing out that "price" is almost all that has meaning to a trier of fact, she notes:

Furthermore, all the testimony in these cases except the opinions of the experts is ignored. Indeed, in hearings before Boards of View [commissioners], the Viewers listen only halfheartedly to the testimony; they pay no attention to anything except the final question addressed to the expert: "What, in your opinion, was the fair market value of the property at the time of condemnation?" At this question, each member rouses himself, grasps his pencil, and writes down the magic figure.<sup>104</sup>

For similar reasons, and also because it found that the minority rule of exclusion resulted in exaggerated awards, New York City in 1932 discarded the exclusionary rule and permitted comparable prices to be introduced into evidence.<sup>105</sup> The *Wallstein Report*, which was the basis for the change, pointed out how "uncertainly and blindly compensation was assessed" under the pre-*Faus* type of rule.<sup>106</sup> The New York City rule, which is still in effect, reads as follows:

Upon the trial, evidence of the price and other terms upon any sale, or of the rent reserved and other terms upon any lease relating to any of the property taken or to be taken or to any other property in the vicinity thereof, shall be relevant, material and competent, upon the issue of value or damage and shall be admissible on direct examination if the court shall find the following:

1. That such sale or lease was made within reasonable time of the vesting of title to the city.
2. That it was freely made in good faith in the ordinary course of business, and
3. In case such sale or lease relates to other than property taken, that it relates to property which is similar to the property taken or to be taken.<sup>107</sup>

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

It is important now to note that this New York City code provision is clearer and more complete than Section 1845.5 of the Code of Civil Procedure, which was enacted by the California Legislature contemporaneously with the decision in the *Faus* case.<sup>108</sup> As will be further explained, it is recommended that, with minor changes and various

<sup>102</sup> See note 101 *supra*. See also Note, 5 U.C.L.A. L. REV. 151, 153 n.11 (1958).

<sup>103</sup> Graubart, *Theory Versus Practice in the Trial of Condemnation Cases*, 26 PA. B.A.Q. 36 (1954). See also, Note, *Methods of Proving Land Value*, 43 IOWA L. REV. 270, 274-76 (1958).

<sup>104</sup> Graubart, *supra* note 103, at 37.

<sup>105</sup> See *Village of Lawrence v. Greenwood*, 300 N.Y. 231, 90 N.E.2d 53 (1949) where the State of New York adopted the majority rule that existed in New York City since 1932.

<sup>106</sup> WALLSTEIN, REPORT ON LAW AND PROCEDURE IN CONDEMNATION (1932); 2 ORGEL 267.

<sup>107</sup> N.Y.C. ADMINISTRATIVE CODE § B 15-16.0 (1957).

<sup>108</sup> That statute as originally enacted read:

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

additions, this statutory provision be adopted in lieu of the present language of Section 1845.5. These changes and additions will presently be discussed.

Before turning our attention to suggested statutory changes in light of the *Faus* case and the policy behind it, it is convenient and helpful to evaluate, as far as possible, the practical effects of the rule in the *Faus* case. The importance of the change is more procedural than substantive; it enables the court and jury to work in the light rather than the dark; it does not insure just compensation, it only better enables its fruition. There is little reason to believe that it will have a pronounced effect on the totality of awards. But it should force extreme estimates of opposing experts to be narrowed to an area of understandable difference.<sup>109</sup> As the Massachusetts court stated:

Evidence of the price received from sales of comparable property is so necessary in order to bring extravagant appraisals by real estate experts into comparison with realities, that the introduction of such evidence ought not to be made so difficult as to be impracticable.<sup>110</sup>

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

#### Proposed Statutory Changes to the Market Data Approach

The court in the *Faus* case, choosing relevancy over expediency, recognized that even the rule of relevancy cannot be left unbridled.<sup>111</sup> Although that case considered the discretion of the court as being a sufficient safeguard to check and control the type of evidence that should be admitted, the following recommendations are made to facilitate the aim of the court in the *Faus* case and at the same time both overcome the confusion of the bench and the bar on such matters and better secure the element of trustworthiness involved in such matters.

#### Sales Price of the Identical Property

Unlike the question whether similar sales prices may be brought out on direct examination, there has been virtually no dispute or difficulty in regard to admitting the prior sales price of the *same* property into evidence in California and almost all other states. It is almost the universal rule that such evidence is admissible.<sup>112</sup>

California, since the decision in *Bagdasarian v. Gragnon*,<sup>113</sup> and particularly since the *Faus* case, has adhered to this position. If the sale was not too remote in time and was one made in a free and open market, there is no reason why such evidence should not be admitted. While the *Bagdasarian* case serves as authority for admissibility, there

<sup>109</sup> Interview of Nate Libott by authors, July 17, 1959.

<sup>110</sup> *Epstein v. Boston Housing Authority*, 317 Mass. 297, 301, 58 N.E.2d 135, 138 (1944). See also *Town of Williams v. Perrin*, 70 Ariz. 157, 217 P.2d 918 (1950); *St. Louis, K. & N.W. Ry. v. Clark*, 121 Mo. 169, 25 S.W. 192 (1893).

<sup>111</sup> *County of Los Angeles v. Faus*, 48 Cal.2d 672, 678, 312 P.2d 680, 684 (1957).

<sup>112</sup> 5 NICHOLS 266; 1 ORGEL 581; Annot., *Evidence—Condemned Realty—Price Paid*, 55 A.L.R.2d 791 (1957).

<sup>113</sup> 31 Cal.2d 744, 755, 192 P.2d 935, 943 (1948). See also concurring opinion of Mr. Justice Ashburn, in the appellate court in *County of Los Angeles v. Faus*, 304 P.2d 257, 267, 269 (1957); and see *Redondo Beach School Dist. v. Flodine*, 153 Cal. App.2d 437, 314 P.2d 581 (1957).

is no reason why this rule should not be codified, as in the New York City code discussed above.

### Comparable Rentals

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

It is to be noted, however, that comparative rentals in this context are to be used solely for the purpose of evaluating the lessee's interest; they are not to be used to arrive at the owner-lessor's interest in his property which may otherwise be determined by capitalizing comparable rentals. Courts seldom permit comparable rentals to be used for this latter purpose. This will be discussed below in that part of the study devoted to capitalization problems.

### Subsequent Sales

Although there seems to be some opposition to the general view<sup>114</sup> as well as some disagreement as to what the general view really is,<sup>115</sup>

generally speaking, the courts make no distinction between sales occurring prior to the taking and sales consummated after the date when title has vested in the condemner. They usually admit the latter type of evidence, sometimes qualifying their ruling by stating that the sale adduced must not be too remote in time or that there must be no drastic change in market conditions.<sup>116</sup>

The law in California, as indicated in *County of Los Angeles v. Hoe*,<sup>117</sup> is in accord, at least under certain circumstances, with the rule admitting subsequent sales. In that case the court admitted evidence of a sale of property occurring seven months after the date of valuation. The court stated that consideration of subsequent sales is proper if conditions are similar; the time element merely goes to the weight of the appraiser's opinion. Thus, it was not error to refuse to strike such an opinion because the witness included a subsequent sale. In so ruling, the California court had ample supporting case authority from other jurisdictions.<sup>118</sup>

But despite the general rule, courts are reluctant to admit evidence of sales of similar property made after the condemnation of property, the value of which is in question, since condemnation proceedings often

<sup>114</sup> Dolan, *Federal Condemnation Practice—General Aspects*, 27 APPRAISAL J. 15, 23-24 (1959); McPherson, *The "Hindsight" Rule*, 21 APPRAISAL J. 55 (1953); Schmutz, *Appraising for Condemnation*, 20 APPRAISAL J. 306 (1952); interview of Judge Clarence L. Kincaid by authors, August 13, 1959; interview of Alec Early by authors, July 29, 1959.

<sup>115</sup> Nichols seems to suggest that the weight of authority is to the contrary. 5 NICHOLS 288.

<sup>116</sup> 1 ORGEL 591.

<sup>117</sup> 138 Cal. App.2d 74, 80, 291, P.2d 98, 101 (1955).

<sup>118</sup> See, e.g., *United States v. Brooklyn Union Gas Co.*, 168 F.2d 391 (2d Cir. 1948); *Bartlett v. Medford*, 252 Mass. 311, 147 N.E. 739 (1925); *Roberts v. Boston*, 149 Mass. 346, 21 N.E. 668 (1889); *Morrison v. Cottonwood Dev. Co.*, 38 Wyo. 190, 266 Pac. 117 (1928).

cause an increase in property values in the vicinity.<sup>119</sup> (In like manner, a subsequent sale may show a deflated price because of the nature of the condemnation.) Still another reason advanced for excluding subsequent sales is the concept that ideally compensation is to be paid at the exact time of the taking.<sup>120</sup>

The bulk of cases that have excluded evidence of subsequent sales did so on the ground that the facts indicated that the taking had enhanced the other property in the vicinity.<sup>121</sup> Cognizant of this, one court in a recent case stated:

There is no absolute rule which precludes consideration of subsequent sales. The general rule is that evidence of "similar sales in the vicinity made at or about the same time" is to be the basis for the valuation and evidence of all such sales should generally be admissible, . . . including subsequent sales. [Citations omitted.] The generality of this rule is limited, however, by the consideration that a condemnation itself may increase prices and the government should not have to pay for such artificially inflated values. [Citation omitted.] But that possibility does not produce a hard and fast exclusionary rule. In every case it is a question of judgment as to the extent of this danger and, particularly where a judge is sitting without a jury, it would seem the better practice to admit the evidence and then to weigh it having due regard for the danger of artificial inflation.<sup>122</sup>

Not only is the admission of subsequent sales justified on the ground that they indicate what the value would have been on the date of the taking, but they are especially important when prior sales are (1) few in number or (2) considerably more remote from the date of taking than are the subsequent sales. Furthermore, subsequent sales may indicate a trend in the market. It is recommended that statutory provisions be adopted that will clearly permit the admission of subsequent sales when such transactions will facilitate a determination of market value and when the party presenting them can show to the satisfaction of the court that the subsequent sales were not significantly affected by the condemnation.

### Sales Made to One Having the Power of Condemnation

One of the most troublesome and most litigated problems concerning the market data approach is the treatment to be accorded sales made to a governmental or quasi-governmental body having the power of eminent domain. Although not without an element of ambiguity,<sup>123</sup> the California Supreme Court in the *Faus* case appears to have held that sales (and sale prices) to condemning parties and those having the power of condemnation are admissible on direct examination as "evidence" of value—notwithstanding the latent "forced" aspect inherent

<sup>119</sup> See "Sales Made At or About the Same Time" May Include Sales Subsequent to Condemnation, 26 APPRAISAL J. 126 (1958).

<sup>120</sup> In *Old Dominion Co. v. United States*, 269 U.S. 55, 65 (1925), the court followed this reasoning and quoted for support the language of Chief Justice Shaw:

"If a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other."

<sup>121</sup> See, e.g., *Shoemaker v. United States*, 147 U.S. 282 (1893); *United States v. Iriarte*, 166 F.2d 800 (1st Cir. 1948).

<sup>122</sup> *United States v. 63.04 Acres of Land, etc.*, 245 F.2d 140, 144 (2d Cir. 1957).

