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Benefits vs. Money as Compensation in a Partial Taking.

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EMINENT DOMAIN—BENEFITS VS. MONEY AS COMPENSATION IN A PARTIAL TAKING

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Assume "A" and "B" own adjacent two-acre tracts. A new improved highway is constructed so as to bisect "A's" premises, resulting in a partial taking thereof of one acre. There is no partial taking of "B's" premises even though his land also abuts the new highway. Before announcement of the highway the market value of both "A's" and "B's" property was $1,000 per acre, but "due to the highway,"[1] the land's market value doubled, each acre now valued at $2,000. "A" now owns one acre with a market value of $2,000. Thus, it can be said, "A" has suffered no monetary loss.[2] Should "A" still be compensated for the one acre actually taken? The issue is complicated further when "B's" land is considered. None of "B's" land was condemned thus his two-acre tract is now valued at $4,000.

The answer involves a determination of whether benefits can be substituted for money compensation for the land actually taken. That is, whether benefits are to be deducted from both the *value of the land taken* and *the damages to the remainder*,[3] or *only from the damages to the remainder*.[4] If the former rule is applied, "A" will receive no monetary compensation, since his payment is the "benefit" of the increased market value of his property. Conversely, if the latter rule is applied, "A" will receive the market value of the property actually taken, although the benefits will be set off against any damages claimed to the remainder.

Contrary to popular belief,[5] both rules are applied in the United States. This comment is a comparative analysis of the application, theory and rationale of the rules for the setting off of benefits in the United States. Particular emphasis is placed on Texas law; not only to illustrate the majority rule in the United States, but also to awaken the Texas

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1 This indicates that the highway or public improvement for which the land was taken bestowed some benefit upon the property which is reflected in increased market value.

2 McCoy v. Union Elevated R.R., 247 U.S. 354, 365, 38 S. Ct. 504, 507, 62 L. Ed. 1156, 1166 (1918).

3 Arkansas State Hwy. Comm'n v. Welter, 471 S.W.2d 541 (Ark. 1971); Bauman v. Ross, 167 U.S. 548, 17 S. Ct. 966, 42 L. Ed. 270 (1897); United States v. 2,477.79 Acres of Land, 259 F.2d 23 (5th Cir. 1958).

4 State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted).

5 Burns, *Damages And Benefits From Constitutional Damaging And Partial Taking—Community or Special?*, in INSTITUTE ON EMINENT DOMAIN 119, 121 (1961).

lawyer to the fact that the *Carpenter*[6] "bible"[7] exists among a nation of atheists as well as Christians.[8]

Basic Rules of Valuation of Compensation in a Partial Taking

Irrespective of benefits, there are certain general rules which have been developed in the various jurisdictions for the determination of "just compensation" in partial taking cases. The award determined from these formulas is the award received by the condemnee *unless* benefits are involved. Whether or not the benefits, if any, must be set off or subtracted from the compensation awarded, and, if so, from what portion of the award, is a controversial question. The origin of this controversy, analogous to the base number and an exponent, is a product of the controversy and conflict surrounding the basic rules of determining "just compensation" in partial taking cases. Two formulas have been propounded:

(a) the value of the part taken plus damages to the remainder,[9] termed the *value plus* formula, and
(b) the difference in value before and after the taking,[10] termed the *before and after* formula.

Both formulas, although variations and modifications are frequent,[11] purport to determine the illusive "just compensation."[12] It is important to understand these formulas as a prerequisite to the understanding of the set-off of benefits rules.

Value of the Part Taken Plus Damages to the Remainder

This two-fold formula requires a separate determination for each element; the property actually taken by the condemnation, and the damages accrued to the remainder after the "taking."

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6 State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted).

7 City of Austin v. Cannizzo, 153 Tex. 324, 336, 267 S.W.2d 808, 816 (1954) (Justice Garwood's dissent).

8 The precedent established by the *Carpenter* decision has caused many Texas courts to view the rules therein as eternal verities. The impressive list of cases citing and following the *Carpenter* case bear witness to this view. When such a phenomenon as this occurs, there tends to evolve a false security around the precedent which, if unchallenged, suppresses any awareness of a contrary view.

9 1 L. Orgel, Valuation Under the Law of Eminent Domain § 64 (2d ed. 1953); Worsham, *Problems Peculiar To A Partial Taking In Condemnation*, in Institute on Eminent Domain 61, 74 (1959), also published in 13 Sw. L.J. 412 (1959).

10 1 L. Orgel, Valuation Under the Law of Eminent Domain § 64 (2d ed. 1953); Commonwealth, Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. Ct. App. 1963).

11 3 Nichols, The Law of Eminent Domain § 8.6206 (3d rev. ed. 1965).

12 U.S. Const. amend. V; Tex. Const. art. I, § 17.

The value of the part taken: Two methods have evolved by which this determination is made. The value of the part taken, in several jurisdictions, is considered as "severed"[13] land. In this context, the land is not valued as a part of the whole from which it was severed, but as a separate and distinct parcel of land.[14] This method has met with much criticism:[15]

> One does not have to talk with the appraisers very long to find out that they do not know how to actually appraise a small portion of land like that being taken as "severed land," because of the fact that in many cases the portion being taken is only ten or twenty feet wide and is not usable for any purpose whatsoever as a ten or twenty foot wide strip. . . . It is rather puerile for us to get ourselves into a corner which gives rise to an argument to the jury that they are to consider that land as though there was a wall between it and the adjoining piece of land that is remaining. We should not deal in fatuous distinctions.[16]

The other method utilized by the courts is to value the part taken as part of the whole tract from which it was severed.[17] A determination is made as to the value of the entire tract, and proportioned to the land actually taken.[18] Whether or not this value is distinguished from the damages to the remainder depends on the jurisdiction,[19] but it has generally been considered independently.[20] This theory, too, has its proponents and opponents:

> The danger in determining the amount of damages by the method used . . . here, that is, valuing the portion taken and adding it to the damages to the remaining land from the taking, is that the land taken may be valued as a portion of the whole, with consequential damages from the taking included, rather that as an independent entity, the result being a duplication of this element in the award.[21]

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[13] State v. Carpenter, 126 Tex. 604, 608, 89 S.W.2d 194, 196, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted); Bickley, *Statutory Changes In Eminent Domain Proceedings Now Under Consideration*, in INSTITUTE ON EMINENT DOMAIN 233, 242 (1959).

[14] State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted).

[15] Bickley, *Statutory Changes In Eminent Domain Proceedings Now Under Consideration*, in INSTITUTE ON EMINENT DOMAIN 233, 243 (1959); 3 NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6206 (3d rev. ed. 1965).

