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As this article points out, one of the most difficult problems of current condemnation law is the ascertainment of "just compensation" for partial condemnation. The author sets out in detailed analysis the peculiarities of California valuation practice in this area; what are legally compensable factors; when is a benefit considered special; will the court consider a general benefit; what is the effect of Code of Civil Procedure section 1248 requiring the jury to find separate values for the part taken, the damages, and the benefits before the court derives a total by combining the separate values? These and other problems as the offset of benefits against the value of the part taken lead the author to conclude that very often the value derived results in a windfall to the condemnee who receives more than the value of just compensation for the whole. The article exemplifies by review of important judicial decisions from California and other jurisdictions, the overwhelming confusion in the procedures used to determine the value of the part taken, the dam-

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ages and the benefits. Finally, in pointing up the need for reform in California, the author suggests consideration be given to the federal before and after rule as a guide to determine just compensation.

NATURE OF THE PROBLEM

The Constitution of the State of California provides that private property shall not be taken for public use without "just compensation" having been first paid to the owner.[1] However, the constitution does not seek to define what constitutes just compensation nor does it state how it shall be measured. This has been left to the courts and the legislature.[2] But where private property is taken for public use, it is universally agreed that the compensation required is to be measured in terms of "fair market value".[3]

The classic definition of fair market value is contained in *Sacramento Southern Railroad Company v. Heilbron.*[4] There the court held that fair market value is

> the 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.[5]

Thus, where an entire parcel of property is being taken, it becomes the function of the trier of fact to attempt to determine what the property would have sold for on the open market. Ordinarily, appraisers or other persons qualified to express such opinions are called by the respective parties, although by California statute the property owner himself is qualified to state an opinion.[6] At the conclusion of such a trial, the jury will merely be asked to provide its answer to the singular question of what constitutes the fair market value of the property.

All condemnation cases are not, however, this simple. A public agency does not always require a person's entire property, and when a

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[1] The California Constitution, article I, section 14, provides in part as follows:
> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into Court for, the owner . . . which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law. . . .

[2] Albers v. County of Los Angeles, 62 Cal. 2d 250, 269 (1965).

[3] Rose v. State of California, 19 Cal. 2d 713, 737 (1942); State of California v. Covich, 260 Cal. App. 2d 663, 665 (1968); CAL. EVID. CODE § 814.

[4] 156 Cal. 408 (1909).

[5] *Id.* at 409. It should also be observed that the 5th amendment to the United States Constitution, like the California Constitution, provides for "just compensation". Again this term is not defined, but the federal courts, like the California courts, have held that "just compensation" contemplates "fair market value". *See* Olson v. United States, 292 U.S. 246 (1933).

[6] CAL. EVID. CODE § 813.

property owner is left with a part of his property,[7] there is an entirely different and far more complex problem presented. Any attorney who practices condemnation law knows that although a total taking case may have its difficulties, it is the partial taking case that is likely to lead to interminable legal problems. And the majority of the difficult appraisal and legal problems which have been faced by the California appellate courts arise in these "partial taking" cases.

When only a portion of a man's property is taken, the determination of just compensation not only requires that attention be given to the part taken, consideration also must be given to the impact of the acquisition project on the part not taken. This is for the reason that the property owner is entitled to compensation for the total injury caused by removal of the part needed for the project which includes the effect that the project may have on his remainder.[8] Again, the standard is fair market value and the basic test is one of diminution in value.[9]

The analysis, however, can become quite complicated because the courts have long held that not all injurious effects may be considered. Certain types of depreciation in value have been held to be noncompensable. In *Rose v. State*,[10] the state supreme court rejected the rule, accepted in some states, that loss in value may be established by testimony relating to *any* factor which would make the property less desirable in the eyes of a prospective purchaser. An excellent summary of this area of the law and of some of the various types of noncompensable damages is contained in *Sacramento and San Joaquin Drainage District Ex rel. The State Reclamation Board v. Reed*.[11] There the court also discussed the effect that these rules have on the trial of a condemnation lawsuit. The court said that "translated into concrete rules of evidence, these concepts have been described in terms of restrictions on opinion evidence of market value."[12] The court went on to hold that a value opinion based upon depreciation attributed to legally noncompensable factors should be excluded and that where cross-examination reveals that loss-of-value testimony is based on noncompensable items, the testimony should be stricken.[13]

Similarly, not all beneficial features which may result from a pro-

[7] Such "portions" left to the property owner after partial takings by public agencies are generally referred to as "remainders".
[8] People v. Ricciardi, 23 Cal. 2d 390 (1943); Bauman v. Ross, 167 U.S. 548 (1897).
[9] Prople v. Ricciardi, 23 Cal. 2d 390 (1943).
[10] 19 Cal. 2d 713 (1942).
[11] 215 Cal. App. 2d 60 (1963).
[12] *Id.* at 64.
[13] *Id. See also* CAL. EVID. CODE § 822(e).

posed public improvement can be considered in determining the amount of the ultimate loss. Only "special benefits", those benefits which directly enhance the value of the property remaining after condemnation, can be offset. Those benefits which are "general"; benefits accruing to the community or the neighborhood as a whole, cannot be offset.[14]

It is thus apparent that attorneys, judges, appraisers and, of course, the lay jurors who must ultimately decide these cases, are faced with no easy task of analysis. They must continuously exclude from their thinking elements which may in fact affect market value, but which may not be considered in the final determination. To this already complicated undertaking must be added a requirement of California law which provides that in partial taking cases the value of the part taken, the damages to the remainder (called severence damages), and the benefits to the remainder, must all be *separately* determined. This is specifically provided for by Code of Civil Procedure section 1248[15] Under this rule, the loss to the owner's entire property cannot be determined by simply finding its fair market value before the condemnation and deducting therefrom its fair market value afterwards. Instead,

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[14] Beveridge v. Lewis, 137 Cal. 619 (1902); City of Hayward v. Unger, 194 Cal. App. 2d 516 (1961). In Unger, the court stated at 518:

> The bases for refusing offset of general benefits are usually stated to be the unfairness of charging only to condemnees benefits which accrue to the entire neighborhood or community, and the uncertainty and speculation involved in attempting to apportion such benefits.

The court also noted that the distinction between general and special benefits is by no means clearly drawn. For a more complete discussion of the differences see Sacramento and San Joaquin Drainage District v. W.P. Roduner Cattle & Farming Company, 268 Cal. App. 2d 199 (1968).

[15] *See* CAL. CODE CIV. PROC. § 1248, which provides in part:

> The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess:
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> 1. *Value.* The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;
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> 2. *Severance damages.* If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;
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> 3. *Benefits.* Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs. If the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken. If the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value. If the benefit shall be greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but the benefit shall in no event be deducted from the value of the portion taken.

separate values must be assigned to each element. When this is done, the jury's task is completed. The actual computation of the award is made by the court.[16]

It thus becomes the task of the jurors in a condemnation case to not only segregate the compensable from the noncompensable, and to differentiate between the general benefits and the special benefits, but they must also seek to divide the net loss into three separate compartments. Moreover, in so doing, they are told that they are to follow the fair market value standard, although their segregation of the various portions of the loss cannot be related to anything that happens in the real market place.