<sup>123</sup> See generally Note, 31 So. CAL. L. REV. 204 (1958).

in such transactions. In so ruling, the court expressly overruled its prior holding in *City of Los Angeles v. Cole*<sup>124</sup> which held that amounts paid for similar property by condemning parties were not admissible on direct examination. Subsequently to and based upon the *Faus* decision, the court in *People v. Murata*<sup>125</sup> indicated that prices paid by entities with the power of condemnation were admissible in evidence if the transactions were "sufficiently voluntary."<sup>126</sup>

If the *Faus* and *Murata* decisions regarding condemnors' sales establish the position that such sales are admissible, which seems to be the case, then California has aligned itself against the majority in this regard. The weight of authority clearly is that evidence of the price paid by the same or another condemning agency for other land that, although subject to condemnation, was sold by the owner without the intervention of eminent domain proceedings, is inadmissible to show the value of the land sought to be condemned.<sup>127</sup>

One of the principal reasons advanced by courts for excluding evidence of such sales is that they constitute "compromises" between the vendor and the condemnor-vendee.<sup>128</sup> This, however, is a weak argument for exclusion; for as one court that favors the admission of such sales has correctly stated:

Almost all sales, however, are necessarily influenced on one side or the other by considerations outside of the fair market value of the property. Either the seller is influenced by the circumstances of his affairs, which make it desirable for him to sell even at some sacrifice, or else he thinks he is getting more for his property than its real worth; and, on the other hand, the purchaser has some special need or use for the property which makes it more valuable to him than to others not having such need, or else he thinks he is buying at less than the property is really worth.<sup>129</sup>

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

There are more valid grounds, however, warranting their exclusion. First and foremost, the sale is not, almost by definition, a voluntary sale on the free and open market.<sup>130</sup> The vendor, knowing his property must "go," is seldom a "willing seller"; the vendee, who out of necessity must obtain the property, is hardly a "willing buyer." Rarely can it be said that such a sale took place on the "open market." Thus, exclusion should be based upon the fact not only that evidence of such transactions will lead to confusion (as will be discussed below) but that these sales seldom conform to a market value definition. It is primarily for this reason that most condemnation experts in this State are of the opinion that all sales to entities having the power of condemnation

<sup>124</sup> 28 Cal.2d 509, 517-18, 170 P.2d 928, 933 (1946). See also *Helmann v. City of Los Angeles*, 30 Cal.2d 746, 754, 185 P.2d 597, 602 (1947) where the court reiterated the language of the *Cole* case: "[I]t is not competent for either party in a condemnation proceeding to put in evidence the amount paid by a condemning party to the owners of adjacent lands."

<sup>125</sup> 161 Cal. App.2d 369, 326 P.2d 947 (1958).

<sup>126</sup> *Id.* at 375, 326 P.2d at 951.

<sup>127</sup> See 5 NICHOLS 293; 1 ORGEL 615; Annot., *Real Property—Value—Evidence*, 174 A.L.R. 386, 395 (1948) and 118 A.L.R. 869, 893 (1939).

<sup>128</sup> See, e.g., *South Park Comm'rs v. Ayer*, 237 Ill. 211, 86 N.E. 704 (1908); *Durell v. Public Serv. Co.*, 174 Okla. 549, 51 P.2d 517 (1935).

<sup>129</sup> *Curley v. Jersey City*, 83 N.J.L. 760, 761, 85 Atl. 197, 198 (1912). Cf. *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E.2d 549 (1947).

<sup>130</sup> Even if by chance or design the vendor is unaware that the vendee has the power of condemnation, the vendee is aware of his power and bargains accordingly.

should be excluded both on direct and cross-examination.<sup>131</sup> In like manner, the Oregon court pointed out the major objection to admitting such sales:

Evidence of sales of neighboring lands, even where permitted, is not admitted unless voluntary on both sides. A sale which is not voluntary has no tendency to prove market value. It is not competent for either party to put in evidence the amount paid by a condemning party to the owners of neighboring lands taken at the same time and as part of the same proceedings, however similar they may be to that in controversy, whether the payment was made as the result of a voluntary settlement, an award or verdict of a jury. The rights of an owner to recover just compensation for the taking of his land are not to be measured by the generosity, necessity, estimated advantage or fear or dislike of litigation, which may have induced others to part with title to their real estate or to relinquish claims for damages by reason of injuries thereto; and it would be equally unwise, unjust, and unpolitic to make it impossible for a corporation to compromise the claims of one owner without furnishing evidence against itself in the cases of all others who had similar claims. If a sale is made to a corporation about to institute condemnation proceedings, if it cannot acquire the land by purchase at a satisfactory price, the price paid is not a fair test of market value.<sup>132</sup>

A second important reason is that often the condemners' sales prices include not simply the value of the property taken but damages for remaining property in partial taking cases. To make meaningful comparisons when this element is involved is virtually impossible.<sup>133</sup> Some condemnees' attorneys have expressed the fact, or at least the fear, that condemners tend to make a settlement with a particular property owner for a certain sum, and credit an undue part of such sum to "damages," which seldom concerns or affects that property owner. Thereafter, the condemner employs in court the smaller sum for the taking as against a subsequent comparable condemnee. Whether in fact such tactics have been used in the past, admitting condemnation sales into evidence would offer the possibility for using such tainted sales in the future.

A third justification for excluding such evidence lies in the fact that establishing or attempting to establish their voluntary nature "would introduce aggravating and time consuming collateral issues tending to promote confusion rather than clarity."<sup>134</sup> While, as a general proposition in this field of law, preference should be given to relevancy as against expediency, the general standard should not be applicable in this instance. The limited number of times that such a

<sup>131</sup> Interviews by the authors of: Judge Clarence L. Kincaid, August 13, 1959, Alec Early and Baldo Kristovich, July 29, 1959, and George Hadley, July 16, 1959.

For basically the same reasons the Condemnation Committee of the Los Angeles Bar adopted in principle the same position. See Minutes of the Committee meeting of June 3, 1959.

<sup>132</sup> Coos Bay Logging Co. v. Barclav, 159 Ore. 272, 291-92, 79 P.2d 672, 680 (1938).

<sup>133</sup> See Lyon v. Hammond & B.I. R.R., 167 Ill. 527, 47 N.E. 775 (1897); Simons v. Mason City & Ft. D. R.R., 128 Iowa 139, 103 N.W. 129 (1905); Blick v. Ozaukee County, 180 Wis. 45, 192 N.W. 380 (1923); 5 NICHOLS 295.

<sup>134</sup> Blick v. Ozaukee County, 180 Wis. 45, 48, 192 N.W. 380, 381 (1923).



sale can be labeled "voluntary," the complexity and the strong possibility of prejudicing the condemnee when damages are involved in the taking of either the subject or comparable property, and the greatly increased amount of time and confusion involved in presenting this evidence, as compared to a normal sale, all combine to favor resort to the auxiliary probative policy—expediency—in these situations.

Despite these drawbacks, it may be argued that there should be at least one exemption to the rule of exclusion. There are certain times when, because of market conditions, there are no similar sales in the vicinity other than ones made to a governmental agency. In such instances, there may be justification, in spite of an auxiliary probative policy, to permit either party to introduce such sales. One state, South Carolina, appears to have adopted this type of exception.

[I]n this state the rule . . . [is] that in a proceeding to condemn lands, where the only sales within recent years have been to the condemnor, the landowner has the right to show the price paid by the condemnor for similar lands in the same general neighborhood.<sup>135</sup>

And at least one New York case has indicated that a similar rule exists in that jurisdiction.<sup>136</sup> But since such a situation seldom arises, it is believed that such an exception would promote more confusion than would be warranted.

### Forced Sales

Like condemnors' sales, but even with greater unanimity, courts exclude evidence of sales that were made under compulsion or duress—forced transactions.<sup>137</sup> This must necessarily follow if the goal is market value.

Sales by an administrator, under a deed of trust or execution, sheriffs' and foreclosure sales are generally excluded because they do not represent market value.<sup>138</sup> Generally such sales lack the necessary requisite that the buyer and seller should have reasonable time before consummating the transaction. Moreover, seldom are such sales not accompanied by undue pressure. However, in those instances where such sales can be shown to be free and open they are held to be admissible.<sup>139</sup>

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

A comparable sale was not under compulsion, coercion, or compromise in this sense if the witness testifies, or if it is otherwise shown, that the public records do not disclose that the sale was at

<sup>135</sup> *Charleston & W.C. Ry. v. Spartanburg Whse., Inc.*, 151 S.C. 542, 543-44, 149 S.E. 236, 237 (1929). See also *Wateree Power Co. v. Rion*, 113 S.C. 303, 102 S.E. 331 (1919).

<sup>136</sup> *Langdon v. The Mayor*, 133 N.Y. 628, 31 N.E. 98 (1892).

<sup>137</sup> Put succinctly by the Massachusetts court, "if it had been a price fixed by a jury, or in any way compulsorily paid by the party, the evidence of such payment would be inadmissible before the jury." *Wyman v. Lexington & West Cambridge R.R.*, 54 Mass. (13 Met.) 316, 326 (1847). See 5 *NICHOLS* 291.

<sup>138</sup> *Ibid.*; *District of Columbia Redev. L. A. v. 61 Parcels of Land*, 235 F.2d 864 (D.C. Cir. 1956); *Baetjer v. United States*, 143 F.2d 391 (1st Cir. 1944).

<sup>139</sup> See *Forest Preserve Dist. v. Dearlove*, 337 Ill. 555, 169 N.E. 753 (1930); *Fourth Nat'l Bank v. Commonwealth*, 212 Mass. 66, 98 N.E. 686 (1912).

foreclosure, under deed of trust securing an indebtedness, at execution or attachment, at auction, under pressure of the exercise of the power of eminent domain, or other coercion *sui generis*—types of legal compulsion generally disclosed by public records. There need be no showing of the non-existence of, or the nature of, the varied and variable economic reasons or motivations which might have moved the parties concerned to resort to the open market to dispose of property or to sell by private negotiation. Such considerations or pressures go to weight and not to admissibility, and may be developed, if desired, on cross examination or by independent evidence.<sup>140</sup>

There is some authority, led by *Hickey v. United States*,<sup>141</sup> that appears to expand the area of forced sales and *initially* excludes a private business sale if it was made under compulsion. But since most sales, even in the ordinary course of business, have some element of necessity connected with them, such a policy takes from the jury's province a good deal of its prerogative. Such considerations should go to weight rather than admissibility.<sup>142</sup>

### Offers

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

When the conduct of others indicating the nature of a salable article consists in offering this or that sum of money, it creates the phenomena of *value*, so-called. For evidential purposes, Sale-Value is nothing more than the nature or quality of the article as measured by the money which others show themselves willing to lay out in purchasing it. Their offers of money not merely indicate the value; they *are* the value; *i.e.*, since value is merely a standard or measure in figures, those sums taken in net potential result are that standard.<sup>143</sup>

But as pointed out at the beginning of this discussion, when particular evidence, though relevant, conflicts not only with the auxiliary probative policy but involves serious questions of trustworthiness, evidence of that nature needs an even greater amount of scrutiny and reappraisal. Offers are a type of such evidence.

<sup>140</sup> District of Columbia Redev. L. A. v. 61 Parcels of Land, 235 F.2d 864, 865-66 (D.C. Cir. 1956).

<sup>141</sup> 208 F.2d 269 (3d Cir. 1953). See also *City of St. Louis v. Paramount Shoe Mfg. Co.*, 237 Mo. App. 200, 168 S.W.2d 149 (1943). In a similar vein, one court excluded evidence of sales within a condemned area before the condemnation action was filed, but after the probability of condemnation was known. *Denver v. Lyttle*, 106 Colo. 157, 103 P.2d 1 (1940).

