Statutory Rules of Evidence for Eminent Domain Proceedings

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History of the Statute

CALIFORNIA'S bustling economy and surging population has brought about a need for land to accommodate new public structures of every kind, from freeways and schools to dams and aqueducts. The acquisition of property for the construction of public improvements by federal agencies, the State of California, and local entities has in recent years become a more frequent occurrence. General practitioners have thus become more involved in representing clients in condemnation matters. One area of specific concern has been the difficulty in determining the case law rules of evidence that are applicable to eminent domain proceedings.

Last year the California legislature partially codified and changed these case law rules by the enactment of sections 810-22 of the new California Evidence Code. At the same time, virtually the same provisions were added to the Code of Civil Procedure\(^1\) as an interim measure until the Evidence Code becomes operative.

The legislative history of the eminent domain evidence statute had its genesis at the 1961 legislative session when State Senator James A. Cobey introduced Senate bill 205, which was the product of the California Law Revision Commission.\(^2\) Although Senate bill 205 was
vetoed by the Governor, the Commission provided comments to the sections of this bill, which contained many of the provisions currently enacted in the Evidence Code. As there are no official Law Revision Commission comments or legislative committee comments attached to either the interim Code of Civil Procedure sections or the Evidence Code sections, the comments to Senate bill 205 may be helpful in determining legislative intent. On the other hand, the fact that some sections were either amended or omitted by the legislature indicates legislative intent to reject the Commission's recommendation.4

Application of the Statute

Evidence Code section 810 provides that Article 2, "Value, Damages, and Benefits in Eminent Domain and Inverse Condemnation Cases," is intended to provide special rules of evidence that are applicable only to eminent domain proceedings and inverse condemnation actions. Thus, other actions and proceedings involving the valuation of real property are still governed by case law.5 Appraisers and attorneys have two sets of rules for valuation of real property, depending upon the type of case involved. Confusion would seem to be the net result. It may be that the trial and appellate courts will want uniformity and may well follow the new evidence rules for all cases involving the valuation of real property. In any event, the Law Revision Commission and the legislature should consider legislation making the Evidence Code provisions applicable to all actions and special proceedings involving the valuation of real property.

Section 6, chapter 1151, statutes of 1965, provides that the new mission and the study by its consultant, the Los Angeles law firm of Hill, Farrer, and Burrill, is contained in 3 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES A5-A65.

3 Final Calendar of Legislative Business—1961 Regular Session 197. The primary reason for the Governor's veto of the 1961 bill was the numerous amendments to the bill in its passage through the legislature.

The same bill was introduced at the 1963 session of the legislature as S.B. 129, but not sponsored by the Law Revision Commission. Again, it was vetoed by the Governor.

Final Calendar of Legislative Business—1963 Regular Session 51.

4 In June of 1964, Pennsylvania enacted a comprehensive Eminent Domain Code. Sections 701 through 706 relating to evidence are in part patterned after the legislation originally proposed by the California Law Revision Commission. Pennsylvania decisions construing sections comparable to those in California should be helpful to the legal researcher.

5 E.g., actions or proceedings involving fraud, partition, probate, tax, depreciation allowances, sale of real property, damage to real property, insurance coverage of insured, real property conversion, trespass, property agreements in divorce actions, trusts, and breach of contracts dealing with real property.
rules of evidence in eminent domain proceedings do not apply to any action or proceeding that has been “brought to trial” prior to September 17, 1965.

The phrase “brought to trial” does have a somewhat fixed meaning by drawing on cases that have analyzed other statutes using the same phrase. Retrials and new trials are governed by the evidence rules applicable to the original trial.

Like all new enactments of the legislature, there will be instances where appraisers and attorneys who are not acquainted with the new legislation will be using appraisal reports prepared and completed before September 17, 1965. Where these appraisal reports contain data which is inadmissible under the new statute, e.g., the price paid by a condemnor in other eminent domain acquisitions, and the attorney uses such information on direct or cross-examination, there will be not only an objection to the question or a motion to strike the answer, but possibly a mistrial declared by the court.