[16] Bickley, *Statutory Changes In Eminent Domain Proceedings Now Under Consideration*, in INSTITUTE ON EMINENT DOMAIN 233, 243 (1959).

[17] 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 53, at 251 (2d ed. 1953).

[18] State Hwy. Comm'n v. Hooper, 468 P.2d 540 (Ore. Ct. App. 1970).

[19] Morgan County v. Hill, 60 So. 2d 838 (Ala. 1952). *Contra*, Louisiana Power & Light Co. v. Lasseigne, 220 So. 2d 462 (La. Ct. App. 1969).

[20] 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 52, at 238 (2d ed. 1953).

[21] Sorensen v. Cox, 46 A.2d 125, 126 (Conn. 1946).

The damages to the remainder: These damages are termed "severance damages,"[22] and are usually determined by application of the "before and after" rule. The remainder before the taking is valued as part of the whole, and the remainder after the taking is valued by analyzing the "severance damages." Several distinct problems arise from this valuation technique. Not all damages are "severance damages" yet they may be reflected in the reduced market value.[23] The fall in the market value may be as difficult to determine and fictitious as the value of the part taken as "severed land."[24]

The danger of "double compensation" inherent in the *value plus* formula for determining "just compensation" draws the most criticism.[25] Since the landowner still owns a portion of the land, but is compensated for the portion taken, there can develop an overlapping of the values due to over-valuation, especially if the part taken is valued as part of the whole.[26] The value of the part taken, if considered as part of the whole, is often higher than if valued separately as "severed land."[27]

Thus, it is clear that the *value plus* formula has numerous pitfalls and critics. The Court of Appeals of Kentucky,[28] in rejecting the *value plus* theory for determination of compensation stated:

> Not only is there no discernible reason for a separate determination of *taking* damages [value of the property taken] and *resulting* damages, [damages to the remainder] but . . . to require or permit the jury to make such a determination results in the use by the jury of approaches to the question of damages that . . . are not valid and sometimes are completely artificial. As to *taking* damages, it causes the jury to attempt to put sale values on things that are never sold voluntarily, such as a 50-foot strip across the front of a farm, or, as in the instant case, a 25-foot strip across the front of a drive-in restaurant. As to *resulting* damages, it results in valuations based on *costs of restoration* or on vague considerations of the *harm* that has been done to the particular owner in his particular use of the property.[29]

22 State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted).

23 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 54, at 253 (2d ed. 1953). *See also* Burns, *Damages And Benefits From Constitutional Damaging And Partial Taking —Community or Special?*, in INSTITUTE ON EMINENT DOMAIN 119, 121 (1961).

24 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 53, at 253 (2d ed. 1953).

25 *Id.* at § 50. *See also* 20 HASTINGS L. REV. 764 (1969); 34 S. CAL. L. REV. 319; Bickley, *Statutory Changes In Eminent Domain Proceedings Now Under Consideration*, in INSTITUTE ON EMINENT DOMAIN 233, 243, 244 (1959).

26 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 52, at 238, 239 (2d ed. 1953).

27 "Severed land," by its very nature has a lower value unless it is valued as if it were not severed, that is, as if it were still a part of the whole.

28 Commonwealth, Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. Ct. App. 1963).

29 *Id.* at 852. (Court's emphasis.) *See also* 1 L. ORGEL, VALUATION UNDER THE LAW OF

Difference in Value Before and After the Taking

This formula entails two determinations: (a) the value of the whole before the taking and unaffected by the pending condemnation, and (b) the value of the remainder after the taking as affected by the public improvement.[30] This difference in market value of the "whole" and the "remainder" equals "just compensation" under this rule. The award incorporates both the value of the land taken, accounted for in the "before" valuation, and the damages to the remainder. As most text writers note, the simplicity of the rule is its principal virtue:

> [T]he simplicity of application of the before and after rule commends itself to the courts as the method most likely to attain a result that is fair both to the condemnor and the condemnee.[31]

As to the fallacies inherent in the *value plus* formula:

> This fallacy may be avoided in the partial-taking cases, however, for a way out of the difficulty is open, namely, the abandonment of the attempt to find the separate value of the part taken, in favor of the rule that recovery should be based on the difference between the value of the whole before and after the taking.[32]

The simplicity of the *before and after* rule loses some of its appeal, and many of its proponents,[33] when the setting-off of benefits becomes a consideration in "just compensation." The rule has an intrinsic limitation; if benefits are to be set off at all, they must be set off from the value of the land taken as well as the damages to the remainder.[34] Thus, application of this rule in any jurisdiction that requires the condemnee to be paid in money for the land actually taken, without deduction for benefits, must be limited to determining damages to the remainder only,[35] and not to the total compensation.[36]

EMINENT DOMAIN § 52, at 238 (2d ed. 1953); 4A NICHOLS, THE LAW OF EMINENT DOMAIN § 14.232[1] (3d rev. ed. 1965).

30 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 64 (2d ed. 1953). *See also* Commonwealth, Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. Ct. App. 1963); State v. Morris, 93 A.2d 523 (Del. 1952); Custer v. Dawson, 144 N.W. 862 (Mich. 1914).

31 4A NICHOLS, THE LAW OF EMINENT DOMAIN § 14.232[1] (3d rev. ed. 1965).

32 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 52, at 238 (2d ed. 1953).

33 Although many jurisdictions apply the "before and after" rule in valuation of the damages to the remainder, few jurisdictions apply the pure "before and after" formula to determine "just compensation" when benefits are involved. Phoenix Title & Trust Co. v. State, 425 P.2d 434 (Ariz. Ct. App. 1967). *See also* Pierpont Inn, Inc. v. State, 449 P.2d 737 (Cal. 1969) and Dep't of Public Wks. & Bldg. v. Divit, 182 N.E.2d 749 (Ill. 1962).

34 4A NICHOLS, THE LAW OF EMINENT DOMAIN § 14.232[1] (3d rev. ed. 1965).

35 *Cf.* Dept. of Public Wks. & Bldg. v. Divit, 182 N.E.2d 749 (Ill. 1962).

36 Morrison v. Fairmont & C. Traction Co., 55 S.E. 669 (W. Va. 1906). "[A] literal enforcement of the rule that if the market value of the residue after the taking is equal to, or greater than, its value before the taking, there is no damage, would plainly charge the landowner with all benefits, general as well as special and peculiar." *Id.* at 672.

As shown thus far, there are three main considerations for valuation in partial taking cases; the value of the whole and the value of the remainder before the taking, the value of the part taken, and the value of the remainder as a result of its severance from the whole. But it is the public improvement itself, like a new street or thoroughfare, or an expressway providing better access that also gives rise to a fourth consideration, "benefits."