<sup>142</sup> Of course, personal and business duress factors must be admitted into evidence if the related sale is admitted. See *Ford v. Worcester*, 335 Mass. 723, 142 N.E.2d 327 (1957).

<sup>143</sup> 2 WIGMORE, EVIDENCE 503 (3d ed. 1940). See also *County of Los Angeles v. Faus*, 48 Cal.2d 672, 677, 312 P.2d 680, 683 (1957).

Offers to buy or sell property are not only treated as an inferior type of valuation evidence but most courts that have considered offers have concluded that they are inadmissible.<sup>144</sup> The courts assign various reasons for exclusion—the most significant being their untrustworthiness. The leading case, *Sharp v. United States*<sup>145</sup> explained:

Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject. Especially is this the case when the offers are proved only by the party to whom they are alleged to have been made, and not by the party making them. There is no chance to cross-examine as to the circumstances of the party making the offer in regard to good faith, etc.

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A reference to the authorities shows them to be almost unanimous against receiving evidence of this kind.<sup>146</sup>

This view not only represents the weight of authority—even in those states that allow comparable sales prices on direct examination, *i.e.*, favor the rule of relevancy—but is the considered opinion of the majority of condemnation experts in this State who were interviewed by the authors.<sup>147</sup>

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

No rule is better settled in California than the rule that the value of property cannot be proved by evidence of sales of other property, or of offers to buy or sell the property in question.<sup>148</sup>

This was the pre-*Faus* rule. As the same cases cited pointed out, however, such offering prices were admitted on cross-examination, as going

<sup>144</sup> 1 ORGEL 620; Note, *Methods of Proving Land Value*, 43 IOWA L. REV. 270, 276 (1958); Annot., *Market Value—Offer as Evidence*, 7 A.L.R.2d 781, 784 (1949).

<sup>145</sup> 191 U.S. 341 (1903).

<sup>146</sup> *Id.* at 349-50. See also *Hine v. Manhattan Ry.*, 132 N.Y. 477, 480, 30 N.E. 985, 986 (1892) where the court said:

"Such market value may be shown by the testimony of competent witnesses but not by an offer.

In the first place, the evidence . . . is objectionable, because it places before the court or jury an absent person's declaration or opinion as to value, while depriving the adverse party of the benefit of cross-examination.

The highest value at which an offer, standing alone, can be estimated is, that it represents the opinion of him who makes it as to the worth of the property. Nevertheless, the assertion that he offered to part with his money, might give to such hearsay opinion more weight with a jury, than an opinion given by a witness before them, not thus supported. While, notwithstanding, his opinion was backed by a promise to pay money, which was not enforceable, he may not have been competent in a legal sense to express an opinion on the subject. If he was, other reasons may have prompted the offer than an expectation of actually becoming the purchaser; or of obtaining it at its market value."

<sup>147</sup> Interviews by authors of: Judge Clarence L. Kincaid, August 13, 1959, Alec Early, July 29, 1959, and Nate Libott, July 17, 1959.

<sup>148</sup> *Merchants Trust Co. v. Hopkins*, 103 Cal. App. 473, 478, 284 Pac. 1072, 1074 (1930). See also *Central Pac. R.R. v. Pearson*, 35 Cal. 247 (1868); *City of Los Angeles v. Deacon*, 119 Cal. App. 491, 493, 7 P.2d 378 (1932).

to the credibility of the witness' testimony; and the offering price of the condemnee could be used against him as an admission.<sup>149</sup>

The unsettled state of the law in California on this point since the *Faus* case is depicted in a series of recent cases. The first reported case on this question subsequent to the *Faus* decision was *People v. Cava*,<sup>150</sup> a District Court of Appeal case which was dismissed on rehearing. In the *Cava* case, the court followed what it considered to be the scope of the ruling in the *Faus* case. It held that an offered price for the condemned leasehold was competent evidence on direct examination. In an even more recent case, however, another California court appears to have had a somewhat different interpretation of the *Faus* opinion as it pertains to offers or "asking" prices. *People v. Nahabedian*<sup>151</sup> concerned the correctness of admitting the "asking" price of comparable property. The court there held that such evidence was inadmissible mainly because it constituted a witness' opinion of other property. The court went on to state:

It is important to remember that in the case of *County of Los Angeles v. Faus, supra*, the court was dealing only with comparable sales prices and not with "asking prices" or offers. And, subsequent to the case just cited, section 1845.5 was added to the Code of Civil Procedure by the Legislature, which provides that a witness may testify to his knowledge of sales prices in establishing his qualifications. We are therefore persuaded that the trial court did not err in striking the aforesaid testimony of appellant.<sup>152</sup>

Although these cases can be distinguished, it is clear that each court gave the *Faus* decision a different interpretation insofar as the admissibility of offers is concerned. The issue is more clearly developed in *Los Angeles City High School Dist. v. Kita*<sup>153</sup> where a document authorizing an offer for similar land to the subject property was admitted on cross-examination. The same judge later granted a new trial because he felt the admission of such evidence constituted prejudice to the condemnor; his action was upheld by the District Court of Appeal. While the appellate court did not flatly pronounce that offers are not admissible for any reason, and while it reaffirmed the holding of the *Faus* case with respect to the wide discretion had by the trial court, it did show a strong disfavor for the use of such evidence for any purpose:

Much has been said about the propriety of receiving in evidence unaccepted offers to buy similar property. An offer to pay a certain amount does not necessarily involve an estimate that such is its full value and should have been taken into consideration in forming an opinion of market value. At best, such offers are but expressions of opinion. They are a species of indirect evidence of the opinion of the offerer as to the value of the land. An unaccepted offer places before the jury an absent person's declaration or opinion of value while depriving the adverse party of the benefit of cross-examination. The offerer may have such slight knowledge on the subject as to render his opinion of no value. He may have wanted the land for

<sup>149</sup> *People v. Ocean Shore R.R.*, 181 P.2d 705, 729, *superseded*, 32 Cal.2d 406, 196 P.2d 570 (1948).

<sup>150</sup> 314 P.2d 45 (1957).

<sup>151</sup> 171 Cal. App.2d 302, 340 P.2d 1053 (1959).

<sup>152</sup> *Id.* at 311, 340 P.2d at 1058.

<sup>153</sup> 169 Cal. App.2d 655, 338 P.2d 60 (1959).

some particular purpose disconnected with its value. Pure speculation may have induced the offer, a willingness to take chances that some new use of the land might later prove profitable. The person making the offer may not have been competent in a legal sense to express an opinion on the subject. Offers may be glibly made without serious intention or the required resources. The offer may contain contingencies, as in the present case. The area for collateral inquiry is far broader than in the case of consummated sales, as is also the opportunity for collusion and fraud. The assertion that the offerer tendered his money might give such hearsay opinion more weight with the jury than an opinion given by a witness before them, not thus supported. If evidence of an unaccepted offer is to be received, it is important to know whether the offer was bona fide and made by a man of good judgment acquainted with the value of the property, and whether made with reference to market value or to supply a particular need or to gratify a fancy. Unaccepted offers are unsatisfactory, easy of fabrication, and even may be dangerous in their character.<sup>154</sup>

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

#### *Offers To Purchase by the Condemnor*

Though it does not appear to have arisen in any reported California case since the *Faus* case, it is almost universally agreed that offers made by a condemnor pending condemnation are inadmissible to show market value.<sup>155</sup> The essential reason for this is that such offers are made in an effort to compromise the suit and, therefore, hardly reflect market value. In like manner, offers to sell made to the condemnor by the condemnee should be inadmissible by either party, though there is some authority that permits them to be used by the condemnor against the condemnee as admissions.<sup>156</sup> The shadow of condemnation is too heavy to warrant their introduction by any party for any reason. As in New York, where there is a specific code section prohibiting the introduction of such evidence,<sup>157</sup> it is recommended that California exclude offers made by either party to the other pending condemnation.

#### *Offers To Purchase*

While offers to purchase made to the condemnee by a third party are admittedly more reliable and meaningful than offers made by the condemnee, the "dangerous" nature of even these offers is such that most courts reject their admission into evidence.<sup>158</sup> There are a few cases from some jurisdictions, including California, indicating that such an offer may be brought out on cross-examination in order to test the credibility of a witness' testimony.<sup>159</sup> It is difficult to see, however, why

<sup>154</sup> *Id.* at 663, 338 P.2d at 65.

<sup>155</sup> 5 NICHOLS 300-301; 1 ORGEL 625-26.

<sup>156</sup> 1 ORGEL 626-27.

<sup>157</sup> N.Y.C. ADMINISTRATIVE CODE § B 15-16.0 (c) (1957).

<sup>158</sup> 5 NICHOLS 301; 1 ORGEL 623, n.91.

<sup>159</sup> See, e.g., *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681 (1891); *Vineyard Grove Co. v. Oak Bluffs*, 265 Mass. 270, 163 N.E. 888 (1928); *Lloyd v. Venable*, 168 N.C. 531, 84 S.E. 855 (1915).

what is considered "dangerous" evidence on direct should be any the less so on cross-examination. It is naive to believe that a jury can or does understand that an offering price is to be used solely for credibility purposes rather than as an indication of value; this point was clearly analyzed by Mr. Justice Ashburn in his concurring opinion in the District Court of Appeal in the *Faus* case.<sup>160</sup> Thus, offers to purchase, being an inferior and dangerous type of evidence, should be inadmissible on either direct or cross-examination.<sup>161</sup>

### *Offers To Sell*

It logically follows that if offers to purchase made to the condemnee are a disfavored genre of evidence and generally inadmissible, courts would be even more opposed to the admissibility of offers to sell made by the condemnee. This is clearly the case; courts almost unanimously reject evidence of offers to sell by the condemnee when he seeks to present such evidence to prove market value.<sup>162</sup> The reasons for the exclusion of offers to sell as evidence of market value are, in general, the same as those applicable to offers to purchase; however, there is even greater propensity and facility to manufacture such evidence.

But even more, such offers are particularly suspect because they are obviously self-serving. In addition, they do not really go to the question of market value; for an owner offering to sell land or listing it for sale often, and perhaps almost always, asks somewhat more for it than he really believes it to be worth, or at least more than he would actually accept.<sup>163</sup>

There is, however, one generally accepted ground for allowing into evidence an offer to sell made by the condemnee to a third party. Almost all courts, including those who summarily reject evidence of offers for any other purpose, permit such offers to be used as admissions on the part of the condemnee.<sup>164</sup> Such also is the position of the California courts, at least as indicated by *People v. Ocean Shore R.R.*<sup>165</sup> The reasoning for this position is, first, such an offer generally indicates the amount that the condemnee himself would consider the property to be worth. Second, if used against the condemnee, there is little doubt as to its trustworthiness. Unless the condemnee was truly unaware of

<sup>160</sup> See note 101 *supra*.

<sup>161</sup> The Illinois position in this regard is of interest. It holds such offers inadmissible except in those situations where there are no comparable sales. *City of Chicago v. Lehmann*, 262 Ill. 468, 104 N.E. 829 (1914). See also *Sanitary Dist. v. Beoning*, 267 Ill. 118, 107 N.E. 810 (1915). Later Illinois cases, however, may have adopted a more liberal position by not requiring that there be an absence of comparable sales in order to justify the admission into evidence of offers to purchase. See, e.g., *Kankakee Park Dist. v. Heidenreich*, 328 Ill. 198, 159 N.E. 289 (1927); *Legislation*, 32 COLUM. L. REV. 1058 n.37 (1932). But "there may be some room for doubt, however, as to whether" this prerequisite for admissibility has been abandoned. Annot., *Market Value—Offer as Evidence*, 7 A.L.R.2d 781, 800 (1949). It is advanced that, as indicated concerning the similar exception suggested by a few courts in regard to sales to condemnors, *supra*, at notecalls 135, 136, such an exception would come into play only in very rare instances, and therefore, it is believed such an exception would be more confusing than helpful.