There appears to be a conflict between section 6 of chapter 1151 and section 12 of the Evidence Code. Section 12 defines when a “trial is commenced,” whereas section 6 did not. Also, section 12 provides that a new trial or separate trial of a different issue commenced on or after January 1, 1967, is governed by the Evidence Code. In construing section 6 of chapter 1151, together with section 12 of the Evidence Code, it would appear that: (1) Case law will govern condemnation cases brought to trial before September 17, 1965. (2) Section 6 will

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6 An action is usually “brought to trial” when the first witness is sworn or the first exhibit is introduced into evidence on any issue in the case, or, in a jury trial, when the jury is impaneled. Adams v. Superior Court, 52 Cal. 2d 867, 345 P.2d 466 (1959); Bella Vista Dev. Co. v. Superior Court, 223 Cal. App. 2d 603, 36 Cal. Rptr. 106 (1963).


8 CAL. EVIDENCE CODE § 822(a).

9 CAL. EVIDENCE CODE § 12 provides: “(a) This code shall become operative on January 1, 1967, and shall govern proceedings in actions brought on or after that date and, except as provided in subdivision (b), further proceedings in actions pending on that date.

“(b) Subject to subdivision (c), a trial commenced before January 1, 1967, shall not be governed by this code. For the purpose of this subdivision: (1) A trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence and is terminated when the issue upon which such evidence is received is submitted to the trier of fact. A new trial, or a separate trial of a different issue, commenced on or after January 1, 1967, shall be governed by this code. (2) If an appeal is taken from a ruling made at a trial commenced before January 1, 1967, the appellate court shall apply the law applicable at the time of the commencement of the trial.

“(c) The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.”

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govern condemnation cases brought to trial on or after September 17, 1965. (3) Retrials or new trials of condemnation cases brought to trial before January 1, 1967, will be governed by the evidence rules applicable to the original trial. (4) The Evidence Code will govern condemnation cases brought to trial on or after January 1, 1967. (5) Although not free from doubt, it appears that retrials and new trials of condemnation cases on or after January 1, 1967, will be governed by the new Evidence Code.10

Appraisal Approaches to Valuation

The Evidence Code has given statutory recognition to the three generally accepted approaches or methods to arrive at an opinion of market value: (1) the sales approach; (2) the income approach; and (3) the cost or summation approach. All three approaches can now be the subject of testimony by a qualified witness on direct examination. Previously, the California courts did not permit an expert witness in an eminent domain proceeding to testify on direct examination about the capitalized value of the income from the property being condemned11 or about the cost less depreciation of replacing the improvements on the property being condemned.12 Until the decision of the California Supreme Court in County of Los Angeles v. Faus,13 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 of value.

The Comparable Sales Approach

Two sections of the Evidence Code—section 815,14 Sales of Subject

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10 Since the new rules of evidence in eminent domain proceedings are incorporated into the new Evidence Code, a court could well decide, for the sake of uniformity, that §12 of the Evidence Code is controlling over Cal. Stat. 1965, ch. 1151, §6, at 2907. The only serious type of case would involve the retrial or new trial on or after January 1, 1967, of a case originally brought to trial before September 17, 1965, because chapter 1151 provides that the case law rules are applicable, whereas CAL. EVIDENCE CODE §12 provides that the Evidence Code applies.

11 Stockton & C.R.R. v. Galgiani, 49 Cal. 139, 140 (1874).


14 CAL. EVIDENCE CODE § 815 provides: "When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation, except that where the sale or contract to sell and purchase includes
Property, and section 816, Comparable Sales—codify the sales approach to market value.

There are several noteworthy similarities, as well as differences, between the two code sections. Both sections, in addition to applying to a completed sale, are also applicable to a “contract to sell and purchase” the subject property or comparable property. Case law prior to the code followed this view. It should be noted that options to purchase the subject property or comparable property are inadmissible.

The second similarity is that the appraiser is allowed to take into account as a basis for his opinion not only “the price” but “other terms and circumstances” with respect to sales involving the subject property and sales of comparable property.