Therefore, it is not surprising that there has been some legitimate inquiry as to whether the present rules truly lead to findings of "just compensation" and as to whether there may be a need for reform.[17] The problems inherent in a partial taking case are sufficiently mind-boggling to scare the average practitioner away from the prospect of trying such cases. The result is that the field of condemnation law is being handled almost entirely by specialists. This, in itself, is obviously unfortunate, but of even greater concern is the fact that the handling of condemnation cases by specialists does not insure that these problems will be adequately understood and resolved by lay jurors.

Most certainly, not all of the problems in condemnation cases can be corrected by merely legislating them away. A just result would not follow from permitting a jury to consider any and all losses that may accrue generally to property merely because a portion of the property is needed for a public project.[18] And although the distinction between special and general benefits is "by no means clearly drawn",[19] no direct consideration will be given herein to the question of whether the law should be changed to allow *all* benefits to offset.[20] It is believed, however, that California unfortunately has become wedded to the concept that special benefits should not be offset against the value of the part taken. This led to the three-pronged analysis of compensation which has been at the root of many conceptual problems which have

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[16] Contra Costa County Water District v. Zuckerman Construction Company, 240 Cal. App. 2d 908, 909 (1966).

[17] *See, e.g.*, Gleaves, *Special Benefits in Eminent Domain; Phantom of the Opera*, 40 CAL. S.B.J. 245 (1965), State of California v. Wherity, 275 A.C.A. 279, 290 (1969).

[18] *See* Rose v. State of California, 19 Cal. 2d 713 (1942); People v. Symons, 54 Cal. 2d 855 (1960).

[19] City of Hayward v. Unger, 194 Cal. App. 2d 516, 518 (1961).

[20] This has, however, been suggested. *See* Haar and Hering, *The Determination of Benefits in Land Acquisition*, 51 CAL. L. REV. 833 (1963).

not been rationally resolved. Moreover, it is believed that this rule frequently leads to the payment of a greater amount than "just compensation", and that strong consideration should, therefore, be given to altering, through legislation, California's present rule as set forth in Code of Civil Procedure section 1248.

Development of the Concept

The basic purpose underlying the concept of "just compensation" in a total taking case is to replace the value of the real property taken with an equivalent value in the form of money. Likewise, in a partial taking case, the goal is to provide the owner with an award in money so that in the end he will have a sum of money which, together with his remaining real property, will have a combined value equal to the total value of the property he had before. He should not be left poorer, but neither should he be made richer. Thus, the basic concept is one which relates to the *entire parcel* of property.

This concept was expressed in *City of Los Angeles v. Harper*[21] as follows:

> The clear intention of the constitutional provision is that the owner of property taken under the power of eminent domain shall be made whole for his loss and shall be recompensed in an amount of money equal to the actual loss which he has suffered by reason of such condemnation. *It does not contemplate that such an owner may make a profit over and above the detriment, expressed in dollars and cents, that he has sustained.*[22] (Emphasis added.)

This same concept was also discussed in *United States v. Miller*,[23] where the United States Supreme Court held that "just compensation" requires payment to the property owner of an amount which will put him "in as good position pecuniarily as he would have occupied if his property had not been taken."[24] The court analyzed the situation as follows:

> Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings. One of these is that a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it.[25]

Of course, it is immediately obvious that in California, whenever the benefits from a condemnation project exceed the amount of damages,

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21 139 Cal. App. 331 (1934).
22 *Id.* at 334.
23 317 U.S. 369 (1942).
24 *Id.* at 373.
25 *Id.* at 375-6.

the property owner will end up with a *greater* total value than he had before, since benefits cannot be offset against the part taken. In such a case, the benefits thus constitute a windfall to the property owner to the extent that they exceed severance damages.

By way of comparison, under the federal rule, the test is simply one of deducting the after value of the property from its before value. The difference constitutes "just compensation" and special benefits are thus offset against both the value of the part taken and the severance damages.[26] The states are closely divided on the question of which rule is the proper one.[27]

The leading case in support of the federal "before and after" rule is the decision of the United States Supreme Court in *Bauman v. Ross*.[28] There the court fully explored the question of whether or not benefits should be offset against the part taken. The court stated:

> Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened.[29]

The court held that the amount of just compensation required by the constitution to be paid to the owner ". . . is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. . . ." The court said: "To award him less would be unjust to him, to award him more would be unjust to the public."[30]

It is important to note that the court in *Bauman* considered the concept of "just compensation" as not applicable solely to the property owner. The court specifically observed that the compensation for property must also be just ". . . to the public which is to pay for it."[31] The California courts have likewise held that the concept of "just compensation" means "just" not only to the person whose property is taken

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[26] Bauman v. Ross, 167 U.S. 548 (1897).
[27] *See* Yager, *Just Compensation*, RIGHT OF WAY, Dec., 1964, at 19; 3 NICHOLS ON EMINENT DOMAIN § 8.6206 at 90, et seq. (rev. 3d ed. 1965).
[28] 167 U.S. 548 (1897).
[29] *Id.* at 574.
[30] *Id.* at 574.
[31] *Id.* at 574.

but also "just" to the public which is to pay for it.[32]

Modern authority following the federal rule is found in a recent Kentucky decision, *Commonwealth of Kentucky, Department of Highways v. Sherrod.*[33] There the court reanalyzed its state constitution and declared certain legislative enactments, which had previously prohibited any offsetting of special benefits against the value of the part taken, to be unconstitutional. The court concluded that an owner's "property" is taken in condemnation ". . . only to the extent he has lost value."[34] The court also took note of the fact that many states (like California) permit benefits to be offset against damages but not against the part taken. The court said, however, that it could find ". . . no sense in this rule, because it simply means that benefits may be set off against loss of an *intangible* but not against loss of a *tangible.* The reality of the loss is the same in either case, so we can find no basis for the distinction."[35] The court ultimately concluded that prohibiting such an offset would actually violate the constitutional mandate of just compensation and concluded in favor of the "before and after" rule.[36]

Interestingly enough, California started out as a "before and after" state. Before the 1872 enactment of California Code of Civil Procedure section 1248, the California Supreme Court in *San Francisco; Alameda and Stockton Railroad Company v. Caldwell*[37] reached the same conclusion as was later reached by the United States Supreme Court in *Bauman v. Ross.*[38] The Court, in *Caldwell,* examined the arguments on both sides of the question,[39] and concluded that the reasons in support

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32 People v. Pera, 190 Cal. App. 2d 497, 499-500 (1961).

33 367 S.W.2d 844 (Ky. 1963).

34 *Id.* at 857.

35 *Id.* at 857.

36 *Id.* at 857. In a later case the Kentucky court in Commonwealth of Kentucky, Department of Highways v. Lawton, 440 S.W.2d 778 (1969), reinforced the Sherrod rule, by stating at 779:

> The simple point that this court has been trying to make clear is that "after" value is to be determined by the value features that the property *has* after the condemnation, not by the value features it *does not have*; the value is to be placed on what is *there*, rather than what is *not* there; the question is the value of what is *left*, not what was *taken away*. We are striving for a *positive* valuation instead of a *negative* one. (Emphasis by the court.)

37 31 Cal. 368 (1866).

38 167 U.S. 548 (1897).