<sup>162</sup> 5 NICHOLS 304; 1 ORGEL 623; Annot., 7 A.L.R.2d *supra* note 161, at 795.

<sup>163</sup> See *Korf v. Fleming*, 239 Iowa 501, 32 N.W.2d 85 (1948); *Reynolds v. Franklin*, 47 Minn. 145, 49 N.W. 648 (1891); *Montclair Ry. v. Benson*, 36 N.J.L. 557 (1873). See also Annot., 7 A.L.R.2d *supra* note 161, at 797.

<sup>164</sup> Nichols states that offers are not so much admissions against interest as they are contradictions of the condemnee's present contention. 5 NICHOLS 303-304. He has apparently confused admissions with declarations against interest. See 4 WIGMORE, EVIDENCE § 1049, p. 6 (3d ed. 1940). Admissions are generally regarded to be statements by a party that are inconsistent with the facts asserted by him in pleadings or in testimony in the case before the court. 4 WIGMORE, *id.* at 3. In any event, the weight of authority considers and treats offers as admissions. See 1 ORGEL 623; Annot., 7 A.L.R.2d *supra* note 161, at 814.

<sup>165</sup> 181 P.2d 705 (1947), *superseded*, 32 Cal.2d 406, 196 P.2d 570 (1948).

the value of his property, or made the offer for other than usual business reasons, such an offer should generally indicate the highest amount that would be received on an open sale. As stated in one New York case:

The price which this owner gave to this real estate agent or firm of real estate agents was an admission on her part as to what she considered her premises worth at that time and is clearly competent as against her. It was an asking price not a selling price and hence, perhaps, would not be assumed to be the lowest price that the owner would take for the property. In any event, it would show the estimate that the owner placed upon the property at the time. Of course, with this evidence might be given any explanation that the owner desires to make as to her reasons for selling at that time or as to the condition that the property might have been in at that time.<sup>166</sup>

Despite the general use of offers to sell as admissions, a more critical analysis casts some doubt as to the justification for using them for such a purpose. To begin with, it is frankly admitted by the courts that, as a general rule, the property owner seeks and asks more than he would accept or receive on the open market.<sup>167</sup> As indicated, therefore, such an asking price is not a true index of market value. Consequently, the only offering prices of the condemnee that the condemnor would resort to use against the condemnee as admissions are low prices; these often include prices well below the prevailing price that could actually be gotten for the property on the open market. The condemnee—offeror, in other words, is an uninformed seller. Thus, not only is the condemnee often greatly prejudiced in the courtroom by his ill-considered prior offer, but further, because he is often an uninformed seller, his offer in such instances does not, by definition, reflect market value. And despite what an owner may, at any one time, consider his property to be worth, he is to be paid the market value for his property.

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

The authors of this study, having presented the arguments on each side of the question of admitting such offers as admissions do not make a recommendation on this point.

### *Offers for Comparable Property*

It is generally agreed that offering prices to purchase or sell comparable property are incompetent for any purpose. As Nichols states:

The objections to the reception of evidence of offers to buy the identical land which is taken are multiplied tenfold in the case of other land in the neighborhood, and if offers for neighboring land were competent, the trial of a land damage case would degenerate

<sup>166</sup> Matter of Simmons, 68 Misc. 65, 66-67, 124 N.Y. Supp. 744, 745 (Sup. Ct. 1910). See also Springer v. City of Chicago, 135 Ill. 552, 26 N.E. 514 (1891); *In re Port of New York Authority*, 28 N.J. Super. 575, 101 A.2d 365 (1953); Gulf, Colo. & S.F. Ry. v. Hanks, 308 S.W.2d 165 (Tex. Civ. App. 1957). See also recent cases compiled in 5 NICHOLS 68 n.22 (Supp. 1959).

<sup>167</sup> See notes 163-67 and accompanying text.

into a confused and endless wrangle in which collateral issues and what is in substance hearsay evidence played the most prominent part. Doubtless under certain conditions evidence of a *bona fide* offer might have some probative value, but the safest course is to exclude such evidence altogether.<sup>168</sup>

This is clearly the position of the California courts as expressed in the *Kita* and *Nahabedian* cases. Because the *Faus* case has created some doubt as to the firmness of this policy,<sup>169</sup> it is suggested that this policy be put into the statute.

### Options

Belonging to the same species as offers, options breed similar disfavor. Because of their general untrustworthiness, courts generally reject the introduction of this type of evidence.<sup>170</sup> Many considerations may enter into the purpose of acquiring an option, and unless it ripens into a sale it should not be admitted as evidence of market value. The fact that somebody has given the option to purchase land at a certain price, as emphasized by the Oregon court, proves nothing as to its real value or market value.<sup>171</sup>

As indicated by *People v. Ocean Shore R.R.*,<sup>172</sup> in California what authority exists supports the position that option prices are admissible in evidence as admissions.<sup>173</sup> Assuming the questionable hypothesis that admissions should be considered in ascertaining compensation, it follows, *a fortiori*, that if offers to sell may be used as admissions, options may be used for the same purpose. However, the position taken herein in regard to offers being used as admissions is also applicable to options: Although we recommend that option prices not be admissible on direct or cross-examination for any purpose, we take no position whether admissions should be made an exception.

### Sales Contracts

Mainly because executory sales contracts, if made in good faith, are important indications of market value, and to a large extent because they are somewhat less suspect than offers,<sup>174</sup> the majority of courts have permitted such prices to be introduced both on direct and cross-examination.<sup>175</sup> A recent federal case admitting such prices into evidence stated:

We are, therefore, of the opinion that the evidence of the terms of the contract of sale for the property condemned in the present

<sup>168</sup> 5 NICHOLS 305-306. See also *Central Pac. R.R. v. Pearson*, 35 Cal. 247 (1868); *State v. Cerruti*, 188 Ore. 103, 214 P.2d 346 (1950).

<sup>169</sup> Compare the decision of the District Court of Appeal in *People v. Cava*, 314 P.2d 45 (Dist. Ct. App. 1957) (appeal dismissed on rehearing) with the action of the court in *Los Angeles School Dist. v. Kita*, 169 Cal. App.2d 655, 338 P.2d 60 (1959).

<sup>170</sup> 5 NICHOLS 308; 1 ORGEL 627. Interview of Judge Clarence L. Kincaid by authors, August 13, 1959; interview of Judge John J. Ford by authors, July 21, 1959.

<sup>171</sup> *Shebley v. Quatman*, 66 Ore. 441, 134 Pac. 68 (1913). See also *State ex. rel. Burnquist v. Nelson*, 212 Minn. 62, 2 N.W.2d 572 (1942); dissenting opinion of Judge Jones in *United States v. Certain Parcels of Land, etc.*, 144 F.2d 626, 631 (3d Cir. 1944) wherein the opinion is expressed that the exclusion of options from evidence should be a matter of law; it should not even go to the weight of evidence.

<sup>172</sup> 181 P.2d 705 (1947), *superseded*, 32 Cal.2d 406, 196 P.2d 570 (1948).

<sup>173</sup> 5 NICHOLS 309; Annot., *Market Value—Offer as Evidence*, 7 A.L.R.2d 781, 814 (1949); Annot., *Eminent Domain—Evidence To Show Value*, 155 A.L.R. 262, 273 (1945).

<sup>174</sup> Compare the leading case in this entire field, *Sharp v. United States*, 191 U.S. 341, 349 (1903). There the court spoke essentially of "oral offers" glibly made.

<sup>175</sup> 5 NICHOLS 307 nn.28, 29; Cf. 1 ORGEL 627.



case should have been received in evidence. It is evidence to be considered in arriving at just compensation, affecting the appellant's substantive right, and its relevancy is therefore a federal question to be determined unfettered by any local rule. It is true that the contract had not been consummated and that, as argued by the government, reception of such evidence makes it possible for a landowner, learning that condemnation of his property is likely, to enter into a collusive agreement of sale so as to manufacture evidence in support of an exorbitant claim. This danger is not to be minimized, particularly in view of the difficulty which might well be entailed in proving such collusion. Yet evidence of a bona fide sale, otherwise relevant, should not be excluded because of the possibility that some landowner might conspire with another to defraud the government by manufacturing collusive evidence. Such objections go to the weight of such evidence rather than to its admissibility, and the trial affords opportunity, both by cross-examination and comment to the jury, to bring such evidence to its proper perspective for the jury's consideration. The penalties of the criminal law also will afford a deterrent to such persons without depriving others of significant evidence of the value of their property in condemnation proceedings.<sup>176</sup>

The New York City code provision, discussed on page A-34, appears to admit evidence of executory sales as well as completed transfers of property to prove market value. Though such transactions are at times tainted with bad faith, as a New York court<sup>177</sup> and the above quoted federal court have indicated, it is preferable, providing the transactions are shown to have been made in good faith, to admit such evidence on direct and cross-examination. This position is particularly justified since such contracts are less tinged with suspicion, and bad faith is more readily detectable than is the case with offers.

### Assessed Valuations

With the exception of a few jurisdictions, it is the overwhelming weight of authority that assessed valuations, made for taxation purposes, are inadmissible into evidence as an indication of market value.<sup>178</sup> California, in theory, is in accord with that position;<sup>179</sup> but, as will be shown, such a policy may not be effectuated in practice in this State.

If the purpose of a condemnation trial is to shed light on the market value of the subject property, then assessed valuations contribute very little, if anything, toward that goal. One authority, who has urged the use of assessment figures in condemnation actions, argues that since such assessments for taxation must be based by law on fair market

<sup>176</sup> *United States v. Certain Parcels of Land, etc.*, 144 F.2d 626, 629-30 (3d Cir. 1944).  
<sup>177</sup> *Matter of City of New York (Hamilton Place)*, 67 Misc. 191, 122 N.Y. Supp. 660 (Sup. Ct. 1910).

<sup>178</sup> 5 NICHOLS 313; 1 ORGEL, 633-34; Annot., *Evidence—Tax Valuation*, 39 A.L.R.2d 209, 214 (1955), 84 A.L.R. 1485 (1933) and 17 A.L.R. 170 (1922). See generally *United States v. Certain Parcels of Land, etc.*, 261 F.2d 287 (4th Cir. 1958), where the court reviewed the matter and held that such evidence cannot be used against the condemnor, even as an admission.

<sup>179</sup> See *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 310, 92 Pac. 849, 852 (1907); *City of Los Angeles v. Deacon*, 119 Cal. App. 491, 493, 7 P.2d 378 (1932). See also *City of La Mesa v. Tweed & Gambrell Mill*, 146 Cal. App.2d 762, 778, 304 P.2d 803, 813 (1956).

value, "what is fair market value for one purpose ought to be fair market value for every purpose."<sup>180</sup> There is the rub: such valuations rarely represent fair market value.

Valuation for taxation purposes is aimed at the *equalization* of the community tax load; in condemnation valuation is made to ascertain what the property would sell for on the open market.<sup>181</sup> Thus, in condemnation, the goal is absolute market value; in taxation valuation, the goal is relativity.