The differences between section 815 and section 816 are threefold. First, section 816 specifically states the elements or factors of comparability, whereas in section 815, Sales of Subject Property, there are no elements or factors of comparability, since the sale is a sale of all or part of the same property being valued. Secondly, section 816 codifies the rule stated in the case of County of Los Angeles v. Faus, insofar as it sets out nearness in location and similarity in character, situation, usability, and improvements as the elements of comparability. However, the Faus case did not specifically mention size as a factor in determining comparability. Size will now be a factor by the specific reference to it in section 816. The addition of this factor of comparability will prevent an appraiser from considering lot sales as comparable sales in his valuation of large acreages.

The third difference concerns sales made after the date of valuation only the property or property interest being taken or a part thereof such sale or contract to sell and purchase may not be taken into account if it occurs after the filing of the lis pendens."

15 Cal. Evidence Code § 816 provides: "When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued."

17 Cal. Evidence Code § 822(b).
18 48 Cal. 2d 672, 312 P.2d 680 (1957).
Both section 815 and section 816 provide for the consideration of sales "within a reasonable time before or after the date of valuation." A sale which occurs after the date of valuation is particularly relevant on the issues of severance damage and special benefits. However, section 815 provides that where a sale of the subject property occurs after the filing of the lis pendens and includes only the property being taken, or part of the property being taken, it cannot be taken into account by the witness as a basis for his opinion. The reason such sales are excluded is that the purchaser is in effect "buying" a lawsuit and speculating on the eventual award. The elimination of such sales should shorten condemnation trials by removing an item of evidence which is highly collateral and a generator of unnecessary rebuttal evidence. This exception does not apply where the remainder is sold alone or is sold with the part taken. These sales are admissible even if they occur after recording of the lis pendens, since they are not sales of "only the property or property interest being taken or a part thereof."

Since the Faus case there was some uncertainty as to whether evidence of comparable sales is direct evidence of value upon which the trier of fact may base a finding or verdict, or whether such evidence is received merely to explain and substantiate opinion evidence. The practical effect of this uncertainty was that trial judges had made con-

985, 50 Cal. Rptr. 859 (1966); Covina Union High School Dist. v. Jobs, 174 Cal. App. 2d 340, 349-50, 345 P.2d 78, 84 (1959). In the Ski Club case the trial was had prior to the effective date of the new statute, although decided afterwards without reference to CAL. EVIDENCE CODE § 816 or CAL. CODE CIV. PROC. § 1271.2 (the interim statute).

20 CAL. CODE CIV. PROC. § 1249 provides that the date of valuation is the date of issuance of summons except where the case is not tried within one year, in which case it is the date of trial unless the delay was caused by the property owner.

21 CAL. CODE CIV. PROC. § 1243 was amended by Cal. Stat. 1963, ch. 70, § 1, at 698, to refer to recording instead of filing of the lis pendens at the commencement of an eminent domain action. Similarly, CAL. EVIDENCE CODE § 815 should be amended to refer to recording instead of filing.

flicting 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 have been used by an expert valuation witness. The Law Revision Commission Recommendation on Evidence in Eminent Domain Proceedings sheds some light on this subject.

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.23

The recommendation of the Law Revision Commission was confirmed by section 813(a), which confines direct evidence of value to opinion testimony, and by the provision in sections 815 and 816 that permit evidence of price only as a basis for the witness' opinion.