39 San Francisco, Alameda and Stockton Railroad Company v. Caldwell, 31 Cal. 367, 374 (1866):

> On the one side it has been maintained that compensation to the extent of the value of the land taken must be made in all cases, without any deduction on account of any benefit or advantage which may accrue to other property of the owner, by reason of the public improvement for which the property is taken. [Citations Omitted.]
>
> In support of this view it is argued that the enhancement of the value of other property of the owner of the land proposed to be condemned to public use, which may by of the parcel of that taken, is merely the measure of such owner's share in the general good produced by the public improvement; and

of the view allowing benefits to be offset were "unanswerable". The court concluded that "just compensation" requires a full indemnity and nothing more.[40]

Following *Caldwell*, in 1879, article I, section 14, of the California Constitution was adopted. Although the 1879 constitution, like its predecessor, the 1849 constitution, continued to specifically refer to "just compensation", it also contained a specific prohibition against offsetting benefits in any case where a right of way was being acquired by any corporation other than a municipal corporation.[41] The present constitution still continues the prohibition against private corporations.

It has been suggested that the constitutional retreat from the *Caldwell* concept of "just compensation", insofar as private corporations were concerned, was aimed primarily at the railroads.[42] Indeed, it would appear that the reason California and other states departed from the simple "before and after" rule was a result of numerous railroad acquisitions during the latter half of the nineteenth century and a change in public attitude towards these private, profit-making corporations.[43]

The 1879 constitution did not state what the rule would be for condemners other than private corporations. However, Code of Civil Procedure section 1248, and its separate assessment requirement, had by 1872 already been enacted. Although it was generally assumed over the years that benefits could not be offset against the part taken under the statute, it was not until 1966 that the issue was squarely decided in *Contra Costa County Water District v. Zuckerman Construction Company.*[44] As this case pointed out, a 1964 Los Angeles Superior Court case had previously concluded that Code of Civil Procedure section 1248, as it then read, did not *specifically* prohibit off-

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why, it is asked, is not the owner in such case justly entitled to the increase in the value of the property thus fortuitously occasioned, without paying for it? His share in the benefits resulting may be larger than falls to the lot of others owning property in the same vicinity, and it may not be so large, and yet he alone is made to contribute to the improvement by a deduction from the compensation which is awarded him by sovereign behest as a pure matter of right, though others whose property may adjoin the public work are equally with himself benefited by it. On the other side it is maintained that the public is only dealing with those whose property is necessarily taken for public use, and that if the property of such persons immediately connected with that taken, but which remains unappropriated, is enhanced in value by reason of the improvement then, thereby the owners receive a just compensation for the lands taken to the extent of such enhancement, and if thereby fully compensated they cannot in justice ask for anything more. [Citations Omitted.]

40 *Id.* at 375.

41 *See* Yager, *supra* note 27.

42 *Id.* at 20. *See also* Note, *Benefits and Just Compensation in California*, 20 HASTINGS L.J. 764 (1969).

43 *See* Yager, *supra* note 27; 1 ORGEL ON VALUATION UNDER EMINENT DOMAIN § 7, at 40, et seq. (2d ed. 1953).

44 240 Cal. App. 2d 908 (1966).

setting special benefits against the part taken. But the appellate court in *Zuckerman Construction Company* decided that section 1248 could only be interpreted as prohibiting such an offset and that *Caldwell* was "in effect overruled" by the statute.[45] It is interesting to note that the legislature in 1965 also reacted to the Los Angeles Superior Court decision and amended subdivision 3 of section 1248 to specifically prohibit the offsetting of benefits against the part taken.[46] The amendment was enacted after the trial in *Zuckerman Construction Company*, but before the appellate court decision. The appellate court held, however, that the amendment did nothing more than restate the existing law.

Although California is presently committed to a rule requiring separate assessment, this does not necessarily mean that each element must be decided independently of the other. Code of Civil Procedure section 1248 may require that the trier of fact *assess separately* the value of the part taken but this does not mean that it has to be valued as a separate parcel. Since the basic concepts of just compensation are unaffected, it would still seem to follow that the "entire parcel" concept requires that the primary focus of the valuation testimony be on the effect that the condemnation has on the entire property.[47] Thus, in theory, the California rule should give the same result as the simple "before and after" rule—at least in those cases where there are no benefits or where benefits do not exceed severance damages.[48]

One of the leading handbooks on condemnation appraising[49] thus describes California as following a "modified before and after" rule.[50] Under this rule, the usual appraisal technique involves the following determinations:

(1) The fair market value of the entire property in its before condition.

(2) The amount of this total value attributable to the part taken.

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45 *Id.* at 912.

46 CAL. STATS. 1965, c. 51, p. 932:

> If the benefit shall be greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but the benefits shall in no event be deducted from the value of the portion taken;

47 *See* Napa Union High School District v. Lewis, 158 Cal. App. 2d 69, 72 (1958), where the court said at 72 quoting from 4 NICHOLS ON EMINENT DOMAIN § 14.1[2], at 494 (rev. 3d ed. 1962):

> The entire tract is considered as a whole and the effect of the condemnation and the projected use evaluated so that determination can be made of what he [the property owner] had prior to the proceeding and what he had left thereafter.

48 *See* 4 NICHOLS, supra note 47 at § 14,232[1].

49 G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK (rev. ed. 1963).

50 *Id.* at 97-99.

(3) The amount of this total value attributable to the remainder as part of the entire property in its before condition.

(4) The fair market value of the remainder in its after condition without regard to benefits, which, when deducted from (3) above, gives the amount of severance damages.

(5) Special benefits.[51]

Inherent in this procedure is the fundamental concept that, except where benefits exceed severance damages, the sum of the parts can never exceed the whole. In line with this concept, many cases have held that the part taken must be valued as a part of the whole.[52] It has similarly been held that severance damages are determined by ascertaining the market value of the remaining property in its before condition as a part of the whole.[53] Nevertheless, because of the requirement of separate determination, there is always a temptation on the part of lay jurors to forget the "entire parcel" concept of just compensation. And this fact, together with the fact that on occasion the California courts have likewise succumbed to this same temptation, has led to some considerable difficulties.

Problems in Separately Assessing the Value of the Taking

Theoretically, there are only two ways in which the part taken can be separately valued. First, it can be viewed as an independent parcel, as divorced from the whole. Second, it can be valued as a part of the whole.[54] Few courts following the California rule of separate assessment have adopted the first method.[55] As a practical matter, partial takings generally are of such unusual size and shape as to have little or no independent value. Nor can one ordinarily find comparable sales by which to judge such parcels. For example, a street widening may involve a parcel 3 feet wide by 100 feet long. Such a parcel cannot be given an independent value for it would not be salable as such. In fact, to do so would constitute a complete repudiation of the basic concept of

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[51] *Id. See also* Sacramento Southern Railroad Company v. Heilbron, 156 Cal. 408, 414 (1909).

[52] *See* City of Los Angeles v. Allen, 1 Cal. 2d 572 (1934); Napa Union High School District v. Lewis, 158 Cal. App. 2d 69 (1958); People v. Loop, 127 Cal. App. 2d 786 (1954); Hayward Union High School District v. Lemos, 187 Cal. App. 2d 348 (1960); City of Downey v. Royal, 215 Cal. App. 523 (1963). As Loop points out, this does not mean that the part taken must necessarily be valued as an *average* part of the whole, for differences in the relative value of different parts of the property must be considered. What is meant is that the value of the part taken will be based on that amount of the overall value attributable to the part taken.

[53] San Bernadino County Flood Control District v. Sweet, 255 Cal. App. 2d 889, 904 (1967).

[54] 1 Orgel, *supra* note 43, § 52 at 236. *See also* Schmutz, *supra* note 49, at 96-99.

[55] *But see*, State v. Carpenter, 89 S.W.2d 195 (Tex. 1936).