Other differences between the two are even more pronounced. Seldom is the assessor for tax purposes competent enough by training to determine market value for most types of property, at least as compared with his counterpart, the real estate appraiser. And even if he were fully qualified, it is beyond question that he would have only a fraction of the amount of time necessary to make a proper evaluation of its market value. The wholesale operation of evaluating property that is involved in assessment for taxation purposes precludes the detailed study necessary in condemnation cases. Further, the time differential between the date when the property was assessed for taxation and the date of the taking is extremely significant; not only is there generally at least a year's span, but often real estate is not re-assessed for tax purposes for many years. And not least of the drawbacks is the fact that the taxation valuation figure, superficial as it may be, is not subject to any of the restrictions of the hearsay rule nor is it subject to cross-examination. Last, frequently political considerations unduly affect assessments for taxation.

A few states, notably Massachusetts, have statutes permitting the introduction of assessment valuations in condemnation cases to indicate market value.<sup>182</sup> Recent legislative proposals in Massachusetts, advanced as a result of a study by a special commission on eminent domain and approved by the Judicial Council of that state, seek the repeal of that statute and the exclusion of such evidence, essentially for the reasons outlined above.<sup>183</sup> Peculiarly enough, Pennsylvania's statute on this point permits such evidence to be introduced only at the instance of the condemnee and as an admission by the government condemnor.<sup>184</sup>

The California practice presents a paradox. As in the case of the pre-*Faus* rule with comparable prices, California refuses to allow such assessments to be introduced on direct examination to show market value. This is in accord with the great weight of authority. But almost alone, California permits assessment valuations to be brought out on cross-examination for the purpose of testing the value of the witness' opinion.<sup>185</sup> As was pointed out by Mr. Justice Ashburn, concurring in the decision of the District Court of Appeal in the *Faus* case, when

<sup>180</sup> Graubart, *Theory Versus Practice in the Trial of Condemnation Cases*, 26 PA. B.A.Q. 36, 46 (1954).

<sup>181</sup> See *Louisiana Highway Comm'n v. Giaccone*, 19 La. App. 446, 451, 140 So. 286 (1932); *Wray v. Knoxville, L.F. & J. R.R.*, 113 Tenn. 544, 560, 82 S.W. 471, 473 (1904). See generally 1 ORGEL 629-32.

<sup>182</sup> MASS. ANN. LAWS ch. 79, § 35 (1953); WASH. REV. CODE § 54.16.020 (1953).

<sup>183</sup> SPECIAL COMMISSION RELATIVE TO CERTAIN MATTERS RELATING TO THE TAKING OF LAND BY EMINENT DOMAIN, HOUSE NO. 2738 (Dec. 1956).

<sup>184</sup> PA. STAT. ANN. tit. 26, § 102; tit. 16, § 2418 (1958). See also Graubart, *supra* note 180.

<sup>185</sup> *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 310, 92 Pac. 849, 852 (1907). See 5 NICHOLS 317.

speaking about comparable prices,<sup>186</sup> such roundabout ways of introducing testimony at the least confuse the jury and, at the most, are ignored by the jury. ("The price is the thing wherein we'll catch the jury writing.") It appears that the admission of much of the testimony that has been allowed on cross-examination was due to the restrictive pre-*Faus* rule: cross-examination served as an opening to get something—anything—before the jury to show market value. It is unfortunate that since the adoption of the more liberal post-*Faus* rule, the dubious vestiges of the earlier position should remain entrenched.

It is to be expected that in light of a statute passed by the California Legislature in 1959,<sup>187</sup> there will be increased attempts to show assessed valuations in condemnation actions. This statute requires the publication of the now secret ratios between assessed value and market value of common property in all counties. Although this provision may be helpful in condemnation actions, it cannot overcome the many shortcomings inherent in assessed valuations. Although their use may be justified on the ground that the court in condemnation actions should have "every available scrap of evidence that may give it guidance," assessed valuations are usually more misleading than helpful for proving market value. The few jurisdictions that admit such evidence apparently do so in order "to check" interested and biased witnesses;<sup>188</sup> however, it would seem that other methods, less misleading, would be more appropriate for obtaining objectivity.

#### Foundation and Hearsay Matters

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

The preceding pages which discussed market data depicted the vital need of establishing, prior to the introduction of such evidence, proof of the true comparability of such data and the minimum trustworthiness that is necessary in order to place it on the record and before a jury. Subsequent pages, dealing with other parts of the trinity approach, will further point out the need for these prerequisite steps. In fact, so essential to the achievement of just compensation and to the orderly process of condemnation actions is the existence of adequate methods of pre-examining the contentions and evidence of the parties that a special study concerning pretrial procedures for discovery and disclosure in this field will subsequently be devoted to these matters.<sup>189</sup> It is necessary now, however, to discuss some of these matters as they occur in the actual trial stage of condemnation actions.

It is the universal rule—and the very nature of the subject matter demands it—that questions of the comparability of market data are

<sup>186</sup> *County of Los Angeles v. Faus*, 304 P.2d 257, 267 (1957).

<sup>187</sup> CAL. REV. & TAX. CODE §§ 1818, 1819; Cal. Stat. 1959, ch. 1682.

<sup>188</sup> See 1 ORGEL 645.

<sup>189</sup> The New York City Administrative Code, note 157 *supra*, makes definite provision for pretrial discovery before the use of comparable prices is permitted at trial.

initially decided by the court as a matter of law; and if, at the discretion of the court, such data are admissible on the grounds of comparability, the degree of comparability is a question of fact for the jury. The *Faus* case, in adopting the rule of admissibility of comparable prices on direct examination, also adopted the concomitant policy (aptly stated by the Colorado court) that

no general rule can be laid down regarding the degree of similarity that must exist to make such evidence admissible. It must necessarily vary with the circumstances of each particular case. Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused.<sup>190</sup>

Whether the court decides such matters as a result of a pretrial conference, in chambers at the time of the trial or before such prices go into the record,<sup>191</sup> it must first, at the time any objection to such evidence is received, make the initial ruling; the jury may then accord the weight to such evidence as it deems proper.

But more controversial and far less clear are the related questions as to the grounds for admitting such evidence and the hearsay bar that is usually involved. To begin with, the clear weight of authority is to the effect that once comparable sales are admitted into evidence they come in as *independent* evidence of value.<sup>192</sup> The *Faus* opinion would seem, on the surface, to agree; however, the opinion is far from explicit on this point and at least two subsequent California cases have held to the contrary.<sup>193</sup> In *People v. Nahabedian*,<sup>194</sup> the appellate court stated:

It must be remembered that the facts stated as reasons for the opinion of the witness do not become evidence in the sense that they have independent probative value upon the issue as to market value. On the contrary, they serve only to reinforce the judgment of the witness, that is, they go to the weight to be accorded his opinion.<sup>195</sup>

The court cited the *Stewart* and *La Macchia* cases to support its position.<sup>196</sup> There is no question that in the pre-*Faus* situation, where prices could only come in on cross-examination, this was the rule, and it had some justification. The court in the *Nahabedian* case further cited 5 *Nichols* 18.45[1] to lend weight to its position. That citation, however, does not, on further analysis, lend support to its holding. It merely says that if such evidence is based entirely on hearsay, the witness may not testify concerning it. It does not go to the question as to how such evidence is treated once it is held admissible.

<sup>190</sup> *Wassenich v. Denver*, 67 Colo. 456, 464, 186 Pac. 533, 536 (1919). See *County of Los Angeles v. Faus*, 48 Cal.2d 672, 678, 312 P.2d 680, 684 (1957).

<sup>191</sup> See *People v. Murray*, 172 Cal. App.2d 219, 342 P.2d 485 (1959).

<sup>192</sup> See 5 *NICHOLS* 265, 269; *Burke, The Appraiser-Witness*, 38 NEB. L. REV. 495, 500, 501 (1959); Annot., *Real Property—Value—Evidence*, 118 A.L.R. 869 (1939).

<sup>193</sup> *Redevelopment Agency v. Modell*, 177 Cal. App.2d 321, 2 Cal. Rptr. 245 (1960); *People v. Nahabedian*, 171 Cal. App.2d 302, 340 P.2d 1053 (1959); *People ex rel. Department of Public Works v. Rice*, 185 A.C.A. 242, 248, 8 Cal. Rptr. 76, 79 (1960).

<sup>194</sup> 171 Cal. App.2d 302, 340 P.2d 1053 (1959).

<sup>195</sup> *Id.* at 310, 340 P.2d at 1058.

<sup>196</sup> *People v. La Macchia*, 41 Cal.2d 738, 264 P.2d 15 (1953); *Long Beach City H.S. Dist. v. Stewart*, 30 Cal.2d 763, 185 P.2d 585 (1947).

The holding of the *Nahabedian* case received additional support from the wording of Section 1845.5 of the Code of Civil Procedure as it existed at that time. The Legislature enacted Section 1845.5 after the *Faus* opinion, indicating its approval of the admissibility of comparable prices on direct examination. It couched this policy in the words, "*In order to qualify a witness.*" [Emphasis added.] Thus, it appears that the Legislature, following the pre-*Faus* cases, limited the use of comparable prices; such prices did not appear to have the rank of independent evidence. However, the Legislature in the 1959 Session amended Section 1845.5 and (perhaps unwittingly) altered the language of the section to read, "In an eminent domain proceeding a witness, otherwise qualified, may testify . . . as to his knowledge of the amount paid for comparable property or property interests."<sup>197</sup> This language would indicate that such prices do not go to the witness' qualifications, but are admitted as independent evidence.

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

A second compelling reason for deciding the issue rests in the fact that there may be a number of times when a jury might give a verdict that is below or above the experts' opinions of value but within the range of comparative sales as testified to by the experts. Under such circumstances, the validity of the verdict would depend upon whether the jury is bound by the opinions of the witnesses and, if not, whether it is bound by the evidence and whether comparable prices are independent evidence. The cases, at least prior to the *Faus* case, tended to hold that the jury cannot go beyond the range of the evidence, that is, the experts' opinions.<sup>198</sup>

In order to analyze the problem properly, it is first necessary to see wherein the courts agree and disagree. All courts are in agreement that if a witness qualifies as an expert (and most courts agree this includes the property owner as well) then he may give his opinion as to the value of the property.<sup>199</sup> (There are some differences as to what factors may qualify a witness, but this is not the issue here.) Moreover, because the courts are cognizant that a great many of the factors that go to make up an expert's opinion are necessarily derived from hearsay matter, they permit an expert to give his opinion despite the hearsay factors he takes into consideration.<sup>200</sup> To do otherwise would virtually preclude any evidence of value from being presented.<sup>201</sup> It is the next stage of the problem where the confusion and controversy comes in.

<sup>197</sup> Cal. Stat. 1959, ch. 2107.

<sup>198</sup> See *People v. Thompson*, 43 Cal.2d 13, 27-28, 271 P.2d 507, 515 (1954); *People ex rel. Department of Pub. W. v. McCullough*, 100 Cal. App.2d 101, 105, 223 P.2d 37, 40 (1950).

<sup>199</sup> 1 ORGEL 563.

<sup>200</sup> See *Bridgeport Hydraulic Co. v. Stratford*, 139 Conn. 388, 94 A.2d 1 (1953); *Natl' Bank of Commerce v. New Bedford*, 175 Mass. 257, 56 N.E. 283, 290 (1900); *Wahlgren v. Loup River Pub. Power Dist.*, 139 Neb. 489, 297 N.W. 833 (1941).

<sup>201</sup> See *Montana Ry. v. Warren*, 137 U.S. 348 (1890); *Commonwealth ex rel. State Hwy. Comm. v. Smith*, 17 S.W.2d 203 (Ky. 1929); *Diamond, Condemnation Law*, 23 APPRAISAL J. 564, 572-73 (1955).