Another aspect of this same problem that has been bothersome to trial judges concerns Evidence Code section 813(a). That section provides that "the value of property may be shown only by the opinions of" qualified witnesses and the owner of the property.24 The problem was whether this section meant that the trier of fact could only make a finding or render a verdict on the exact figures presented by the testimony of each qualified witness or whether he could make a finding or render a verdict within the range of the figures presented by the testimony. The logical construction of section 813(a) is that the findings or verdict need not be exactly the same as the appraisal figures of a qualified witness, but must be within the range of figures supported by the testimony. The basic reason for this construction is

23 3 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES A6.
24 CAL. EVIDENCE CODE § 813(a). (Emphasis added.)
that section 813(b) provides for a jury view of the property "for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony given . . . ." Giving weight to the view of the property by the jury and its right to judge credibility, disbelief of the plaintiff's valuation witnesses would naturally produce a higher value, while disbelief of defendant's witnesses would produce a lower value and thus be within the range of the valuation figures testified to by the witnesses.25

Cost Approach

The cost approach, or more accurately the summation approach, to arrive at an opinion of market value is detailed in Evidence Code section 820. This section permits the valuation witness in forming his opinion of the value of the improved property to consider, when relevant, a summation of the cost less depreciation of the improvements plus an opinion of the value of the land. If the expert bases his opinion upon a consideration of a summation study, he is permitted to state the details of the study on direct examination. This section represents a change from prior California case law.26

Section 820 specifically limits the use of the summation approach to situations where "the improvements enhance the value of the property or property interest for its highest and best use." Therefore the summation approach is irrelevant and cannot be used where the "existing improvements" do not enhance the value of the property for its highest and best use. Evidence Code section 821 provides that the witness may consider the nature of the improvements on properties in the general vicinity and the character of existing uses to determine the highest and best use of the subject property. Thus, the appraiser's opinion of the highest and best use of the land has to be consistent with the use of the existing improvements. Since the summation approach consists of an opinion of land value plus the cost of the improvements, the comparable sales used to arrive at an opinion of land

25 The range of testimony concept is compounded by the fact that in a partial taking case the appraiser testifies to three figures: the value of the part taken, the severance damage, if any, and the special benefits, if any. The benefits are offset by the court against the severance damage but not against the value of the part taken. Cal. Code Civ. Proc. § 1248. Thus, the high range of testimony is the highest value of the part taken plus the highest severance damage figure as offset by the lowest special benefits figure. The low range of testimony is the lowest value of the part taken plus the lowest severance damage figure as offset by the highest special benefits figure.

value necessarily have to be based on a use consistent with the exist-
ing use of the property.

The statute assumes that the normal and customary appraisal rules
can be used by the witness in determining the depreciation or obso-
lescence the "existing improvements" have suffered.

Section 820 uses both the words "replacing" and "reproducing"
interchangeably. This use may reflect the fact that these words have
been used interchangeably by the courts without a thoughtful analysis
of their different meanings. These terms have been defined differ-
ently by appraisal authorities, a deviation which could lead to widely
varying figures where the appraiser does not give proper recognition
to obsolescence. In appraisal practice, reproducing means to dupli-
cate the same actual improvement as originally built. Replacing means
to replace the functional equivalent of the improvement. For very old
buildings the replacement technique is normally used, and for new
buildings the reproduction technique is normally used.

Income Approach

The income approach to an opinion of fair market value is codified
in Evidence Code section 819. That section provides that a qualified
witness may take into account as a basis for his opinion of market
value the capitalized value of the reasonable net rental value attrib-
utable to the land and existing improvements. The section goes
on to exclude from the capitalization process the income or profits
attributable to the business conducted on the land.

The key phrase in section 819 is the "reasonable net rental value." The
use of the word "reasonable" means that the actual net rental of
the subject property cannot be capitalized, but it may be considered
by the witness in arriving at an opinion of reasonable net rental value
pursuant to section 817. The word "net" is not defined and will pre-
sumably have its customary meaning in appraisal practice.

As pointed out above, section 819 excludes the capitalization of in-
come or profits from a business conducted on the subject property.
This provision is qualified by the last sentence of section 817, which
allows a witness to take into account a so-called "percentage lease" on

29 The distinction between income from the property and income from a business
conducted thereon is patterned after existing law. See People v. Dunn, 46 Cal. 2d 639,
287 P.2d 964 (1950).
the subject property only for the purpose of arriving at his opinion of the reasonable net rental value. A percentage lease is described in the section as a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property.