"just compensation" which looks to the impact of the acquisition on the entire property. Under an independent value approach, the sum of the parts would rarely equal the value of the whole and, in most instances, would add up to much less than the value of the whole.[56]

The California courts, like most other courts following the separate assessment requirement, have generally adhered to the entire parcel concept. As mentioned earlier, this has been done by attmpting to value the part taken as a part of the whole and this rule has been followed, not only to protect the property owner, but to protect the public as well.

A typical situation where the property owner would stand to benefit greatly under the independent parcel rule is where the utility of the property taken will be replaced on the part not taken. This frequently occurs when a street or highway is widened, moving the strip of more valuable frontage further to the rear. In fact, this very situation was of primary concern to the United States Supreme Court in reaching its decision in the *Bauman* case.[57] This also was the basic factual situation before the California Supreme Court in *City of Los Angeles v. Allen.*[58]

In *Allen,* the plaintiff city sought to condemn a strip of land for the purpose of widening Santa Monica Boulevard, a major street in Los Angeles. The defendant owned approximately 38.6 acres of land which was about 2,000 feet deep with 800 feet of frontage on Santa Monica Boulevard. The strip taken was about 33 feet deep. There was no attempt to value the parcel as if separately owned, the court observing a "tacit assumption on both sides that a piece of land of such slight depth could not be put to any very valuable use."[59] The case was tried by referees under the Street Opening Act of 1903. Testimoney was received that the frontage to a depth of 107 feet (which included the entire 33-foot depth taking) had a value of $1.64 per square foot. The back land was valued at $0.25 per square foot. Of course, in the after condition, the remainder still had the same 107 foot depth of more valuable frontage—it had just been shifted rearward on the property. There was no claim for severance damages to the remainder and hence the *sole issue* was the fair market value of the part taken.

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56 *See* 1 ORGEL, *supra* note 43, § 52 at 236-7.

57 Bauman v. Ross, 167 U.S. 548, wherein the court observed by way of example the following at 574-5:

> If, for example, by the widening of a street, the part which lies next to the street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part, and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself, nor required by the Constitution, that the owner should be entitled both to receive the full value of the part taken, considered as front land, and to retain the increase in value of the back land, which has been made front land by the same taking.

58 1 Cal. 2d 572 (1934).

59 *Id.* at 574.

The referees awarded $8,614.00 based upon the value of the part taken as a part of the entire tract. The referees used an average value of $0.32 per square foot. The gist of the property owner's argument on appeal was that he should have been awarded $1.64 per square foot. He argued that shifting the frontage strip further back on the remainder might have resulted in a special benefit to the remainder, but this could not offset the value of the part taken. The supreme court, however, rejected this argument and, in so doing, made the following analysis:

> Assume the aggregate value of the land as an entire tract before the taking computed at 32 cents per squre foot to be $500,000, after the taking the appellant retains acreage of the value of $491,386, plus $8,614, the damages awarded, which together make it whole. That is, after the taking the appellant still has the equivalent of $500,-000. Should the appellant prevail in its contention that it is entitled to $43,952, instead of $8,614, it would have the value of the retained portion, or $491,386, plus $43,952, which would leave it in possession of $35,338 more than it had originally.[60]

The court further held that the ultimate question before the referees, and the only question they were authorized to answer, was "What is the value of this parcel of land, as it lies before us, being part of an undivided tract under single ownership?"[61]

It thus appears that, as of the time of the *Allen* case, California was still committed to the entire parcel concept wherein the sum of the parts should not exceed the value of the whole—with the singular statutory exception of where special benefits exceed severance damages. But any such conclusion is no longer valid for in *People v. Silveira*,[62] the court partially adopted the rule permitting independent valuation of the part taken.

In *Silveira*, the trial court directed the jury to determine whether part of the defendant's tract taken (approximately 9 acres from a total of 260 acres) "had a greater value considered as a *separate* and *distinct* piece of property *disconnected* from the remainder of the tract or when considered as a fraction or part of the entire tract, and to take the higher market value."[63] The appellate court affirmed and this ruling

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60 *Id.* at 576-7.
61 *Id.* at 575.
62 236 Cal. App. 2d 604 (1965).
63 *Id.* at 616. The actual instruction given read as follows:
You must determine whether it has a greater value considered as a separate and distinct piece of property disconnected from the remainder of the tract, or whether the part taken has a greater value considered as a fraction or part of the entire tract. You must then select from those two valuation methods whichever one of the two produces the higher and greater market value, and

has subsequently been followed.[64] The court concluded that the "value as part of the whole" concept was a rule designed "to protect the condemnee", and that since it was "obviously for the condemnee's benefit", the jury should be allowed to consider the value of the part taken as an independent parcel if this would result in a higher valuation.

This results in a new situation in California where a property owner will be left with a greater total value "after" than he had "before", in addition to the situation where benefits exceed damages. Attributing to the part taken an amount greater than its value as a part of the whole will necessarily lead to the sum of the parts *exceeding* the value of the whole. This sort of unjust enrichment was, of course, the specific thing which the supreme court in *Allen* was attempting to avoid. Although the court in *Silveira* attempted to distinguish *Allen* as "just and proper under the particular facts of that case,"[65] it would seem that the basic concepts in *Allen* and *Silveira* can only be viewed as diametrically opposed.

What effect *Silveira* will have on *Allen* is hard to say, but it has been suggested that *Silveira* has added a "new dimension" to partial taking cases.[66] The holding in *Silveira* obviously departs radically from the entire parcel concept and the "modified before and after" rule which had heretofore been followed in California and used generally by appraisers in appraising public acquisitions.[67]

This case has already created some serious problems in the California trial courts. Most California appraisers analyze values by following the previously mentioned procedure wherein the entire property is first valued, a value is then assigned to the part taken, and then values are assigned to the part not taken in its "before" and "after" conditions for

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make your awards accordingly. The landowner is entitled to the highest value.

[64] People *ex rel.* Department of Public Works v. Princess Parks Estate, Inc., 270 Cal. App. 2d 876 (1969), wherein the court held that the Silveira instruction embodied a correct statement of the law. In this case the jury was instructed that it was to value the part taken as a part of the whole and was *also* instructed in accordance with the Silveira independent parcel theory. The appellate court found no error in this inconsistency for the reason that apparently all witnesses considered that the parcel taken, viewed as an independent parcel, would have a lesser value. Thus, the court concluded that the jury was left with the single alternative of valuing the part taken as part of the whole and was not "misled or confused" by the Silveira instruction. This may be a correct legal assumption, but one can wonder if the average lay juror could really be expected to listen to such conflicting instructions and have any understanding at all as to what was expected of him.

[65] People v. Silveira, 236 Cal. App. 2d 604, 618 (1965).

[66] Clarke, *Easement and Partial Taking Valuation Problems,* 20 HASTINGS L.J. 517 (1969). *See also* Matteoni, *The Silveira Case and Reestablishment of the Higher Zone of Value on the Remainder,* 20 HASTINGS L.J. 537 (1969).

[67] *See* SCHMUTZ, *supra* note 49, at 97-99. *See also* Deer Valley Industrial Park Development and Lease Company v. State of Arizona, 5 Ariz. App. 150, 424 P. 2d 192, 199 (1967), which expressly rejected the holding in Silveira "as being unrealistic".

the purpose of determining damages. To follow *Silveira* means that on cross-examination it will be revealed that mathematically the value of the property remaining when added to the appraiser's figures for the part taken and severance damages will be more than the total value of the property he had placed on the property in the first instance. To avoid the unpleasantness of this sort of examination, an appraiser can sidestep the "modified before and after" analysis by simply testifying to severance damages in a lump sum. This is permitted.[68] But, unless his severance damages are limited to readily identifiable cost-of-cure items that are obviously not in excess of the otherwise loss in market value, he will be subject to cross-examination as to how he can determine a loss in value to property upon which he has placed no value.