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

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

An expert may testify to value although his knowledge of details is chiefly derived from inadmissible sources, because he gives the sanction of his general experience. *But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible.* [Emphasis added.]<sup>202</sup>

Virtually all courts would adhere to this position if the witness had garnered his information solely from "talk on the street." In other words, if the hearsay is not in any way checked, if the sales prices are not in any other way checked upon, all courts would prevent a witness from testifying about them in any detail.<sup>203</sup> But if the comparable sales data were derived from more than "talk on the street" and from more than a mere recitation in a deed, would such prices be admissible into evidence?

The question is squarely presented by two recent federal cases reaching fairly opposite results. In a 1952 Fourth Circuit case,<sup>204</sup> the court stated that the witness' testimony regarding comparable sales that "he had learned of in his investigation and which he had verified by examination of the land records in the county," should have been admitted into evidence. The court was of the opinion that the trial court's exclusion of such testimony based on the hearsay and best evidence rule was erroneous and the jury was entitled to the "facts" supporting the opinion of the witness.

In a 1954 First Circuit case,<sup>205</sup> the court apparently swung in the opposite direction. It held that there was no abuse of discretion by the trial court in excluding, as hearsay, testimony concerning recitations in deeds, "talk on the street" or in the real estate trade and computations from revenue stamps; such prices, therefore, were held inadmissible into evidence for any purpose.

The arguments on each side of this question are strong. Supporting the admissibility of such testimony is that by its exclusion, parties to every sale would have to be called and the trial would, at the least, be unduly prolonged. On the other hand, by admitting this testimony, an expert may support his *opinion*, but true comparability cannot be tested by cross-examination. One recent circuit court, in order to avoid the impasse, adopted the following position:

The admission of such testimony [comparable sales] will be subject to the discretion of the trial court, not only as to questions concerning comparability or remoteness, but also as to whether the expert's

<sup>202</sup> *Natl Bank of Commerce v. New Bedford*, 175 Mass. 257, 261, 56 N.E. 288, 290 (1900). See also *Hammond L. Co. v. County of Los Angeles*, 104 Cal. App. 235, 247-48, 285 Pac. 896, 902 (1930).

For a critical attack on the wisdom of this position, see Maguire & Haheys, *Requisite Proof of Basis for Expert Opinion*, 5 VAND. L. REV. 432, 437-38 (1952).

<sup>203</sup> See generally Burke, *The Appraiser-Witness*, 38 NEB. L. REV. 495, 500 (1959); Winner, *Rules of Evidence in Eminent Domain Cases*, 13 ARK. L. REV. 10, 23 (1958-59).

<sup>204</sup> *United States v. 5139.5 Acres of Land, etc.*, 200 F.2d 659, 659-61 (4th Cir. 1952).

<sup>205</sup> *United States v. Katz*, 213 F.2d 799 (1st Cir. 1954).

sources of information are reliable enough to warrant a relaxation of the rule against hearsay evidence.<sup>206</sup>

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

This brings us to the last and principal stage of the problem. As might be expected, the confusion concerning the admissibility of this "hearsay" evidence of comparable sales for any purpose has produced further confusion as to the purpose for which it is admitted, if held admissible at all. As indicated above, those courts that admit such prices into evidence generally consider it independent evidence of value. The court in the *Nahabedian* case (and the more recent *Modell* case) would hold otherwise. There is a good deal of logic in permitting a court to treat such evidence as independent evidence inasmuch as a jury, practically speaking, would do the same.<sup>207</sup> Furthermore, as indicated above, occasionally juries grant awards either below or above any opinion of value testified to by an expert but within the range of comparable sales prices or other data presented at the trial. At least prior to the *Faus* case, the rule appeared to be that the jury could not go beyond the range of opinion evidence. Since the *Faus* case, California courts have ruled both ways, one court interpreting the *Faus* opinion differently from the courts in the *Nahabedian* and *Modell* cases.<sup>208</sup>

But, even though there may be a strong argument for allowing such evidence to be treated as independent evidence, particularly since the jury tends to so treat it, it is suggested that there are countervailing reasons that outweigh such an otherwise logical conclusion. To begin with, it is generally recognized that in most cases in which juries go beyond the range of opinion testimony, the verdicts are unfair and unwarranted.

It is true that the court has the power to grant a new trial notwithstanding the verdict;<sup>209</sup> nonetheless, courts are hesitant to do so, particularly when confronted with a policy that allows all evidence to be independent evidence. If the factors supporting the expert's opinion

<sup>206</sup> District of Columbia Redev. L. A. v. 61 Parcels of Land, 235 F.2d 864, 866 (D.C. Cir. 1956).

<sup>207</sup> Interviews of Judge John J. Ford by authors, July 21, 1959; interview of George Hadley by authors, July 16, 1959.

<sup>208</sup> See record in Lawndale School Dist. of Los Angeles v. Andres, No. 685,049 (1958).

<sup>209</sup> See 1 ORGEL 555.

are not independent evidence of value, presumably the jury would be limited to the range of expert testimony under the pre-*Faus* cases.

Moreover, to admit the supporting data as independent evidence may produce a confusion in the minds of the jurors greater than that which it is designed to eliminate. A mass of facts and figures—market data, capitalization studies, reproduction cost studies from several different experts—would be before the jurymen. They would be instructed that they could consider it all as independent evidence. The opinion of the expert would be merely one element, of an advisory character, to be considered by the jury in arriving at its value, *i.e.*, making its own appraisal. It would apparently be appropriate to instruct the jurors that they need in no way be bound by the expert opinions.

Thus, although it may now make little sense to jurors to be told that they can consider comparable sales only for the purpose of weighing the expert's opinion, there appears to be little improvement in the instructions that would be given under the new policy. It would undoubtedly mystify most jurors to be told that they, persons untrained in real estate appraisal, are to perform an appraisal function, and yet need not give any more consideration than they wish to the opinions of men highly trained in the field.

Another reason, perhaps more legalistic, for adhering to the pre-*Faus* policy relates to the hearsay problem. If the evidence comes in as independent evidence of value, evidence of a comparable sale is received to show that such a sale actually took place at the price indicated. If such evidence is testified to by a witness, based upon what a seller, buyer, or broker told him, there is a technical violation of the hearsay rule. If, on the other hand, the evidence is received merely to show what the expert took into account in arriving at his opinion, the hearsay doctrine is not so badly strained. The crucial evidence in the latter case is not the comparable sale, but the expert's opinion of value.

Perhaps the most compelling reason for retaining the pre-*Faus* system is one of expediency. If comparable sales, for example, are to be independent evidence of value, it would undoubtedly be appropriate to prove them by a succession of buyers, sellers, brokers or other persons having knowledge of the facts. It is probable that trial time would be greatly lengthened by such a presentation. Not only would it take longer to prove sales that are in fact truly comparable, but attempts might be made to prove sales which have no comparability whatsoever. Under the pre-*Faus* policy, there is at least a determination made by an expert that a sale is comparable before attempts are made to offer testimony concerning it.

In view of these considerations, it is recommended that the pre-*Faus* policy in regard to the consideration to be given comparable sales and other market data be continued.

### The Income Approach

Except in very rare instances, as pointed out before, evidence of the net profits or income from business property is inadmissible on direct examination in arriving at market value.<sup>210</sup> Not only is such evidence

<sup>210</sup> See 2 LEWIS, EMINENT DOMAIN 1273 (1909); 1 ORGEL 655; Annot., *Eminent Domain—Market Value—Profits*, 134 A.L.R. 1125 (1941) and 7 A.L.R. 163 (1920); see also note 75 *supra*.



excluded in numerous cases where an expert appraiser often finds its use vital in ascertaining market value, but its general exclusion contradicts the basic theory of value held by almost all economists—the value of income-producing property equals the present value of the income it will produce.<sup>211</sup> Because of the difficulty accompanying this approach, however, the courts have deliberately avoided coming to grips with this factor. As was previously pointed out, their brothers on the bench in the Commonwealth countries do not have this reticence concerning these matters, difficult and complex as they often are.<sup>212</sup>

There is a striking similarity between the reluctance of the courts to admit comparable sales prices on direct examination in the pre-*Faus* era and the present policy to block testimony regarding income and capitalization factors on direct examination. This can best be illustrated by the courts' language in two leading cases. In *Central Pac. R. R. v. Pearson*,<sup>213</sup> the Supreme Court said:

But, while the opinions of witnesses thus qualified by their knowledge of the subject are competent testimony, they cannot, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the company have [*sic*] been compelled to pay in other and like cases— notwithstanding those transactions may constitute the source of their knowledge. If this was allowed, the other side would have a right to controvert each transaction instanced by the witnesses, and investigate its merits, which would lead to as many side issues as transactions, and render the investigation interminable.<sup>214</sup>

Adopting virtually the same rationale, the District Court of Appeal in *City of Los Angeles v. Deacon*<sup>215</sup> stated:

To accept a statement of net profits as a fact to be taken into consideration in arriving at market value, of necessity opens the door: To an investigation into the accounting system of those operating the plant; into the costs of original installation and replacements; raises questions of efficiency and skill; and leads into innumerable other sideroads and alleys. A witness who has given an opinion as to market value may be asked on cross-examination if he knew of the net profit and what importance, if any, he attached to it, but such questions are permitted to test the value of the opinion ventured, and not because the sum involved is to be made use of by the court or jury as a basis for computing market value.<sup>216</sup>

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

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

<sup>211</sup> See 1 ORGEL 647.

<sup>212</sup> See 18 AM. JUR. *Eminent Domain* § 345 (1938). See also notes 46-52 *supra*.

<sup>213</sup> 35 Cal. 247 (1868).

<sup>214</sup> *Id.* at 262.

<sup>215</sup> 119 Cal. App. 491, 7 P.2d 378 (1932).

<sup>216</sup> *Id.* at 495, 7 P.2d at 379.

Deriving the value of real estate from the business profits of an enterprise located thereon is both difficult and dangerous. It is especially dangerous where there is no record of past profits on which to base an inference as to future profits. Even where there is such a basis, it is difficult to apportion or allocate the earnings as between the real estate and the business enterprise.

The courts have taken the proper course in avoiding this kind of valuation wherever possible because in the hands of unskilled jurors and judges on the one hand and of biased experts, on the other, there is no effective check on the value placed on properties by means of capitalization of earnings. Where actual sales prices are available, they are probably a safer index of the market value of property despite the fact that they raise collateral issues, such as similarity in kind and proximity in time. These issues, difficult as they are, are not as difficult as inferring value by anticipated future profits.<sup>217</sup>

In essence, therefore, the objections to the introduction of this measure of evaluation are that it is difficult to explain and understand and it lacks a checking rein. Formidable as these objections are—and they may not be easily minimized—it would appear that neither Orgel nor the courts would oppose the introduction of this formula wherever its use is proper and feasible; nor can it be doubted that modern business practices have forced the courts to ease up on this tight-fisted restriction; nor can it be denied that, regardless of judicial reservation, the market place does not sidestep the issue because of its difficulty.