RULES ON SET-OFF OF BENEFITS IN A PARTIAL TAKING

Before any benefit can be considered, and before any rule as to setting-off of these benefits can be applied, the benefit must be the result of some particular public improvement for which the land is taken.[37] Thus, for eminent domain purposes, a benefit for set-off purposes is some advantage, convenience or profit bestowed upon property, as to a whole area in general, or as to particular tracts, due to a public improvement. Yet not all benefits that result from a public improvement are considered for set-off purposes in partial taking cases. Therefore, for set-off purposes, benefits have been classified into two categories; general benefits and special benefits.

General Benefits

General benefits are defined as those benefits which affect the entire community or area, with no peculiar effect on any particular property.[38] Although the definition is applied with reasonable uniformity among the various jurisdictions, the resulting determination is not so uniform. Nichols defines general benefits as "those which arise from the fulfillment of the public object which justified the taking . . . ."[39] This definition has been cited with approval in many jurisdictions.[40]

Texas courts refer to general benefits as "community" benefits,[41] deriving this term from the statutory distinction between special and general benefits. The statute reads:

> [B]enefits which the owner sustains or receives in common with the community generally and which are not peculiar to him and

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37 Burns, *Damages And Benefits From Constitutional Damaging And Partial Taking—Community or Special?*, in INSTITUTE ON EMINENT DOMAIN 119, 124 (1961).

38 G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK 130 (1963).

39 3 NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6203, at 66 (3d rev. ed. 1965).

40 United States v. 2,477.79 Acres of Land, 259 F.2d 23, 28 (5th Cir. 1958); Backer v. City of Sidney, 89 N.W.2d 592 (Neb. 1958).

41 State v. Davis, 140 S.W.2d 861 (Tex. Civ. App.—Fort Worth 1940, no writ); Houston & T.C.R.R. v. Postal Telegraph Co., 45 S.W. 179 (Tex. Civ. App.—San Antonio 1898, no writ); City of Dallas v. Kahn, 29 S.W. 98 (Tex. Civ. App.—Dallas 1894, no writ).

> connected with his ownership, use and enjoyment, of the particular parcel of land, shall not be considered by the commissioners in making their estimate.[42]

It is generally held, as in the above statute, that general benefits cannot be considered as compensation in eminent domain.[43] These benefits are viewed as conjectural, remote and speculative[44] and thus must be excluded. Several jurisdictions allow both general and special benefits to be set-off from the compensation awarded.[45] Several other jurisdictions liberally construe special benefits to include what is normally held to be general benefits.[46]

Special Benefits

Many tests have been propounded for the determination of special and general benefits. One such test holds that a special benefit is different in *amount* or *degree* from those accruing to the whole area.[47] If particular tracts are benefited to a greater extent, even though in the same way as surrounding land, this constitutes a special benefit. Another view distinguishes special benefits by their *nature* and *kind* rather than by the *amount* or *degree*.[48] In other words, this view would classify those benefits capable of being ascertained in dollar amounts as special benefits, whereas conjectural or remote benefits are classified as general benefits.[49] The Supreme Court of the United States defines special benefits as "any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken."[50] Orgel defines special benefits as "those benefits that result in increases in value of particular properties directly affected by the taking. . . ."[51] The definitions of special benefits are as varied and numerous as the jurisdictions defining them.

An extremely liberal view is taken by the Indiana Supreme Court in

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42 TEX. REV. CIV. STAT. ANN. art. 3265, § 4 (1968).

43 In only two states are general benefits allowed to be set off from the compensation award. City of Albuquerque v. Chapman, 413 P.2d 204, 210 (N.M. 1966); Grand Union Co. v. State, 300 N.Y.S.2d 248 (N.Y. Ct. Cl. 1969).

44 Texas Elec. Serv. Co. v. Campbell, 161 Tex. 77, 336 S.W.2d 742 (1960).

45 City of Albuquerque v. Chapman, 413 P.2d 204, 210 (N.M. 1966); Grand Union Co. v. State, 300 N.Y.S.2d 248 (N.Y. Ct. Cl. 1969).

46 Sanitary Dist. v. Boening, 107 N.E. 810, 813 (Ill. 1915); Fifer v. Ritter, 64 N.E. 463, 465 (Ind. 1902); State v. Michelson, 170 N.W.2d 442 (Minn. 1969).

47 G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK 130 (1963); Highway Comm'n v. Young, 23 S.W.2d 130 (Mo. 1929).

48 *See also* Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966).

49 Hempstead v. Salt Lake City, 90 P. 397 (Utah 1907).

50 Bauman v. Ross, 167 U.S. 548, 584, 17 S. Ct. 966, 980, 42 L. Ed. 270, 286 (1897).

51 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 7, at 41 (2d ed. 1953).

Fifer v. Ritter.[52] This court held that although the condemnee was not chargeable with benefits accruing in the future, he may be charged for the value of the present opportunity for future enhancement.[53]

Illinois also liberally construes special benefits.[54] Special benefits result by mere increase in market value:

> If property is increased in value by an improvement, it is a special benefit to the property. The benefit must be such as affects the market value of the land, and where this market value is increased as the effect of the improvement a special benefit results.[55]

Since consideration of all benefits which have been classified as special is beyond the scope and purpose of this comment, the above treatment must suffice as a basis to a general understanding of special benefits.[56]

Only three states refuse to allow either general or special benefits to be set off from the compensation award[57] while only two states allow both general and special benefits to be set off from the compensation

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52 64 N.E. 463 (Ind. 1902).

53 *Id.*

54 Sanitary Dist. v. Boening, 107 N.E. 810 (Ill. 1915).

55 *Id.* at 813.

56 As an example of the diverse opinions and holdings as to what constitutes a special benefit, consider the issue of whether enhanced market value as a result of a new highway constitutes a special benefit to landowners whose property abuts the highway.

Minnesota follows the rule that enhancement of the land value because of the location of a new highway, causing a change in the land to a higher use, is a special benefit. State v. Anderson, 223 N.W. 923 (Minn. 1929).

A Texas case, Hall v. Wilbarger County, 37 S.W.2d 1041 (Tex. Civ. App.—Amarillo 1931), *aff'd*, 55 S.W.2d 797 (Tex. Comm'n App. 1932, opinion adopted), holds that the "increased market value of the land brought about by the construction of the paved road is not such benefit standing alone as can be offset against actual damages done to the . . . [land]." *Id.* at 1047.

Maine views "advantages which an abutter may receive from his location on a highway laid out, altered, or widened . . . [as special benefits] . . . because other estates on the same street receive special and peculiar benefits of a similar kind." Chase v. City of Portland, 29 A. 1104, 1107 (Me. 1894).