Thus, a property owner's attorney or appraiser who seeks a higher total award by use of the *Silveira* instruction must be most careful. In fact, the instruction can backfire. For example, where the part taken is from a greater depth of valuable frontage (as in *Allen*), and where the construction of the improvement will also cause damage to a portion of the valuable frontage in the remainder (unlike *Allen*), use of the *Silveira* instruction might successfully secure a higher award for the part taken, but considerably less for damages. If we assume that this taking is for a highway widening, where a portion of the valuable frontage is being taken, but where a limitation on access will also impair the value of that portion of the more valuable frontage on the remainder, should the jury conclude that the part taken must be viewed as a separate and independent parcel, it may quickly conclude that the remainder must likewise be viewed as a separate and independent parcel. Viewed as such, the remainder would not have an area of valuable frontage to be detrimentally affected. In fact, viewed as such, the remainder would have no frontage at all. Severance damages would be nonexistent.

Another problem which has been encountered with *Silveira* relates to the admissibility of sales. By statute in California, the price at which other property is sold is admissible in evidence if the sale property is first determined to be "comparable" to the "property being valued."[69] *Size* is a specified factor in determining comparability. Obviously, the "property being valued" under the independent parcel approach is *not* the entire parcel but is, instead, the part taken. However, for the purpose of determining severance damages, the "property being valued" can only refer to the remaining property. When the size of the remainder is disproportionate to the size of the

[68] People v. Ricciardi, 23 Cal. 2d 390 (1943); San Bernardino County Flood Control District v. Sweet, 255 Cal. App. 2d 889, 904 (1967).

[69] CAL. EVID. CODE § 816.

part taken, application of the new rule would seem to require the consideration of one set of sales for use in valuing the part taken, and an entirely separate set of sales for analyzing the damages to the remainder. This result, should it become established law, can only lead to lengthened trials and added jury confusion.[70]

Fortunately, the independent parcel rule will not have wide application for it does not generally benefit the property owner. Most condemnations will thus be tried on a "value as a part of the whole" theory. But where this theory is followed, there are still many possibilities of jury confusion. As stated by one author: "If the 'value of the part taken' includes some allowance for its value as a part of the entire tract, what elements of damage are *not* thus included, so that they must be allowed for in a separate award of 'damages to the remainder'?"[71] Thus, if a backyard is removed from a parcel of residential property, it will be given a value because of its use in connection with the remainder. If the jury at the same time assesses damages to the remainder for loss of the yard, double compensation obviously results. If the jury makes a legitimate effort to divide the loss between the part taken and severance damages, the question becomes —how does one as a practical matter segregate such a loss?

This problem can be particularly acute where only an easement, such as for a power line, is being taken. In this type of case, the property owner will be left with the full use of his property, subject only to whatever burdens may be imposed by the construction and use of the easement. Logically, the net diminution in the value of the owner's entire tract resulting from imposition of the easement should be the measure of compensation.[72] But this, of course, is not in accord with the separate assessment requirement of Code of Civil Procedure section 1248. Such a problem was faced in *Pacific Gas and Electric Company v. Hufford.*[73] There the jury was provided with a verdict form which required that it separate the net loss between the part taken and severance damages.[74] The jury was instructed that in assessing severance damages, it was to consider the effect of the construction on defendants' *entire tract of land.* On appeal, the condemner asserted that

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[70] That this is already the law is suggested in Clarke, *Easement and Partial Taking Valuation Problems,* 20 HASTINGS L.J. 517, at 532 (1969).

[71] 1 ORGEL, *supra* note 43, § 52 at 241.

[72] *See* Taylor, *The Right to Take—The Right to Take the Fee or Any Lesser Interest,* 1 PAC. L.J. 555, 574 (1970).

[73] 49 Cal. 2d 545 (1957).

[74] *Id.* at 550:

We, the jury in the above entitled case, find:

1. That the market value of the easements taken by plaintiff is — dollars.
2. That the severance damage to the remainder of defendants' property is — dollars.

severance damages applied only to the remaining lands outside the right of way limits of the easement; that the loss in value to the easement area itself constituted the take; and that hence the trial court's instruction permitted the jury to assess damages to the easement area twice, resulting in double recovery.

The court concluded that "in a strict definitive sense,"[75] the value of the part taken is measured by the loss in value of the land under the easement, whereas severance damages relate to the loss in value to the remaining lands outside the easement. However, the court felt that since the defendants' witness used *both* the total "before and after" method as well as the separate assessment method, and correlated his figures to reach the same ultimate total, no prejudice resulted. Plaintiffs' witnesses also used both methods and the court concluded that the technical error was not likely to mislead the jury. It can legitimately be asked, however, why it should ever be necessary for the appraisers and jurors to be involved with the two appraisal methods when in reality the only question when an easement is taken is one of net diminution in value. Requiring what can only be viewed as an arbitrary breakdown between the value of the property taken and severance damages serves no purpose other than to technically comply with the code section and possibly to keep our already overburdened appellate courts busy with appeals such as that in *Hufford.*

Another illustration of how inextricably involved a case can be under the present rule is contained in *People v. Hayward Building Materials* Company.[76] There a conceptual problem was bound to develop because the parties *stipulated* to the value of the part taken and left the *sole* issue of severance damages to the jury. In this case, the entire property, consisting of a total area of 84,898 square feet, was used as a building materials plant and sales yard. The condemner took 18,992 sauare feet, together with certain building improvements essential to the overall operation. The parties agreed that the fair market value of the part taken, including improvements, was $42,520.00. Both parties thus faced a subsidiary question of whether the remainder in its "after" condition was or could be made capable of accommodating the continued function of a building materials plant and sales yard. All agreed that certain improvements located on the part taken would have to be rebuilt on the remaining parcel so that the business operation could continue.[77] Needless to say, the condemner, having paid

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[75] *Id.* at 554.
[76] 213 Cal. App. 2d 457 (1963).
[77] The complicated nature of the valuation testimony can best be understood by reference to the case itself.

for the improvements as part of the stipulated value, presented its case in a carefully guarded manner so as to prevent the jury from again compensating for their loss as part of the severance damage analysis. This was done primarily by focusing attention on the before value of the entire property. Thus, one witness placed the value of the entire property before the taking at $246,000.00, and deducted therefrom his value of the remainder property after the taking of $192,200.00. The difference represented the *total* reduction in value which the witness rounded out at $54,000.00. From this, the witness deducted the stipulated value of the land and improvements ($42,500) and gave the remaining balance of $11,500.00 as a severance damage figure. Of course, one of the factors considered by the witness in analyzing the after value of the remainder was the cost of the preparation of the remainder so as to accommodate the reconstruction of the improvements taken. But he allowed nothing for the replaced improvements themselves. To this, the defendant property owners objected on appeal. However, the appellate court concluded that the analysis by the plaintiff's witness was properly designed "so as to eliminate a double recovery."[78]