In addition to leases on the subject property, section 818 allows a witness to consider the rent reserved and other terms and circumstances of a lease of comparable property in determining the reasonable net rental value. No exception is made for allowing a witness to consider a percentage lease on comparable property. In fact, section 822(f) precludes a witness from directly capitalizing the income or rental from property other than that being valued.

The capitalization process, though contained in and limited by four different code sections, is essentially the capitalization of the reasonable net rental income that the property should produce. The appraiser cannot capitalize the actual rental income or profits either on the subject property or comparable property. To summarize, the appraiser, in order to arrive at an opinion of reasonable net rental value, may consider: (1) The rent from the subject property. (2) The rent from a percentage lease on the subject property. (3) The rent from comparable property. He cannot consider: (1) The profits from a business on the subject property. (2) The income from a hypothetical improvement on the subject property or comparable property. (3) The rent from a percentage lease on comparable property. (4) The profits or income from a business on comparable property.

Matters the Appraiser Can Consider

Evidence Code section 81430 states the general rule concerning other matters which a qualified witness can consider in arriving at an opinion of value.31 Such matters must meet the following four statutory criteria: (1) The matter was perceived by or personally known to the witness, or made known to him at or before the hearing, whether it is admissible or not. (2) The matter is of a type that reasonably may be relied upon. (3) The matter is of a type that a willing

30 CAL. EVIDENCE CODE § 814 is substantially the same as CAL. EVIDENCE CODE § 801(b). This redundancy should be eliminated by a repeal or amendment of § 814.

31 The term “matter” is defined in the comment of the Law Revision Commission with respect to Division 7 of the Evidence Code as “facts, data, and such matters as a witness’ knowledge, experience, and other intangibles upon which an opinion may be based.”
purchaser and a willing seller would take into consideration. (4) The matter is not one which the witness is precluded by law from using. The above criteria, although stated in general terms, have specific application to various aspects of testimony by expert valuation witnesses.

The first and second criteria allow a witness to base his opinion upon various matters, whether or not he has personal knowledge of them. Thus, the hearsay rule does not prevent a qualified witness from stating the matter upon which his opinion is based, except when the hearsay is unsupported and unreliable. The court has had this inherent power to prevent the use of such testimony. The application of this rule can create some difficult problems in a condemnation case. For instance, comparable sales data is usually obtained by the appraiser from the buyer or seller, or their real estate broker, and is usually used by the witness as reasonably reliable data. This would not be so if the witness obtained his sales data from a stranger to the transaction. More difficult is the situation where the appraiser computes the sales price by use of the Internal Revenue stamps on the deed. In that case it should not be considered as a reasonable reliance, because there are many reasons why buyers and sellers place additional Internal Revenue stamps on deeds.

The third criterion for consideration of other matters is based on a partial restatement of the definition of market value. It should be noted, however, that section 812 provides that the evidence provisions are not intended to alter or change the substantive law on "just compensation" or the meaning of "value".

The fourth criterion is an important limitation to prevent a witness from using inadmissible matter as a basis for his opinion, under the guise that it is a reason for his opinion or because a willing purchaser and a willing seller would take it into consideration. This same limitation is contained in Evidence Code sections 801 and 802, and is consistent with the rule in the condemnation case of People v. La Macchia.

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32 Law is defined in CAL. EVIDENCE CODE § 160 as including constitutional, statutory and case law.
The application of this last criterion prevents an expert from relying on the personal considerations of the owner, or the need of the condemnor to obtain the property, or injuries caused by the exercise of the police power, even though such injuries may actually influence market value. Without this fourth criterion, damages might be awarded indirectly for losses for which a property owner is not legally entitled to be compensated.

Matters the Appraiser Cannot Consider

Evidence Code section 822 lists six categories of matters upon which a witness may not base his opinion. The introductory paragraph to this section specifically states that each category listed is "inadmissible as evidence and is not a proper basis for an opinion as to the value of the property . . . ." This means that the excluded items are inadmissible for any purpose. Therefore, improper matters cannot come in on direct examination under the guise of showing the scope of the witness's investigation or to test the depth of his knowledge on cross-examination. Neither can such evidence be used to show highest and best use, possibility of zoning changes, or any other issue in an eminent domain proceeding or an inverse condemnation action.