New Hampshire allows only special and peculiar benefits to be taken into consideration as a set-off. "Applying this rule, it has been repeatedly held in this state that benefits from . . . the establishment of a new highway, cannot be set off against damages, because they are general and not special benefits." Cram v. Laconia, 51 A. 635, 637 (N.H. 1901).

The Missouri Supreme Court in Highway Comm'n v. Young, 23 S.W.2d 130 (Mo. 1929) viewed special benefits from the construction of a highway as benefits greater than those enjoyed by other land in the area, and thus, as special benefits. *Id.* at 134.

Vermont does not consider highway benefits as special benefits. The Supreme Court of Vermont held that "[v]alue enhanced for commercial purposes by increased traffic, and a rise of market value for reasons of easy accessibility are substantially the same in cause and effect. The increase in worth is not distinctively peculiar to the lands from which the condemned segment was taken. The increment is shared by all the property in the neighborhood of the newly constructed facility." Smith v. State Hwy. Bd., 262 A.2d 486, 488 (Vt. 1970).

57 Powers v. Dubuque, 176 N.W.2d 135 (Iowa 1970); Swett v. Mississippi State Hwy. Comm'n, 193 So. 2d 596 (Miss. 1967); Finley v. Board of County Comm'r, 291 P.2d 333 (Okla. 1955). For the federal view *see* King v. Grand River Dam Auth., 336 F.2d 682 (10th Cir. 1964).

award.[58] Thus, once the nature of the benefit is ascertained, the rule is almost universal that special benefits may be set off from *at least* a portion of the compensation awarded.

The particular dilemma of ascertaining when benefits may be substituted for money compensation, that is, when benefits may be set off from the compensation award, may be summarized in three general rules:

(a) Benefits cannot be considered at all.[59]
(b) Benefits can be set off against damages to the *remainder only*.[60]
(c) Benefits can be set off against damages to the *remainder* and *against the value of the property taken*.[61]

Only a few jurisdictions refuse to recognize benefits as a proper element of "just compensation."[62] In these jurisdictions, just compensation is determined by use of the *before and after* rule. *Powers v. City of Dubuque*[63] defines the proper rule as:

> [T]he difference between the fair market value of the entire tract immediately before and immediately after the condemnation without regard to resultant benefit or betterment.[64]

In such jurisdictions, when the *before and after* formula is utilized, and the valuation is based on the "fair market value" before and after, it can nevertheless result in consideration of benefits.[65] Certain benefits are reflected in increased "fair market value" and thus will inevitably be included in the compensation awarded. This particular benefit would be extremely difficult to exclude, however, since the net result of the taking is a decreased "fair market value" and the extent to which this decrease is lessened by the benefit is extremely conjectural.

The rule is almost universal[66] that benefits can be set off against the damages to the remainder, but a controversy develops when these benefits are to be set off against the compensation to be awarded for the

58 City of Albuquerque v. Chapman, 413 P.2d 204, 210 (N.M. 1966); Grand Union Co. v. State, 300 N.Y.S.2d 248 (N.Y. Ct. Cl. 1969).

59 *Federal:* King v. Grand River Dam Auth., 336 F.2d 682 (10th Cir. 1964). *State:* Powers v. Dubuque, 176 N.W.2d 135 (Iowa 1970); Swett v. Mississippi State Hwy. Comm'n, 193 So. 2d 596 (Miss. 1967); Finley v. Board of County Comm'r, 291 P.2d 333 (Okla. 1955).

60 State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted).

61 Morgan County v. Hill, 60 So. 2d 838 (Ala. 1952); Arkansas State Hwy. Comm'n v. Welter, 471 S.W.2d 541 (Ark. 1971).

62 Cases cited note 59, *supra*.

63 176 N.W.2d 135 (Iowa 1970).

64 *Id.* at 138.

65 Morrison v. Fairmont & C. Traction Co., 55 S.E. 669, 672 (W. Va. 1906).

66 3 NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6207, at 98 (3d rev. ed. 1965); McCoy v. Union Elevated R.R., 247 U.S. 354, 364, 38 S. Ct. 504, 507, 62 L. Ed. 1156, 1166 (1918).

land actually taken. Simple formulas may be used to illustrate this problem. When the *value plus* rule is used:

1. (Value of the land taken) + (Damages to the remainder — benefits) = just compensation.[67]

Using this formula, the condemnee will always receive at least the value of the land actually taken.

2. (Value of the land taken + damages to the remainder) — Benefits) = just compensation.[68]

Using this formula, the condemnee's award may be $0, since benefits are substituted for the total money compensation.

As noted earlier,[69] when the *before and after* rule is applied, the intrinsic limitation exists that benefits *must* be set off against both damages to the remainder and the value of the land taken since no separate determination of these values are made. The practical result is the same as formula number two. This, also, can be illustrated by a simple formula:

3. (Value of the "whole" *before* the taking — value of the remainder *after* the taking) — (Benefits) = just compensation.[70]

Majority Rule on Set-Off of Benefits

Any classification into the category of majority or minority is, of course, generic. Many variations exist within the majority jurisdictions and the rules applied are by no means uniform. Nevertheless, the majority rule is based on the common underlying principles that compensation must be paid in money, that benefits are not legally considered money compensation, and benefits are not a proper element in determining compensation for the land actually taken. Twenty-seven states comprise the majority view.[71] These states attach a higher

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67 3 Nichols, The Law of Eminent Domain § 8.6206, at 91 (3d rev. ed. 1965).

68 *Id.* at 90.

69 4A Nichols, The Law of Eminent Domain § 14.232[1] (3d rev. ed. 1965).

70 3 Nichols, The Law of Eminent Domain § 8.6206, at 91 (3d rev. ed. 1965). These formulas take into consideration all jurisdictions that allow set-off of benefits, irrespective of whether they are general or special. For accuracy sake, and to avoid confusion, the *before and after* formula may be refined for each particular jurisdiction as follows:

(a) In jurisdictions which allow only special benefits to be set-off:
(Value of the "whole" *before* the taking — Value of the remainder *after* the taking) + General Benefits = just compensation.

(b) In jurisdictions which allow no benefits to be set-off:
(Value of the "whole" *before* the taking — Value of the remainder *after* the taking) + Special and General Benefits = just compensation.

(c) In jurisdictions which allow both special and general benefits to be set-off:
(Value of the "whole" *before* the taking — Value of the remainder *after* the taking) — Benefits = just compensation.