The *Hayward Building Materials Company* case thus serves well to illustrate the practical difficulties which so often arise in determining whether the real injury done—there the taking of improvements essential to overall property value—is to be resolved in the taking or damage determinations. The basic fallacy of the separate assessment rule is the underlying assumption that the overall loss can be logically divided and that market data can be applied in the analysis. Regardless of whether the "independent parcel" or "value as a part of the whole" approaches are used, the jury is still dealing with but a single injury to property which it must, as stated in a recent Arizona case,[79] somehow segregate into ". . . two measures of damages to be awarded —that for the parcel taken and that for the severance damages."[80] The Arizona court said:

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[78] *See* note 76 *supra*, at 468. For a similar problem in an out-of-state case, see Commonwealth v. Blanton, 352 S.W.2d 545 (Ky. 1961), which involved the taking of an apartment house parking lot. The court said at 547:

> It must be obvious, however, that if in valuing the land *taken* its use as a specific facility is considered, and the damages for the *taking* are thus computed on the basis that the owner is being deprived of that facility, the loss of the facility taken cannot be again considered as part of the damages to the remainder of the tract. It seems to us that the situation here is no different from that in Smick v. Commonwealth, Ky., 268 S.W.2d 424, where the landowner's garage was taken and paid for, and he sought to recover in addition the expense of building a new garage.

[79] Deer Valley Industrial Park Development and Lease Company v. State of Arizona, 5 Ariz. App. 150, 424 P.2d 192 (1967).

[80] 424 P.2d at 197.

> Though easy to express in words, the application of these words to the realities of the real estate market results in a breaking down of concepts, because in so attempting to separate the two portions of the property affected, appraisals are being placed on things not bought or sold as such in the market place.[81]

The problems involved under the separate assessment rule are largely avoided under the federal rule where the total loss, whatever it may be, is ascertained by computing the before value and by then deducting the after value. There is no need to segregate the loss into the value of the parcel taken and damage elements. Where special benefits are not an issue (and that is frequently the case), it seems clear that the federal rule provides a simpler method of reaching a proper answer even if one wants to preserve the "no set-off" rule for benefits. It certainly avoids the objection that a jury ". . . may include in 'damages to the remainder' a part of the very injury which it incorporates in 'value of the part taken.' "[82]

PROBLEMS IN SEGREGATING DAMAGES AND BENEFITS

Although the average appraiser or juror may have problems in attempting to separately analyze that portion of the total injury attributable solely to the part taken, an even greater problem is frequently encountered in attempting to assess severance damages apart from special benefits. The task will not generally be too difficult if physically different parts of the remaining property are affected differently. Thus, if one portion is cut off from street access, changing its highest and best use from residential to agricultural, and another portion is to be located on a new interchange, changing its highest and best use from residential to commercial, market data will ordinarily be available upon which to base a conclusion. But what does one do where the beneficial and damaging features cannot be readily segregated? They may be so interrelated as to be inseparable as a practical matter. Thus, the question often becomes one of determining when the damage analysis ends and the benefit analysis begins.

This is a problem that has long plagued appraisers in condemnation cases and existing law simply does not adequately answer the legitimate inquiry as to how to proceed. Assume, for example, that a parcel of land fronts on a highway and has access to it. Assume also that the highway is being converted into a freeway but that, as part of the proposed plan of construction, another access road such as a frontage road, will be constructed to serve the property. Does the appraiser simply

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[81] *Id.*

[82] 1 ORGEL, *supra* note 43, § 52 at 238.

look to the property in its before and after conditions and, in so doing, seek to determine the net increase or decrease in the value of the remainder as a result of the overall change in access? If he does so, is he failing to separately analyze benefits in violation of Code of Civil Procedure section 1248?

This very problem was faced in *People v. Anderson.*[83] There a portion of the remainder would have been landlocked by freeway construction, except for a newly constructed frontage road leading to it. One of the condemner's appraisers testified that the remainder, with the new access, would be specially benefited. Although the trial court judge had agreed to instruct on special benefits, he somehow overlooked the written instruction while charging the jury. Upon discovery of his oversight, he gave a somewhat vaguely stated informal instruction. The jury returned a zero verdict for special benefits and the condemner appealed asserting a failure to properly instruct.

The appellate court, in analyzing the issue, noted that ". . . when the only special benefit claimed is some part of the plan of construction *which lessens the severance damage,* an analysis of the wording of section 1248 will show that literal compliance therewith is difficult . . . ."[84] The court then concluded that if an appraiser's method for computing severance damages is to compare the "before" and "after" market values of the severed remainder, ". . . the arithmetical problem to be performed becomes an *impossible* one."[85] The court found, however, that it would not have to struggle "in the morass thus created and the dilemma thus presented."[86] All of the appraisers who testified had considered the mitigating effect of the frontage road in assessing damages.[87] The court felt that the jury also considered the value of the frontage road as a factor lessening damages, and thus gave full credit to its beneficial features. The court, therefore, was unable to find any prejudice.

Although the court expressly refrained from deciding the question, the *Anderson* case does imply that, despite the requirements of Code of Civil Procedure section 1248, separate analysis may not be necessary where the beneficial feature is constructed to lessen damages. What

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[83] 236 Cal. App. 2d 683 (1965).
[84] *Id.* at 696. (Emphasis by the court.)
[85] *Id.* at 696. (Emphasis by the court.)
[86] *Id.* at 697.
[87] *Id.* at 696:
In their "after" valuation they considered the value of the westerly remainder NOT in a landlocked condition which would have been its situation *but for the frontage road*; instead they considered its market value WITH the frontage road. Had they considered the value of land-locked land, the "after" value necessarily would have been zero, or nearly so, since the only access thereto would be by boat or helicopter. (Emphasis by the court.)

does one do, however, when the issues are equally interrelated but the mitigation aspect is not involved? Consider, for example, a most typical situation where a new freeway is constructed with interchanges and related access facilities through acreage land adaptable to residential subdivision purposes. Typically, the property owner will argue that freeway traffic greatly impairs the value of the remainder, or that it at least impairs the value of that portion of the remainder in immediate proximity to the freeway. The condemner, however, will likely argue that overall the freeway is most beneficial, opening up new access to the property and providing a new transportation facility which will greatly enhance the value of the remainder in the eyes of a purchaser desiring to develop the property. Indeed, the very increase in traffic complained of by the condemnee may be asserted as a benenficial feature by the condemner.[88] The initial battle lines will be drawn around the question of whether the damages are compensable,[89] and the benefits are special.[90]

If we assume, however, that the damaging aspects are compensable and the beneficial aspects are special, the question remains—must they be separately valued by the condemnation appraiser and must he place a separate dollar and cents figure on each element? If the appraiser attempts to do so, one thing is certain: When he goes into the market to undertake his investigation, the people he interviews will in all likelihood consider his questions as unrelated to anything that happens in the real market. One may compare freeway lands with nonfreeway

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88 *See* City of Hayward v. Unger, 194 Cal. App. 2d 516 (1961).

89 *See* City of Berkeley v. Von Adelung, 214 Cal. App. 2d 791 (1963) and People v. Presley, 239 Cal. App. 2d 309 (1966), indicating that damages from traffic resulting from fumes and noise are noncompensable as involving "general" damages. *But see* Pierpont Inn, Inc. v. State of California, 70 Cal. 2d 282 (1969) and City of Pleasant Hill v. First Baptist Church, 1 Cal. App. 3d 384 (1969), indicating that where construction *on the part taken* interferes with amenities which the property formerly enjoyed, such as freedom from noise, this may be a proper element for an appraiser to consider in support of his opinion of severance damages.