Evidence Code section 803 states the procedure to be followed where an opinion is based on improper matter. This section requires the court, upon objection, to exclude an opinion that is based in whole or in substantial part on that which is not a proper basis for an opinion. Where the witness is required by the court to state the matter upon which his opinion is based before stating his opinion of value, and it is apparent from the direct examination that the matter is improper, an objection to the opinion is the means to exclude the testimony. However, if on cross-examination it appears that the opinion is based on improper matter, then a motion to strike the opinion of value is the means to exclude the testimony.

39 See CAL. EVIDENCE CODE § 802.
In order for an attorney to determine if the witness has improperly considered an inadmissible matter, the only question that the attorney can ask is whether the witness based his opinion on one of the following: assessed value, an offer, an option, or a condemnor purchase. The question cannot be framed by the cross-examiner so as to include the amount of the assessed value, the amount of the offer or option, or the price paid by the condemnor. The practice of "jamming in" inadmissible facts by a question on cross-examination is thus improper and could lead to mistrials, or at least to opening the door to a tremendous amount of collateral inquiry, which would merely confuse the jury.

The case of *Rose v. State* set forth the procedure for the types of questions that the cross-examiner must ask in order to move to strike out an opinion based on improper considerations. The cross-examiner was required to ask the appraiser whether he can segregate out in a dollar amount the inadmissible matter. If the witness cannot, then the motion is to strike the total dollar opinion of value. If the witness can segregate it out, the motion is to strike the dollar opinion of the inadmissible matter, leaving in the net figure which excludes that item.

The new procedure set forth in section 803 may have changed this practice. This section provides that the court *shall*, upon objection, exclude an opinion that is based in whole or in significant part on an improper matter. If there remains a proper basis for his opinion, then the witness may state his revised opinion, excluding the improper consideration.

**Condemnors' Acquisitions**

Subsection (a) of section 822 changed the law by excluding from any consideration the "price," "terms," or "circumstances" of sales of property to persons or entities that could have acquired the property by condemnation proceedings. Under prior law, such purchases could be used as comparable sales, provided it could first be shown that the transactions were voluntary. The Law Revision Commission succinctly stated the reason such sales should be excluded, as follows:

(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

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40 19 Cal. 2d 713, 733-34, 123 P.2d 505, 518-23 (1942).
41 The determination of what is a significant part is a matter for the discretion of the court. Cal. Evidence Code § 803, comment.
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.  

**Options, Offers and Listings**

Subsection (b) of section 822 clarified existing law which was somewhat ambiguous. In *Los Angeles City High School District v. Kita*, the court stated that offers were an unsatisfactory source of evidence because they were easily fabricated; and in *Pao Ch’ien Lee v. Gregoriou*, which was not a condemnation case, evidence of an offer for the subject property was allowed.  

This section now provides that the amount offered to buy, sell, list or option any property is inadmissible as evidence, and is not a proper basis for an opinion of value, with one exception. An offer, listing, or option price may be shown where it constitutes “an admission of another party to the proceeding.” The reference to “another party” would seem to include condemnor’s offers to settle an eminent domain proceeding, such as occurred in *People ex rel. Department of Pub. Works v. Forster*. However, Evidence Code section 1152 changes the rule of the *Forster* case and excludes such offered prices as well as any negotiation statements. Subsection (b) also limits the use of the admission to impeachment purposes, since it cannot “be used as direct evidence upon any matter that may be shown only by opinion evidence,” i.e. value of the property.  

The original Law Revision Commission recommendation stated the reasons for this rule: (1) Oral offers, often casually made, are generally unreliable since they are not binding in law, (2) written offers require collateral inquiry to determine if they were an accurate indication of market value or if they were influenced by personal reasons unrelated to market value, and (3) the offeror may not be before the court and subject to cross-examination.  