71 *Alaska*: Alas. Rev. Stat. § 9.55310(3) (1962); *Arizona*: Phoenix Title & Trust Co. v.

constitutional status to compensation for the land taken than to compensation for damages to the remainder. This dichotomy is due to express statutes[72] or *express* constitutional provisions[73] requiring irreducible compensation for the land taken in a number of states within the majority view. But the other states following the majority view base this dichotomy upon *general* constitutional provisions, patterned after the fifth amendment to the United States Constitution. When based on the latter reasoning the distinction becomes somewhat questionable.[74]

In answering the question posed at the beginning of this comment, a Texas practitioner would reply with an emphatic "yes," citing as his authority the *Carpenter*[75] "bible."[76] Although the *Carpenter* case is not the first decision on the issue of set-off of benefits in Texas, it is certainly the most cited and followed for the proposition that:

> It is of course settled that enhancement in market value of the residue of the land by reason of "special benefits" is a legitimate offset to damages thereto, but not to the value of the part actually taken.[77]

State, 425 P.2d 434 (Ariz. Ct. App. 1967); ARIZ. REV. CIV. STAT. § 12-1122 (1956); *California*: Pierpont Inn, Inc. v. State, 449 P.2d 737 (Cal. 1969); *Colorado*: Boxberger v. State Hwy. Comm'n, 251 P.2d 920 (Colo. 1952); COLO. REV. STAT. ANN. § 50-1-17 (1953); *Florida*: Caspersen v. West Coast Inland Nav. Dist., 198 So. 2d 65 (Fla. Ct. App. 1967); FLA. REV. STAT. § 73,071(4) (Supp. 1971); *Georgia*: State Hwy. Dep't v. Handley, 150 S.E.2d 316 (Ga. Ct. App. 1966); *Idaho*: State *ex rel.* Symms v. Collier, 454 P.2d 56 (Idaho 1969); IDAHO CODE ANN. § 7-711 (1947); *Illinois*: Department of Public Wks. & Bldg. v. Divit, 182 N.E.2d 749 (Ill. 1962); *Indiana*: State v. Furry, 250 N.E.2d 590 (Ind. 1969); State v. Ahaus, 63 N.E.2d 199 (Ind. 1945); *Louisiana*: Louisiana Power & Light Co. v. Lasseigne, 220 So. 2d 462 (La. Ct. App. 1969); *Maryland*: Johnson v. Consolidated Gas, Elec. Light & Power Co., 50 A.2d 918 (Md. Ct. App. 1947); *Montana*: MONT. REV. CODES ANN. § 93-9912 (1947); *Nebraska*: Frank v. State Dep't of Roads, 129 N.W.2d 522 (Neb. 1964); *Nevada*: State *ex rel.* Dep't of Hwys. v. Olsen, 351 P.2d 186 (Nev. 1960); NEV. REV. STAT. § 37.110 (1957); *New York*: Esso Standard Oil Co. v. State, 192 N.Y.S.2d 823 (N.Y. App. Div. 1959); Grand Union Co. v. State, 300 N.Y.S.2d 248 (N.Y. Ct. Cl. 1969); *North Dakota*: Bismark v. Casey, 43 N.W.2d 372 (N.D. 1950); *Ohio*: *In re* Adjudication of Claims, 121 N.E.2d 695 (Ohio Com. Pl. 1953); *Oregon*: State Hwy. Comm'n v. Hooper, 468 P.2d 540 (Ore. Ct. App. 1970); 38 ORE. L. REV. 86 (1958); *Rhode Island*: D'Angelo v. Director of Pub. Works, 152 A.2d 211 (R.I. 1959); *South Dakota*: State Hwy. Comm'n v. Bloom, 93 N.W.2d 572 (S.D. 1958); *Tennessee*: Wray v. Knoxville, L.F. & J.R.R., 82 S.W. 471 (Tenn. 1904); *Texas*: State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted); *Utah*: Salt Lake & U.R.R. v. Butterfield, 150 P. 931 (Utah 1915); *Virginia*: Campbell v. State Hwy. Comm'r, 165 S.E.2d 281 (Va. 1969); *West Virginia*: Morrison v. Fairmont & C. Traction Co., 55 S.E. 669 (W.Va. 1906); *Wyoming*: WYO. STAT. ANN. § 1-775 (1959); *Wisconsin*: for general rule and exception *see* Carazalla v. State, 70 N.W2.d 208 (Wis. 1955).

[72] *Supra* note 71.

[73] IOWA CONST. art. I, § 18. "[W]ho shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

[74] 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 7 (2d ed. 1953).

[75] State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted).

[76] City of Austin v. Cannizzo, 85 Tex. 225, 267 S.W.2d 808 (1954). *See also* State v. McConnell, 444 S.W.2d 648 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.).

[77] State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted).

Texas, in line with the majority rule in the United States, does not allow special or general benefits to be set off against the value of the land actually taken. The land taken must be valued as "severed" land, not as part of the total tract before the taking,[78] but independently of the value of the remainder.[79]

The issue of set-off of benefits was first considered by the Supreme Court of Texas in *Buffalo Bayou, B. & C.R.R. v. Ferris*.[80] This case, occurring during the Civil War, held that "[t]he constitution requires the compensation to paid in *money*, not in real or imaginary benefits derived from such improvement."[81] Following this to its logical conclusion, the court held:

> The owner of land taken for public use is entitled to the intrinsic value of the land so taken, without reference to the profit or advantage that he may derive from the construction of the improvement for which it is taken.[82]

Both of the above propositions established by the *Ferris* case, being issues of first impression, were supported by no Texas authority. The commission of appeals, in *Bourgeois v. Mills*,[83] chose not to follow the precedent of the *Ferris* decision and affirmed the lower court's ruling that awarded no compensation to the condemnee whose property was taken for a public road. The court reasoned that "the commission of review may have concluded that the advantages arising from the establishment of the road fully compensated appellants for the damages resulting from the easement upon their land."[84] Nevertheless, the *Ferris* decision has been followed and cited with approval by the Texas courts.[85]

The condemnee in Texas is also entitled to indemnification for any damages to the remainder both by statute[86] and by express constitutional provision.[87] But special benefits may be set off from the compensation awarded for damages to the remainder.[88]

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78 *Id.* at 201.

79 City of Austin v. Cannizzo, 85 Tex. 225, 267 S.W.2d 808 (1954). *See also* State v. Davis, 140 S.W.2d 861 (Tex. Civ. App.—Fort Worth 1940, no writ).

80 26 Tex. 588 (1863).

81 *Id.* at 597 (emphasis added). *See also* Dulaney v. Nolan County, 85 Tex. 225, 20 S.W. 70 (1892).