90 Improved access and transportation facilities have been held to result in special, rather than general, benefits. *See* People v. Edgar, 219 Cal. App. 2d 381 (1963), where the court said at 384:

> Benefits resulting from improved access and the better accommodation of transportation constitute special benefits for which an allowance by a jury in eminent domain is proper. [Citations Omitted.]

See also People v. Hurd, 205 Cal. App. 2d 16 (1962); People v. Bond, 231 Cal. App. 2d 435 (1964); and Sacramento and San Joaquin Drainage District v. W.P. Roduner Cattle and Farming Company, 268 Cal. App. 2d 199 (1968), wherein the court in fn. 2, at 205 quoted from NICHOLS, *supra* note 27, § 8.6203 at 68, as follows:

> There is a well-recognized distinction between general and special benefits. The former is what is enjoyed by the general public of the community, through which the highway passes, whether it touches their property or not. An improved system of highways generally enhances all property which is fairly accessible to it. But that which borders it, or through which it extends, has benefits by reason of that circumstance which are not shared by those which are not so situated.

lands, but how does one find a market reaction to just the detrimental aspects of such a freeway without regard to its beneficial aspects? If the appraiser seeks out a developer of similar acreage along freeways, and asks for his reaction as to only the detrimental aspects, he may be told that absent the freeway, the developer would not even be interestsed in the property. The appraiser, however, in logical pursuit of his elusive quest may inquire if the lands immediately adjacent to the freeway are of a lesser value. To this the developer may respond that lots fronting on the freeway may sell slower, or may even sell for less, and that he would, therefore, attribute a lesser value to this area. But this does not mean that such area is damaged. Nor does such a response answer the appraiser's question. The answer merely provides a comparison of values adjacent to the freeway in the *after* condition with values further removed from the freeway—*also in the after condition.* It may be that the developer is saying no more than that the entire property has been enhanced in value, but that the acreage further removed from adverse proximity factors will secure a greater degree of enhancement.

The appraiser, who needs to secure a comparison of values in the *after* condition with values in the *before* condition, will likely next ask a question designed to determine how much loss in value is caused to the area immediately adjacent to the freeway without regard to the beneficial effects of the freeway. But no matter how this inquiry is framed, to the developer, unfamiliar with the sophisticated analyses required in condemnation appraising, the question will undoubtedly sound like: "How much has this property been hurt by the freeway, but give your answer disregarding the freeway?" By the time the appraiser starts drawing a distinction between special and general benefits, the developer may decide that he no longer has time for such mental gymnastics.

A partial answer to the appraiser's predicament may be found in certain cases where it was concluded that if the after value of the remainder is equal to or greater than its before value, the proper conclusion is that there is simply no damage and consequently nothing to offset.

Thus, in *People v. Schultz Company*,[91] a case involving conversion of an existing highway to a freeway with an outer highway, all three of the plaintiffs' expert witnesses testified that when the freeway was constructed there would be no severance damages at all. They also testified that when so constructed there would actually be material benefits to the remaining land for which each witness gave his own individual appraisal. When asked to explain their opinions, each witness testified

[91] 123 Cal. App. 2d 925 (1954).

that construction of the freeway and outer highway would more than offset the loss of the present means of access to the highway. On appeal, it was argued that the witnesses failed to segregate severance damages from benefits in violation of Code of Civil Procedure section 1248. The appellate court explained that the witnesses testified to "no severance damages" and that they also testified there would be "some benefits". The court concluded that "[w]hen they testified that severance damages would be more than offset by benefits, they were testifying precisely as required by the section."[92]

It is hard to say what the result would have been if the appraisers had concluded that the beneficial features did not quite offset the damaging features and testified to a small net loss in value without separately analyzing damages and benefits. This question may, however, be answered by another case.

In *People v. Al. G. Smith Company Ltd.*,[93] the plaintiff sought to acquire a right of way in fee and access rights to the existing highway. The defendants made no claim for the value of the part taken and thus the sole question was loss in value to the remainder. The property owners would continue to have access to the highway through three separate 30-foot openings. In the before condition, the highway consisted of only two lanes with a "borrow pit" lying between the traveled way and the adjacent property. The property owners had to cross over culverts in order to secure access to their abutting land. The new highway would have improved traffic lanes with 8-foot shoulders. Moreover, a drop along the edge of the pavement on the old highway would be eliminated. Experts for the plaintiff condemner testified that in their opinion there was no damage by the taking of access and that "considering the size of appellants' tract the benefits from the new highway would offset any possible damage."[94]

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92 *Id.* at 936.

93 86 Cal. App. 2d 308 (1948).

94 *Id.* at 310. In so holding, the court relied on Collier v. Merced Irrigation District, 213 Cal. 554 (1931), which involved the taking of riparian rights pursuant to Code of Civil Procedure section 1248, subdivision 4, which specially provides for the deduction of benefits from "any damages awarded the owner." The jury was not required to separately assess benefits. The court held at 571-2 that the "only way to measure the injury done by an invasion of the riparian right is to ascertain the depreciation in market value of the physical property." The court concluded that "the only way to show that depreciation is to show the conseqences to the land from the construction and operation of the public works" and that in a case of this type, "it is impossible to separate or disregard the item of benefits in making up a verdict or judgment." The court thus upheld what in effect constituted an offset of benefits against the "take" noting at 572 that if the part taken were land, rather than an intangible right, and "had a physical independent existence . . . it would then be possible to disregard the item of benefits when appraising the specific property appropriated." But, of course, the impossibility contemplated by the court with reference to the impact of the construction would be equally applicable to a determination of loss in

The jury returned a verdict of zero severance damages. They were not asked to consider benefits because benefits, as a separate item, had not been testified to. As might be anticipated, the property owners argued on appeal that the condemner's testimony was improper. The appellate court, however, affirmed. It should be noted that, as in the *Schultz Company* case, the condemner's appraisers concluded that benefits outweighed damages. But the *reasoning* of the court in *Al. G. Smith Company Ltd.* would have been equally applicable to a reverse situation leading to a net loss figure, for the court said that the only way to measure the injury done was to "ascertain the depreciation in market value of the physical property from the construction and operation of the public improvement", and that "[i]n so doing, it is *impossible to disregard the item of benefits accruing to such land by reason thereof.*"[95] (Emphasis added.)

The *Al. G. Smith Company* case also states, however, that "[i]f the abutting land is not depreciated in market value, there is no legal injury and consequently no right to compensation."[96] Thus, the case is not entirely clear as to whether separate analysis of the beneficial features would have been required if the net result was some overall depreciation in value. But what was viewed as impossible in the first instance would be equally impossible in the second.

In reaching its decision, the court, in *Al. G. Smith Company*, relied on an 1892 New York case, *Bohm v. Metropolitan Elevated Railway Company*,[97] which serves well to illustrate that the complexities of the problem are not new to condemnation law. *Bohm* involved the taking of easements of light, air and view by the construction of an elevated railway. The appellate court concluded that the easements as such were of nominal value and that the real issue was that of damages to the remainder. The trial court, sitting without a jury, had been requested to make findings that the benefits from the construction resulted in an overall increase in value. The trial court refused such findings and the appeal followed. The appellate court agreed with the railroad's assertion that the evidence of increase in value was uncontradicted and went on to consider whether the beneficial features which caused such increase should have been considered below. In reversing, the court made the following observation:

> If the taking by the railroad actually had the effect of en-

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value to the remainder, and a separation of damages from benefits whether the take be tangible or intangible.