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43 3 CAL. LAW REVISION COMM’N, REPORTS, RECOMMENDATIONS & STUDIES A7.
46 Id. at 505, 326 P.2d at 137.
47 58 Cal. 2d 257, 23 Cal. Rptr. 582, 373 P.2d 630 (1962).
48 See CAL. EVIDENCE CODE § 1152, comment.
49 3 CAL. LAW REVISION COMM’N, REPORTS, RECOMMENDATIONS & STUDIES A7-A8.
Assessed Value

Under prior law, assessed value could not be used as evidence of the market value. However, a witness could be cross-examined on assessed value to test his knowledge of and familiarity with the property. But under subsection (c) of Evidence Code section 822, assessed value cannot be mentioned in questions and answers on direct or cross-examination.

Subsection (c) does not prohibit the witness from considering the "actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued." There should be no conflict between this provision and Revenue and Taxation Code section 4986(2)(b), which relates only to the mention of unpaid taxes.

The reason that assessed value is excluded is because it is merely another person's—the assessor's—opinion of its value. In some instances assessed value is not current and does not reflect market changes.

Opinion of Value of Other Property

Subsection (d) of section 822 codifies in part the existing case law which prevents a valuation witness from giving an opinion on property other than that being valued or condemned. This subsection, by its explicit wording, will prevent a witness from giving his opinion as to the breakdown between land and improvements of other property used as comparable sales. Evidence Code section 816 refers only to the "price and other terms and circumstances" of a sale of comparable property, and makes no mention of the separate value of land and improvements of comparable property, unless such separate values are stated as part of the "terms" of the transaction.

In support of this conclusion is the fact that Code of Civil Procedure section 1845.5 was repealed by chapter 1151, statutes of 1965. This section formerly allowed a witness to "consider and give evidence..."
as to the... value of the improvements... of properties in the general vicinity.”

**Noncompensable Items**

Subdivision (e) of section 822 requires that the witness exclude from consideration, in forming his opinion as to value, the influence of “any noncompensable items of value, damage or injury.” Evidence of value, damage or injury based on noncompensable elements is not a proper basis for an opinion under existing law.\(^5\) A similar statement is contained in Evidence Code section 814 and is reinforced by section 811, which provides that the article on eminent domain evidence does not alter or change the law interpreting just compensation value, damages, or benefits.

**Capitalization of Income from Other Property**

Subsection (f) of section 822 prevents the use of capitalized values of other properties in arriving at the value of the subject property. A witness is limited to utilizing actual comparable sales as permitted by Evidence Code section 816. A witness can, however, consider the actual rental income of other comparable properties for the purpose of arriving at a capitalization rate (i.e. by comparing that income with the property’s sales price) to be applied under Evidence Code section 819. To be consistent with Evidence Code section 819, a witness would have to compare the reasonable net rental value, as opposed to raw income or profits, with the sales price to arrive at his capitalization rate.

The rationale for excluding comparable capitalized values is based upon a balance of time consumption versus probative value. Opening this area of inquiry would require an examination or discovery of the business practices and accounting methods of each “comparable” business. This same objection is present in using comparable rental income to arrive directly at a capitalization rate; however, at least there is a sales price present, reducing the speculative nature of the evidence.

Conclusion

The enactment of the article in the Evidence Code on "Value, Damages and Benefits in Eminent Domain and Inverse Condemnation Cases" has not solved or ended the evidentiary problems for condemnation attorneys, appraisers, and trial judges.

As a general proposition, the codification tends to clarify this area of law. It has reduced to 13 sections what has been judicially determined in hundreds of decisions, dating back to the 1850s. For the appraiser and general practitioner who embarks into the specialty of eminent domain practice, it should provide a convenient legal and appraisal tool, easily available for ready reference. The science of appraising and appraisal practice, such as it is, cannot all be put into legislation. Only limited areas can be controlled by legislation. This was the approach taken by the Law Revision Commission and the legislature. Its worth has already been proven in assisting appraisers, trial attorneys and judges, under the interim Code of Civil Procedure provisions in effect until the Evidence Code becomes operative on January 1, 1967.