82 Buffalo Bayou, B. & C.R.R. v. Ferris, 26 Tex. 588, 603 (1863).

83 60 Tex. 76 (Tex. Comm'n App. 1883, holding approved).

84 *Id.*

85 State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted).

86 TEX. REV. CIV. STAT. ANN. art. 3265, § 1 (1968).

87 TEX. CONST. art. I, § 17. "[N]o person's property shall be taken, damaged or destroyed for or applied to public use, without adequate compensation being made, unless by consent of such person." *See* Travis County v. Trogden, 88 Tex. 302, 31 S.W. 358 (1895) for definition of "adequate compensation" related to benefits.

88 State v. Meyer, 403 S.W.2d 366 (Tex. Sup. 1966); Dulane v. Nolan County, 85 Tex.

If logic were followed, it appears that the same reasoning could be applied to the setting off of benefits from the damages to the remainder as is applied to justify the *refusal* to allow the *same* benefits to be set off from the land actually taken; namely, that the constitution of Texas requires that compensation be made in money.[89] Why this dichotomy exists is not altogether clear, but the proposition that compensation for the land taken must be paid in money and that benefits accruing from the improvement cannot be substituted for the money compensation is not unique to Texas.

MINORITY RULE ON SET-OFF OF BENEFITS

Twenty states espouse the view that benefits may be set off from both the part actually taken and the remainder and that if the part remaining is worth as much as or more after completion of the public project than the entire tract was worth immediately before the taking, the landowner has sustained no damages and is not entitled to any further compensation.[90] The Arkansas Supreme Court[91] summed up the minority view as:

225, 20 S.W. 70 (1892); Buffalo Bayou, B. & C. R.R. v. Ferris, 26 Tex. 588, 604 (1863); State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled,* 89 S.W.2d 979 (Tex. Comm'n App. 1936, opinion adopted).

89 The Texas Constitution, art I, § 17 requires "adequate compensation" to be paid if a person's property is "taken, damaged or destroyed for or applied to public use. . . ." The Constitution makes no distinction between "adequate compensation" for a "taking" or "adequate compensation" when property is "damaged," yet the Texas courts have artificially drawn such a distinction. If "adequate compensation" for a *taking* means only money compensation, it seems arbitrary to hold that such does not apply to damages equally as well. This is not to suggest that such a holding should be applied, but only to illustrate the contradiction in reasoning.

90 *Alabama*: Morgan County v. Hill, 60 So. 2d 838 (Ala. 1952); *Arkansas*: Arkansas State Hwy. Comm'n v. Welter, 471 S.W.2d 541 (Ark. 1971); *Connecticut*: Appeal of Phillips, 154 A. 238 (Conn. 1931); *Delaware*: State v. Morris, 93 A.2d 523 (Del. 1952); *District of Columbia*: *See* Bauman v. Ross, 167 U.S. 548, 17 S. Ct. 966, 43 L. Ed. 270 (1897); *Hawaii*: Hawaii v. Mendonca, 375 P.2d 6 (Hawaii 1962), *for contra see* rule applied in highway aligning and widening: Territory of Hawaii v. Adelmeyer, 363 P.2d 979 (Hawaii 1961); *Kansas*: Beard v. Kansas City, 154 P. 230 (Kan. 1916); *Kentucky*: Commonwealth, Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. Ct. App. 1963); *Maine*: Chase v. City of Portland, 29 A. 1104, 1107 (Me. 1894); *Massachusetts*: Cooper v. Commonwealth, 227 N.E.2d 739 (Mass. 1967); *Michigan*: Mackie v. Sabo, 144 N.W.2d 798, 800 (Mich. Ct. App. 1966), but must be authorized by statute; *Minnesota*: State v. Hayden Miller Co., 116 N.W.2d 535 (Minn. 1962); *Missouri*: State Hwy. Comm'n v. Cady, 400 S.W.2d 481 (Mo. Ct. App. 1965), *cert. denied,* 385 U.S. 204, 87 S. Ct. 407, 17 L. Ed. 2d 300 (1965); *New Hampshire*: Cram v. City of Laconia, 51 A. 635, 637 (N.H. 1901); *New Jersey*: State v. Hudson County Bd. of Chosen Freeholders, 25 A. 322 (N.J. 1892) (the general rule does not apply to the taking of land by municipalities for streets); *see* Robinson v. Borough of Edgewater, 119 A. 7 (N.J. 1922); *New Mexico*: City of Albuquerque v. Chapman, 413 P.2d 204 (N.M. 1966); *North Carolina*: State Hwy. Comm'n v. Reeves, 173 S.E.2d 494 (N.C. Ct. App. 1970); *see* Robinson v. State Hwy. Comm'n, 105 S.E.2d 287 (N.C. 1958) for possible conflict in holdings; *Pennsylvania*: Simon v. City of Philadelphia, 177 A.2d 621 (Pa. 1962); *Vermont*: Smith v. State Hwy. Bd., 262 A.2d 486, 488 (Vt. 1970); *Washington*: State v. Reano, 409 P.2d 853 (Wash. 1966).

91 Arkansas State Hwy. Comm'n v. Welter, 471 S.W.2d 541 (Ark. 1971).

> [W]here the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received *just compensation in benefits* under our constitution.[92]

Although Hawaii holds the minority view for compensation under eminent domain partial taking cases, it also has one important exception.[93] The Hawaii Legislature has seen fit to limit the minority rule as to compensation to be paid for highway realignment or widening. In these cases, benefits are not considered as compensation for the land taken, although they may be deducted from the damages to the remainder. The Hawaii courts view this departure from the minority rule as:

> [L]egislative recognition of the equitable principle that it is unfair to make one person pay in land for that which another receives free.[94]

In supporting this intervention of equity, the court reasoned that special benefits which result when land abuts on a proposed road do not become general benefits merely because other properties which also front on the road receive the same benefits without being required to contribute to the road in property. The court stated that it would be inequitable to require the landowner to pay for his benefits while others do not.[95] Kentucky,[96] another minority rule state, does not agree with this reasoning.

> If in truth and in fact the owner's loss has been reduced by an enhancement in value of his remaining land it would violate the Constitution to pay him compensation without regard to the enhancement. The fact that some other citizen is at the same time getting a free enhancement is just one of the *inescapable inequities of society,* and it is no reason why the condemnor must pay more than the loss sustained by the person whose property was taken.[97]

The minority states do not agree totally on the issue of whether benefits are always legal-constitutional compensation, although they do agree that benefits can be set off from total compensation awarded. These states do not draw the majority's distinction between "just compensa-

92 *Id.* at 542 (emphasis added).
93 Territory of Hawaii v. Adelmeyer, 363 P.2d 979 (Hawaii 1961).
94 Territory of Hawaii v. Mendonca, 375 P.2d 6, 14 (Hawaii 1962).
95 *Id.* at 13.
96 Commonwealth, Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. Ct. App. 1963).
97 *Id.* at 857 (emphasis added).

tion" for the land taken and "just compensation" for damages to the remainder; however, the distinction, in at least some of the minority states, is there. This result, though, is reached through application of the principles of equity.