[95] 86 Cal. App. 2d 308, 311.

[96] *Id.*

[97] 129 N.Y. 576, 29 N.E. 802 (1892).

> hancing the value of the remaining land, the inquiry as to the amount of loss that might otherwise have been occasioned (if there had not happened to be the actual benefit) would be the purest guess and speculation in the world, and, even when arrived at, would be but proof of what might have happened if something else had not occured which prevented it, and caused the contrary to happen.[98]

The court went on to hold that the case did not involve offsetting injury against benefits, but instead involved a process of "discovering whether in reality there has been any injury" at all.[99]

As one might expect, the property owners in *Bohm* argued that the increase in value reflected general benefits as well as special benefits. Thus the court went on to consider a question, neither raised nor decided in *Al. G. Smith Company*, as to whether there is a legal injury if, notwithstanding the adverse features of the project, the remaining land will increase in value due to general benefits. In other words, must the appraiser seek to determine what the damage would have been, absent the general benefits? The court stated that it was "wholly unable to see the least materiality" of the distinction between general and special benefits as applied to the facts before it, and concluded that if there would be no loss in value, there could be no injury. The court said that any inquiry as to "whether the land would have been injured if certain circumstances had not occurred, which not only prevented such injury, but enhanced its value, is wholly immaterial."[100]

The extent to which the reasoning of this case finds application in California law is hard to say. But the logic of the case in holding that a property owner is not entitled to damages where his remaining property is actually increased in value cannot be denied. However, in *Pierpont Inn, Inc. v. State of California,*[101] the supreme court, quoting from its earlier decision in *Beveridge v. Lewis,*[102] implied that reducing severance damages by *general* benefits would deny equal protection of the law. But the question raised by *Bohm* is whether there is any damage at all to be offset.

In any event, it does appear that under the *Anderson, Schultz Company* and *Al. G. Smith Company* cases, the California appraiser does not always have to separately analyze the damaging and beneficial features of a project. But the question of when and under what circumstances he is required to do so is far from clear. An additional, and

98 29 N.E. at 805.
99 29 N.E. at 806.
100 *Id.*
101 70 Cal. 2d 282, 296 (1969).
102 137 Cal. 619, 625 (1902).

perhaps more important question, is that of what can be expected of the jurors when different appraisers adopt different approaches, and the jury must somehow be expected to resolve them. The existing state of the law obviously does not provide answers.

By way of comparison, it is interesting to note that no such complexities have occurred in inverse condemnation cases—at least where no taking is involved.[103] Although it has been said that the "principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action,"[104] the courts have generally disregarded the rule requiring separate analyses of damages and benefits in this type of case.[105]

CONCLUSION

As late as 1965, the California Legislature reinforced the California separate assessment requirement by amending Code of Civil Procedure section 1248 to specifically prohibit offsetting benefits against the part taken.[106] It should not be assumed, however, that this amendment represented anything more than a desire to maintain a status quo with regard to what most persons had assumed to be the rule all along.[107] In fact, at the time, the California Law Revision Commission, at the direction of the legislature, had commenced an overall study of condemnation law.[108] The Commission has completed considerable work in the field, but has yet to make specific recommendations regarding val-

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103 Article I, section 14, of the California Constitution, unlike the 5th amendment to the United States Constitution, requires compensation for the taking *or damaging* of private property. Thus where construction of a public project interferes with a legally recognized property right, the owner may have a remedy against the public agency whether or not there has been an actual taking. *See* Albers v. County of Los Angeles, 62 Cal. 2d 250 (1965). Such cases are typically called inverse condemnations.

104 Breidert v. Southern Pacific Company, 61 Cal. 2d 659, n. 1 at 663 (1964).

105 *See* Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California,* 16 U.C.L.A. L. REV. 491 (1969), wherein it is stated in n. 96, at 516:

> It is recognized that absent a partial taking . . . the California inverse decisions seldom discuss the benefit problem, since special benefits are ordinarily assimilated into evidence relating to the extent of claimed dimunition of value without the need for separate identification. [Citations Omitted.] . . .
>
> Consistency suggests the appropriateness, in inverse cases where differences in result might be significant, of seeking to isolate special from general benefits so that the latter may be excluded from the computation of compensation. It should be noted, however, that the special benefit rule, in most applications, is beset with serious ambiguities and definitional uncertainties. [Citations Omitted.] These conceptual difficulties would be eliminated by replacing the present rule with one based on the federal 'before-and-after' test for compensable loss. [Citations Omitted.]

106 CAL. STATS. 1965, c. 51, p. 932, § 1.

107 *See* Contra Costa County Water District v. Zuckerman Construction Company, 240 Cal. App. 2d 908 (1966).

108 *See* Gleaves, *Special Benefits in Eminent Domain; Phantom of the Opera,* 40 CAL. S.B.J. 245 (1965).

uation. Hopefully, this will soon be forthcoming, for it is most apparent that there is a need to remove some of the braintwisting complexities from condemnation trials. As stated in the dissent to one recent case:[109]

> In this era of the law explosion no phase of judicial administration is more ripe for reform than eminent domain valuation. Trial judges, lawyers and appraisers are willy-nilly players in a supercharged psychodrama designed to lure twelve mystified citizens into a technical decision transcending their common denominator of capacity and experience. The victor's profit is often less than the public's cost of maintaining the court during the days and weeks of trial.

One aspect of the existing California law which should be carefully scrutinized is the separate assessment requirement. As shown above, such a requirement makes a demand on the average juror which he frequently is not capable of dealing with. On at least two occasions, our appellate courts have concluded that literal compliance with the requirement is "impossible".[110] As one leading writer in the field has stated, "it has caused the courts to demand of the juries . . . that they find a *tertium quid* that is simply non-existent."[111]

In a recent analysis of the problem in Arizona, the court, after analyzing the development of the law under a statute similar to the California statute, commented:

> it is no wonder that juries are presented with such variations in testimony that it is difficult to comprehend that the testifiers purport to be members of a common profession. Tremendous variations in verdicts thus result, making eminent domain litigation an attractive game of chance for those armed with the more imaginative and persuasive professional witnesses.[112]

It is, therefore, believed that strong consideration should be given to adoption in California of the federal before and after rule. The only possible argument against such a rule is that it permits an offsetting of benefits against the value of the part taken. But if "just compensation" is the goal, and if this concept means "just" not only to the property owner, but to the public taxpayer as well, there is no reason why the property owner should be compensated in an amount which will result in his making a profit at public expense. It is thus not surprising that

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109 State of California v. Wherity, 275 A.C.A. 279, 290, 79 Cal. Rptr. 591 (1969).

110 *See* People v. Anderson, 236 Cal. App. 2d 683 (1965) and People v. Al. G. Smith Company Ltd., 86 Cal. App. 2d 308 (1948).

111 1 ORGEL, *supra* note 43, § 52 at 238.

112 Deer Valley Industrial Park Development & Lease Company v. State of Arizona, 5 Ariz. App. 150, 424 P.2d 192 (1967).

the majority of commentators who have studied the problem have concluded that the federal rule is the better one even though it does result in benefits being offset against the value of the part taken.[113]

113 *See, e.g.,* ORGEL, *supra* note 43, § 52 at 238; Yager, *supra* note 27; Gleaves, *supra* note 17; Haar and Hering, *supra* note 20; Note, *Benefits and Just Compensation in California,* 20 HASTINGS L.J. 764 (1969).