While it is quite correct that courts will reject evidence as to income and profits to prove the market value of the property, the full picture is far from black and white; gray is the prominent color. First of all, if the business as well as the property is being taken, there is but little restriction on the use of the capitalization method.<sup>218</sup> Second, some courts have shown a tendency to admit income data, not for the purpose of determining the value of the property as it exists, but to point out its highest and best use.<sup>219</sup> Of course, this differentiation (if it truly be one) would escape even that rare juror who takes a 150 I.Q. into the box with him. Other courts, like California's, bring about similar results by allowing this data to come out on cross-examination for the purpose of testing the witness' credibility.<sup>220</sup>

But the vagaries surrounding this subject are even more marked. As well settled as it is that income and profits of a business cannot be shown for the purpose of proving value, it is by the same token fairly well settled that rental income can be shown and the capitalization formula employed when the property is essentially rental type.<sup>221</sup> The basic distinction between the treatment of rentals and profits is that the appraiser can generally utilize rentals with greater confidence than profits. The major distinction advanced by the courts, however, is that

<sup>217</sup> 1 ORGEL 696.

<sup>218</sup> *Cal-Bay Corp. v. United States*, 169 F.2d 15 (9th Cir. 1948); *United States v. 340 Acres of Land, etc.*, 64 F. Supp. 117 (S.D. Ga. 1946); *Anderson v. Chesapeake Ferry Co.* 186 Va. 481, 43 S.E.2d 10 (1947).

<sup>219</sup> See, *e.g.*, *United States v. 340 Acres of Land, etc.*, 64 F. Supp. 117, 120 (S.D. Ga. 1946); *Housing Authority v. Lustig*, 139 Conn. 73, 90 A.2d 169 (1952); *New Jersey Highway Authority v. Rue*, 41 N.J. Super. 385, 125 A.2d 305, 307 (1956).

<sup>220</sup> *City of Los Angeles v. Deacon*, 119 Cal. App. 491, 7 P.2d 378 (1932).

<sup>221</sup> See 5 NICHOLS 228; 1 ORGEL 703; Winner, *Rules of Evidence in Eminent Domain Cases*, 13 ARK. L. REV. 10, 18 (1958-59).

the condemnor does not take the business but takes only the real property, and, therefore, profits of the business are extraneous.<sup>222</sup> The weakness and fallacy of this major premise, however, is that the real purpose of showing profits is *not* to prove a separate element of damage but rather to reflect the value of the real property itself.

Even if the distinction between rentals and profits were valid in theory, from a practical point of view such a distinction is often merely a semantic one. For the element of personal management in rental property is a factor that often affects the income of such property; yet courts, quick to stress the personal element involved in business profits, ignore or minimize this factor when dealing with rental property. And while California appears to be in the minority,<sup>223</sup> the majority of courts do permit profit data to be shown when farm lands are involved.<sup>224</sup> Obviously, the element of personal management is significant even when the most ordinary type of farm is involved.

The tenuous distinction between income derived from the property itself and income derived from the enterprise located thereon has, with the advent of modern commercial activity, reached a breaking point. In trying to resolve the differences between the law and the market place, there appears to be a recent tendency to face the realities of the market place. This can no better be depicted than by pointing out that courts have admitted into evidence gross income figures in instances, such as rentals in gasoline station operations, that involve leases primarily or solely based on sales.<sup>225</sup> At least one court has indicated a willingness to admit income data resulting from the operations of a parking lot.<sup>226</sup> Then, too, the question arises in valuing shopping center property and numerous other properties, the rentals of which are based to a great extent upon gross receipts. This type of lease represents a major trend in modern real estate transactions.<sup>227</sup> Although there have been no reported cases on this particular problem, in at least one very recent California case the trial court admitted figures of gross receipts on a month-to-month lease basis for the purpose of proving market value.<sup>228</sup>

Not only does the type of lease discussed above fail to fall clearly into either the "income from property" or the "income from business" category, but numerous transactions involving other types of business properties, such as garages, department stores, restaurants and drug-stores,<sup>229</sup> actually form a spectrum between the extremes. Throughout this spectrum all property values are to some extent affected both by the physical property itself and the personal management involved.

<sup>222</sup> See *City of Chicago v. Farwell*, 286 Ill. 415, 423, 121 N.E. 795, 798 (1919); *Matter of Board of Water Supply*, 121 Misc. 204, 207, 201 N.Y. Supp. 88, 90 (Sup. Ct. 1923).

<sup>223</sup> See *Stockton & C. R.R. v. Galgiani*, 49 Cal. 139 (1874).

<sup>224</sup> *Denver v. Quick*, 108 Colo. 111, 113 P.2d 999 (1941); *Reisert v. City of New York*, 174 N.Y. 196, 66 N.E. 731 (1903); 5 NICHOLS 228. See generally 1 ORGEL 679-86.

<sup>225</sup> See, e.g., *St. Louis Housing Authority v. Bainter*, 297 S.W.2d 529 (Mo. 1957); *State v. Hudson Circle Service Center, Inc.*, 46 N.J. Super. 125, 134 A.2d 113 (1957).

<sup>226</sup> *Ribak v. State*, 38 N.Y.S.2d 869 (Ct. Cl. 1942).

<sup>227</sup> Winner, *Rules of Evidence in Eminent Domain Cases*, 13 ARK. L. REV. 10, 20 (1958-59).

<sup>228</sup> *People v. Stevenson & Co.*, Case No. 705457 (Parcels 2A & 2B) (Superior Ct. Los Angeles County, Aug. 1959).

<sup>229</sup> See Dunn, *Some Reflections on Value in Eminent Domain Proceedings*, 24 AP-FRAISAL J. 415, 416-418 (1956).

But in many, if not most, instances a prospective purchaser would seek to ascertain, almost immediately, the income that is presently being derived from the use of the property.

The dilemma that this established distinction creates is exemplified in California cases. The *Deacon* case, *supra*, is authority for the position that profits (and inferentially income figures) from businesses cannot be testified to on direct examination. More recently, in *People v. Dunn*,<sup>230</sup> the court reaffirmed the *Deacon* position. At the same time it did state that income from rentals is a proper element to be considered in arriving at value. In 1952, in *People v. Frahm*,<sup>231</sup> the sublessee of the condemned property who conducted a restaurant on the premises, had a lease under which he paid his lessor 10 per cent of the gross receipts of the restaurant. The trial court permitted the sublessee to show the net profits he made for the purpose of justifying a fair market value of the sublease predicated upon a fair rental value of 20 per cent of the gross receipts. In affirming this action, the appellate court said:

The testimony to which the appellant objects, regarding the facts in connection with the actual operation of this business, was properly admitted as being a part of the foundation for the opinion expressed as to the value of the lease. . . . The actual experience of the respondents in running this business, and the general conditions surrounding that operation, would greatly affect the saleability of that lease, and had an important bearing on its market value.<sup>232</sup>

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

A further examination of each of the grounds advanced by the courts for rejecting income data casts further doubt upon the strictness of the rule they have adopted. Most courts when confronted with this question state that to take these factors into consideration in determining value would open the gates to speculative and conjectural awards.<sup>233</sup> Certainly, the capitalization method involves a considerable amount of guesswork. Nonetheless, these same problems do not appear to have caused any major stumbling block when the condemnor takes not only the real property but the business as well.<sup>234</sup> And in other fields of law courts have been able to determine compensation and damages based upon the capitalization approach.<sup>235</sup> More significant, courts have been able to measure compensation by the income approach in condemnation cases. In England and Canada courts utilize the income approach as long as profits tend to prove the value of the property even though

<sup>230</sup> 46 Cal.2d 639, 297 P.2d 964 (1956).

<sup>231</sup> 114 Cal. App.2d 61, 249 P.2d 588 (1952).

<sup>232</sup> *Id.* at 63-64, 249 P.2d at 589-90. The opinion fails to show any evidence other than income that was used by the condemnor—lessee to show value. Bearing in mind that the court in *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 25 Pac. 977 (1891), excluded an expert's opinion which was based upon the capitalization approach, although his testimony did not contain estimated income, it can be seen that the *Frahm* decision is a major deviation from that of the *Neale* case.

<sup>233</sup> See *Sauer v. The Mayor*, 44 App. Div. 305, 60 N.Y. Supp. 648 (1899).

<sup>234</sup> See note 218 *supra*. See also *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

<sup>235</sup> See Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 71 n.43 (1957). See also 1 ORGEL 658.

this may be partially affected by personal management factors.<sup>236</sup> And, finally, a number of jurisdictions in this country permit business profits to be shown in order to measure damages in partial takings;<sup>237</sup> one state, Florida, specifically provides for this by statute.<sup>238</sup>

A second major reason advanced by the courts for refusing to allow profit data to be admitted is that the condemnor takes the real property, he does not take the business.<sup>239</sup> Although this argument might have some validity when the issue involves incidental business losses (and the study on incidental business losses, which is one of this series of studies, questions the appropriateness of this reasoning even in those instances), this argument should have little weight in ascertaining the market value of the property taken. For the purpose of introducing profit data, in this context, is not to compensate the condemnee for lost profits; rather it is to ascertain market value, that is, what the property would sell for on the open market. And, as expressed by the California Supreme Court in *De Freitas v. Town of Suisun City*,<sup>240</sup> generally the income approach does not aim to "furnish a *conclusive*" measure of market value; it is only an *element* in determining market value.

Courts also maintain that comparable sales are a better index of market value. This point has already been discussed at length and although this assertion is often true, it frequently is erroneous even in cases wherein true comparability can be established. Further, in valuing nonresidential, commercial property where the capitalization approach is most useful, comparability is far more difficult to establish than it is in valuing residential, non-investment type realty. Moreover, the inherent difficulties involved in the capitalization method basically reflect the complexity of many modern real estate transactions. It is not, therefore, a case of the tail wagging the dog. Seldom can the courthouse be less complex than the market place.

Senate Bill No. 1313, introduced in the 1959 Session of the Legislature and referred to above,<sup>241</sup> addresses itself to this point. It calls for the admission of evidence to show market value when, among other things, such evidence will show, "if income-producing property, the income potential of the property based in part upon its recent history." In light of the discussion thus far, this study is in essential accord with the purpose and language of that bill in this regard. The purpose, of course, of allowing evidence of income or rentals into evidence is to establish a basis upon which a witness predicates his opinion of fair rental or income attributable to the real estate; such an opinion is the starting point for the witness' capitalization study.

As long as the court deems that a reasonable purchaser would be significantly concerned and would seek to ascertain such information—as Senate Bill No. 1313 would seem to indicate—such information would not only be proper but necessary in order to determine market value.

<sup>236</sup> See 18 AM. JUR. *Eminent Domain* § 345 (1938). See also notes 46-52 *supra*. Federal courts apparently are more willing to entertain evidence as to income factors. See, e.g., *United States v. Waterhouse*, 132 F.2d 699 (9th Cir. 1943).

<sup>237</sup> See *In re Slum Clearance*, 332 Mich. 485, 495, 52 N.W.2d 195, 199-200 (1952). *Cf. Herndon v. Housing Authority*, 261 S.W.2d 221, 223 (Tex. Civ. App. 1953). *But see City of Dallas v. Priolo*, 150 Tex. 423, 426-27, 242 S.W.2d 176, 179 (1951).

<sup>238</sup> FLA. STAT. § 73.10 (1959). See also IND. ANN. STAT. § 3-1706 (1946).

<sup>239</sup> *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 282 (1943); *Mitchell v. United States*, 257 U.S. 341, 345 (1925); see also note 222 *supra*.

<sup>240</sup> 170 Cal. 263, 149 Pac. 553 (1915).

<sup>241</sup> See text at A-31, A-32.