The minority view gains substantial import when considered in light of Supreme Court decisions. The rule enunciated by the Supreme Court in *Bauman v. Ross*[98] is well settled that benefits to the remainder can be deducted from the total compensation awarded.[99] In this case, a state statute[100] expressly provided for set off of benefits from the value of the land taken. The Supreme Court upheld this statute as constitutional, and more important, definitively narrowed the term "just compensation" as used in the fifth amendment to the United States Constitution:

> The just compensation required by the Constitution to be made 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. To award him less would be unjust to him; to award him more would be unjust to the public.
> [I]t 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 . . . and to retain the increase in value of the back land, which has been made front land by the same taking.[101]

Does "just compensation" under the Constitution require payment in *money* for the land taken unreduced by benefits or can compensation be made entirely in "benefits?" The *Bauman* case settled this controversy for the federal courts:

> The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and . . . no such prohibition can be implied . . . .[102]

The Court concluded:

> 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.[103]

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98 167 U.S. 548, 17 S. Ct. 966, 42 L. Ed. 270 (1897).
99 *Id.* at 574, 17 S. Ct. at 976, 42 L. Ed. at 283.
100 D.C. REV. STAT. ch. 8, §§ 477-481, Act of Jan. 12, 1809, ch. 8, 2 Stat. 511.
101 Bauman v. Ross, 167 U.S. 548, 574, 17 S. Ct. 966, 976, 42 L. Ed. 270, 283 (1897).
102 *Id.* at 584, 17 S. Ct. at 980, 42 L. Ed. at 286.
103 *Id.* at 574, 17 S. Ct. at 976, 42 L. Ed. at 283.

Thus, the *quid pro quo* of "just compensation" requires no more than an award to the condemnee which leaves him no richer and no poorer than he was before the taking of his property for public use.

Not only does the Supreme Court substantiate and strengthen the minority rule, but also from the above language quoted, expresses a disinclination for the majority rule. The *Bauman* case has been uniformly followed since it was rendered.[104] In *United States v. Indian Creek Marble Co.*,[105] the *Bauman* case was cited and followed even where a contrary state statute existed. In disposing of the application of the statute, and in effect, the majority view, the court declared:

> The State of Tennessee cannot by statute or by decision fix either a greater or less compensation for land taken by the United States than the Constitution of the United States provides, which is just compensation. It is inconceivable that the contention would be seriously made that either the Supreme Court of Tennessee could by express decision or legislation define "just compensation" as employed in the Constitution of the United States so as to require the United States to pay a citizen . . . of another State [more] for a fee or easement of exactly the same value.[106]

The court further declared that the Tennessee statute (majority rule) would inevitably result in a landowner receiving incidental damages twice, "either in cash compensation or partly in cash and partly in inci-

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104 United States v. 2,477.79 Acres of Land, 259 F.2d 23 (5th Cir. 1958). The court held that it was the creation of the improvement and not the incident of the taking which determines the benefits. *Id.* at 27. For other Fifth Circuit decisions supporting the federal rule see: Pokladnik v. United States, 378 F.2d 59 (5th Cir. 1967); United States v. 8,968.06 Acres of Land, 318 F. Supp. 698 (S.D. Tex. 1970). *See also* United States v. Sponenbarger, 308 U.S. 256, 60 S. Ct. 225, 84 L. Ed. 230 (1939); United States v. River Rougue Co., 269 U.S. 411, 46 S. Ct. 144, 70 L. Ed. 339 (1926). A taking may occur where land is subjected to intermittent flooding by the government, but "it has never been held that Government takes an owner's land by a flood program that does little injury in comparison with far greater benefits conferred." United States v. Sponenbarger, 308 U.S. 256, 267, 60 S. Ct. 225, 229, 84 L. Ed. 230, 238 (1939).

McCoy v. Union Elevated R.R., 247 U.S. 354, 38 S. Ct. 504, 62 L. Ed. 1156 (1918). "[W]e are unable to say that . . . [the condemnee] . . . suffers deprivation of any fundamental right when a State . . . permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all the neighborhood receives like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury." *Id.* at 366, 38 S. Ct. at 508, 62 L. Ed. 1166.

The federal rule is also stated in federal statutes for certain partial takings. The Rivers and Harbors Act of 1918, 33 U.S.C. § 595 reads:

> In all cases where private property shall be taken, by the United States for the public use in connection with any improvement of rivers, . . . where a part only of any such parcel, . . . shall be taken, . . . the damages to the owner, whether for the value of the part taken or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special or direct benefits to the remainder arising from the improvement, ...

105 40 F. Supp. 811 (E.D. Tenn. 1941).

106 *Id.* at 818.

dental benefits."[107] As to the court's view of the rationale of the Tennessee (majority) rule:

> That type of so-called compensation is and must be grounded upon a statutory provision setting up an artificial measure based upon neither justice nor the settled conception of the meaning of the word "compensation."[108]

The guarantees of the fourteenth amendment to the United States Constitution were interpreted by the Supreme Court in *McCoy v. Union Elevated R.R.*[109] as meaning that a landowner shall not be deprived of the market value of his property under a rule or statute which makes it impossible for him to obtain "due process of law" through "just compensation." Thus, when an appeal from a state court alleging deprivation of property without due process of law is granted by the Supreme Court of the United States, the issue for the Court is whether the fundamental right was denied and *not* whether the rule adopted by the particular state was best supported by reason.[110] Certainly, an appeal to the Supreme Court for denial of property without due process of law from a condemnee in a *majority-view* state is unlikely to occur. The condemnee's award in those states which hold contrary to the federal rule is usually higher than under the federal rule, since the condemnee will always receive the value of the property taken in money, while under the federal and minority rule, benefits may be his only compensation.