### The Reproduction Approach

The third of the major methods of ascertaining market value is the summation approach, usually referred to as the reproduction less depreciation or simply the reproduction approach.<sup>242</sup> Perhaps because of its apparent simplicity, the majority of the jurisdictions have admitted reproduction evidence for the purpose of proving market value.<sup>243</sup> Thus, because of the simplicity goal, which is also the supposed hallmark of the market data approach, reproduction evidence is usually accorded greater favor than the capitalization approach which, because of its readily admitted complexity, is generally treated with disfavor by the same courts. Paradoxically, appraisers appear to have greater reservations concerning the justifiable utility of this method in many of those instances in which the courts have expressed no such reticence.<sup>244</sup> Despite their misgivings about this approach, appraisers would be quick to assert that there are times when this approach is the only meaningful method of ascertaining value.<sup>245</sup>

But while the majority of courts are perhaps at times open to criticism for their unsophisticated acceptance of the reproduction approach, the California courts, representing a distinct minority, are vulnerable insofar as they often summarily exclude such data on direct examination even in those instances when appraisers who are aware of the dangers and pitfalls of this approach would argue that its consideration is quite helpful in the quest for market value. Although the California position is not devoid of ambiguity,<sup>246</sup> it is reasonably clear that the courts in this State exclude reproduction data on direct examination except only in those instances when there would be no feasible alternative—particularly in situations in which the property involved is service type and is not ordinarily bought and sold on the market.<sup>247</sup> Thus, the court in *City of Los Angeles v. Klinker*<sup>248</sup> stated:

The general rule is against the admission of this class of evidence for any purpose. The market value of the land, together with the improvements thereon, viewed as a whole and not separately, is the general rule.<sup>249</sup>

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

There seem to be three misconceptions concerning the reproduction approach which are held by the courts that summarily reject such evidence. The first concerns the purpose for introducing such evidence. Contrary to the misgivings of the California courts, such evidence is

<sup>242</sup> The "replacement" valuation approach is where the structure is replaced by another but different type of structure of equal utility; reproduction, on the other hand, denotes a replica. More often than not courts, however, include the replacement theory of value in terms of reproduction. Following their example, this study refers to the summation method as the reproduction approach. See note 76 *supra*.

<sup>243</sup> See 5 NICHOLS 244; 2 ORGEL 9-10, 56; Winner, *Rules of Evidence in Eminent Domain Cases*, 13 ARK. L. REV. 10, 21 (1958-59).

<sup>244</sup> *Ibid.* See also Harvey, *Observations on the Cost Approach*, 21 APPRAISAL J. 515 (1953).

<sup>245</sup> Interview of Charles Shattuck by authors, August 7, 1959; interview of Nate Libott by authors, July 17, 1959.

See generally Kaltenebach, *Separate Consideration of Specific Elements* (Spec. Bull. No. 4) JUST COMPENSATION (1959).

<sup>246</sup> See Annot., *Eminent Domain—Value—Cost*, 172 A.L.R. 236, 255-56 (1948).

<sup>247</sup> See *City of Los Angeles v. Klinker*, 219 Cal. 198, 25 P.2d 826 (1933).

<sup>248</sup> 219 Cal. 198, 25 P.2d 826 (1933). See *Vallejo & No. R.R. v. Home Sav. Bk.*, 24 Cal. App. 166, 173, 140 Pac. 974, 977 (1914). But see *Joint Highway Dist. No. 9 v. Ocean Shore R.R.*, 128 Cal. App. 743, 18 P.2d 413 (1933) for possible distinction.

<sup>249</sup> *Los Angeles v. Klinker*, 219 Cal. 198, 211, 25 P.2d 826, 832 (1933).

not introduced for the purported purpose of establishing the standard of value; it is not, and seldom is alleged to be, the conclusive test of value. Rather, the reproduction approach, except in situations when unique or service type property is involved, is merely one of the elements that "fairly enter into the question of market value."<sup>250</sup> As the Connecticut court acutely suggested:

The divergence of opinion upon the admissibility of replacement value of a building taken in condemnation proceedings may have arisen from the failure to distinguish between the measure of damage and the elements of damage.<sup>251</sup>

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

A second misleading factor that has unduly brought about the rejection of reproduction data is the failure to differentiate between original cost and reproduction cost less depreciation. As the United States Supreme Court has stated, "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost."<sup>252</sup> With this statement there can be no quarrel. Nonetheless, since reproduction costs automatically reflect the changes in prices of labor and materials, this otherwise valid objection is inapplicable. Yet, it appears that some courts have failed to appreciate this differentiation when they have rejected reproduction data.<sup>253</sup>

A final factor which incorrectly closes the door to reproduction data is the view that since the value of the improvements and land should not be separately evaluated it is improper to show the value of the improvements independently.<sup>254</sup> Although there is merit in the argument that market value should result from the value of the land as enhanced by the improvements, this concept should not exclude the employment of an *initial* separate treatment of the land and the improvements. There is no valid reason why an expert may not appraise each separately and then establish their integral value of market worth. The leading case supporting the admissibility of reproduction data is *In re Blackwell's Island Bridge Approach*.<sup>255</sup> In that case the New York court said:

The learned Appellate Division has laid down the rule that, in condemnation proceedings, evidence of the structural value of buildings should not be received, and that the landowner must be confined to proof of the value of his land as enhanced by the value of the structures thereon. This is doubtless the rule applicable to certain cases, but we think it is not, and should not be, a rule of universal application. All proceedings prosecuted under the right of eminent domain are based upon two fundamental facts. The first is that the owner's land is taken from him theoretically against his will, and the second is that the owner is not permitted to fix his own price, but must be content with just compensation. The latter is a burden to which the owner must submit, but it is also a

<sup>250</sup> *Matter of City of New York*, 198 N.Y. 84, 91 N.E. 278 (1910).

<sup>251</sup> *Campbell v. New Haven*, 101 Conn. 173, 184, 125 Atl. 650, 653 (1924).

<sup>252</sup> *United States v. Toronto Nav. Co.*, 338 U.S. 396, 403 (1949).

<sup>253</sup> See, e.g., *United States v. 70.39 Acres of Land, etc.*, 164 F. Supp. 451, 488-89 (S.D. Cal. 1958). See generally Annot., *Eminent Domain—Value—Cost*, 172 A.L.R. 236, 244 (1948).

<sup>254</sup> See *Vallejo & No. R.R. v. Home Sav. Bk.*, 24 Cal. App. 166, 173, 140 Pac. 974, 977 (1914). See generally Note, U. ILL. L.F. 294 (1957).

<sup>255</sup> 198 N.Y. 84, 91 N.E. 278 (1910).

right which he may enforce. What is just compensation? In some cases the value of expensive structures may not enhance the value of the land at all. An extremely valuable piece of land may have upon it cheap structures which are a detriment rather than an improvement. A man may build an expensive mansion upon a barren waste, and, in such a case, the costly building may add little or nothing to the total value. In the greater number of cases, however, when the character of the structures is well adapted to the kind of land upon which they are erected, the value of the buildings does enhance the value of the land. In such cases it is true that the value of the land as enhanced by the value of the structures is the total value which must be the measure of the owner's just compensation when his property is condemned for public use. As to that general proposition there can be no disagreement. But how is the enhancement of the land by the structures which it bears to be proven? If all buildings were alike, the rule laid down by the Appellate Division would be one of convenient and universal application. It is common knowledge, however, that buildings not only differ from each other in design, arrangement and structure, but that many which are externally similar and are situated upon adjoining lands, are essentially different in the quality and finish of the materials used and in the character of the workmanship employed upon them. It must follow that such differences contribute in varying degrees to the enhancement in the value of the land, and we can think of no way in which they can be legally proved except by resort to testimony of structural value, which is but another name for cost of reproduction, after making proper deductions for wear and tear. This may be by no means a conclusive test as to the market value of premises condemned for public use. But that is not the question at issue. The question is whether evidence of structural value is competent to show market value, when the buildings are suitable to the land. There are instances, of course, when precisely similar buildings upon identical parcels of land may have the same potential market value just as the price of commodities like cotton, flour or potatoes is regulated by the law of supply and demand without reference to cost of production in particular cases. When that is true, the market value may be the value of the land as enhanced by the value of the buildings, without reference to structural value. But when a building has an intrinsic value, which must be added to the value of the land in order to ascertain the value of the whole, the owner may not be able to establish his just compensation unless he is permitted to prove the value of his land as land and the value of his buildings as structures. By adding to each other these two quantities the result is really the value of the land as enhanced by the buildings thereon.<sup>256</sup>

The court in that case was undoubtedly aware of the complex problems involved in the reproduction approach. The problems of adaptability, depreciation—functional and physical—and obsolescence are as difficult as they are elusive. A failure to weigh these factors properly

<sup>256</sup> *Id.* at 86-88, 91 N.E. at 278-79.



has often led to excessive or depreciated awards. Because of the danger of excessive awards, Orgel has suggested, and some courts have held, that reproduction data should be admitted only in the absence of comparable sales or evidence of earning power of the property.<sup>257</sup> The drawback that such a policy would have is that reproduction less depreciation would rarely be a permissible approach save for service or unique type of property. But the policy of admitting reproduction data despite the existence of alternative methods of valuation is not only the majority position, but one adhered to by appraisers who are well aware of the dangers inherent in this method of evaluation. If the expert is competent and has carefully done his work, these dangers are greatly minimized. The fear that the bias of experts is too formidable to overcome is apparently held by Orgel and others. We shall turn our attention to this factor in a subsequent study. For now, it is advanced that reputable appraisers consider this method often to be a valid approach to market value; at a minimum it can serve to check and support the other approaches to market value.

On this subject the opinion of Judge James M. Carter in *United States v. 70.39 Acres of Land*<sup>258</sup> is extremely interesting. In that case the court clearly held that comparable sales were the best evidence of value; and the court went on to reject reproduction data as direct evidence of value. As indicated before at some length, we are in disagreement with the rigid conclusion. Yet, the opinion with considerable candidness goes on to examine the propriety of admitting an opinion of value based on reproduction data though rejecting any elaboration or explanation of the manner in which the opinion was formed. Judge Carter writes:

Is it inconsistent not to permit defendants to put into evidence, the dollars and cents value of "reproduction cost," as bearing on fair market value, yet permit defendants to ask their expert generally, whether he considered this as a factor? We do not think so.<sup>259</sup>

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

Judge Carter supports his stand on arguments reminiscent of the pre-*Faus* era. He indicates how collateral matters will arise and how prolonged trials will become if such data is admitted into evidence. But these arguments were not only laid to rest in the *Faus* case but were likewise buried by Chief Justice Holmes with an appropriate epithet, "so far as the introduction of collateral issues goes, that objection is a purely practical one—a concession to the shortness of life."<sup>260</sup>

<sup>257</sup> 2 ORGEL 57.

<sup>258</sup> 164 F. Supp. 451 (S.D. Cal. 1958).

<sup>259</sup> *Id.* at 489.

<sup>260</sup> *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 943-44 (1887).

Judge Carter then adds that a detailed explanation of the expert's method regarding the reproduction approach would "prejudice" the jury. It is difficult to follow this reasoning but it obviously is based on the premise that anything but comparable sales is surplusage. The appraisal theory is not in accord.

It is advanced that statutory provision be made admitting into evidence on direct examination "the value of the land together with the cost of reproducing the functionally equivalent improvements thereon less whatever depreciation such improvements shall have suffered, functionally or otherwise, if such improvements are adapted to the land." This language is somewhat more restrictive than that contained in Senate Bill No. 1313. These further restrictions are, however, necessary; and the application of such restrictions should be handled by the court in the same manner as the court exercises its authority when dealing with the market data and capitalization approaches. The pretrial devices will need to be utilized to a considerable extent regardless of the approach, however. As indicated, a subsequent study will discuss methods of strengthening such pretrial practices.

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