Contrast and Comparison of Both Rules

Both the majority rule and the minority rule, although diametrically opposed, base their reasoning and rationale on constitutional grounds. Opposite results are reached through the interpretation of similar and even identical constitutional phrases such as "just compensation" and "due process of law." Obviously such phrases are open to many interpretations, but rarely do such interpretations become as diverse as the issue of "set-off of benefits." There seem to be five main areas of controversy: (1) application of the laws of equity versus the inescapable inequities of society; (2) the requirement that compensation for the land taken must be made in money; (3) the dichotomy of compensation for the land taken and the damages to the remainder; (4) the imaginary

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107 *Id.* at 819.
108 *Id.* at 819.
109 247 U.S. 354, 365, 38 S. Ct. 504, 507, 62 L. Ed. 1156, 1166 (1918).
110 *Id.* at 365, 38 S. Ct. at 507, 62 L. Ed. at 1166.

or conjectural nature of benefits; (5) the arbitrary exercising of taxing powers. Each area of conflict will be briefly dealt with to show the basis for the controversy and the reasoning supporting each. At best, this treatment will only introduce the reader to the problems surrounding the controversial issue of "set-off of benefits" in partial taking cases.

Equity vs. Inescapable Inequities of Society

"[I]t is unfair to make one person pay in land for that which another receives free."[111]

"The fact that some other citizen is at the same time getting a free enhancement is just one of the *inescapable inequities of society*. . . ."[112]

The court, in all eminent domain cases, stands in the position of balancing two interests: full and fair compensation to the property owners, versus justified concern of the public for the cost of condemnation through increased taxation. Many state courts express the sentiment that the constitutional limitation is to "balance the equities" of the state and individual. "Just compensation," as interpreted by the United States Supreme Court, means "compensation that would be just in regard to the public, as well as in regard to the individual. . . ."[113] Clearly, equity is of primary concern.

The arguments for equity by the majority view focus on the value of the condemnee's land relative to the value of the land of his neighbors and not relative to the value of his own land prior to the taking.[114] This view calls for balancing of the equities between the landowner and his neighbor instead of the landowner and the public. It was a reaction to the propensity of many American communities to be over-sanguine in regard to the beneficial results of a particular public improvement ". . . that led to the ready adoption of a rule which, while in theory unsound, would as a matter of practice bring about a more equitable result, and in the case in which injustice resulted, would distribute the effects of it upon the public at large."[115] This rule requires that the condemnee must be paid the value of the land taken, not reduced by any benefits.

On the other hand, the minority "balances the equity" by the determination of special benefits and the requirement that only such benefits shall be considered as set-off; that is:

111 Territory of Hawaii v. Mendonca, 375 P.2d 6, 14 (Hawaii 1962). *See also* Pochila v. Calvert, W. & B.V. Ry., 72 S.W. 255 (Tex. Civ. App.—Houston 1903, no writ).

112 Commonwealth, Dep't of Hwys. v. Sherrod, 367 S.W.2d 844, 857 (Ky. Ct. App. 1963) (emphasis added).

113 Bauman v. Ross, 167 U.S. 548, 570, 17 S. Ct. 966, 975, 42 L. Ed. 270, 281 (1897).

114 Comment, *The Offset of Benefits Against Losses in Eminent Domain Cases in Texas: A Critical Appraisal*, 44 TEXAS L. REV. 1564, 1569 (1966).

115 3 NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6206 (1) (3d rev. ed. 1965).

> [T]hat it is unfair for a land owner to be taxed specially through the reduction or refusal of compensation by offsetting benefits which his neighbor, whose land is not taken, nonetheless receives free of charge. It is to avoid the unfairness of making one man pay in land for that which another receives free that special benefits are narrowly conceived.[116]

Is not the distinction between special and general benefits a sufficient application of the laws of equity to reach a satisfactory balance between the two opposing interests? The condemnee is not charged with benefits shared generally by the community, yet proponents of the majority view argue further that the condemnee should not be charged with benefits which he alone receives. "Clearly, where the landowner suffers no loss in value, a rule that forces the condemnor to pay double compensation upsets this 'balance' and violates the policy of the constitutional provision [of just compensation]."[117]

Compensation Must Be Paid In Money

"The constitution requires the compensation to be paid in money, not in real or imaginary benefits derived from such improvement."[118]

"[T]he constitutional requirement has no reference to the form in which compensation shall be paid, whether in cash or in benefits. . . ."[119]

In the states adhering to the majority view, the "payment-in-money" rule is often cited as support for the proposition that the condemnee must always receive compensation not reduced "in money" for the value of the land actually taken. This non-monetary status given benefits, however, is not pursued to the logical result of excluding all benefits.[120] Instead, only general benefits are completely excluded, while special benefits, though excluded from the value of the land taken, are set off from the damage-compensation to the remaining land.

The Supreme Court[121] has held there to be no violation of the fifth amendment to the United States Constitution, when benefits are deducted from the total compensation. Some minority-view states hold the ". . . 'just compensation' . . . would include payment in benefits so long as the benefits were *peculiar* or *special* . . . and not *general*. . . ."[122]

Nichols argues the payment is not made in benefits, "as implied by

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116 Territory of Hawaii v. Mendonca, 375 P.2d 6, 13 (Hawaii 1962).
117 20 HASTINGS L.J. 764, 770 (1969).
118 Buffalo Bayou, B. & C. R.R. v. Ferris, 26 Tex. 588, 597 (1863).
119 United States v. Indian Creek Marble Co., 40 F. Supp. 811, 819 (E.D. Tenn. 1941).
120 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 7, at 48 (2d ed. 1953).
121 Bauman v. Ross, 167 U.S. 548, 17 S. Ct. 966, 42 L. Ed. 270 (1897).
122 Simon v. City of Philadelphia, 177 A.2d 621, 623 (Pa. 1962).

this argument," but is considered only to determine the extent of the actual injury suffered by the condemnee.[123] Thus, the more practical argument seems to be that compensation is always made in "money," and benefits are not legal compensation, ". . . but are [only] allowed to be shown as a means of ascertaining what the just compensation should be."[124] The argument for "money" compensation, thus, becomes rather meaningless yet the majority view refuses to allow benefits to adjust the "money compensation" to be paid the condemnee for the land actually taken, insisting that this is an attempt to make payment in benefits.[125]

Dichotomy in Compensational Status of "Land Taken" and "Damages"

Most states adhering to the majority view determine compensation by the *value plus* formula.[126] From this two-element formula, the dichotomy has evolved. For those states holding that compensation must be paid in money for the land taken, a determination of the value of the land taken must be made separate from that of the remaining land; thus, the dichotomy results. Other states take the view that since the constitution requires payment only for the land actually taken, if the legislature chose to grant in addition, damages to the remaining land, it might impose the condition that benefits should be set off from such damages.[127] This dichotomy also resulted from the court's desire to guarantee the owner a minimum of compensation in place of his tangible property.[128]

The Supreme Court,[129] however, draws no such dichotomy. The property of a landowner is considered a value unit. When a portion of land is taken and damages to the remainder occur, the only question before the court is how much has the unit been reduced in value, without regard to what physical components may have been taken from the unit. Property under the United States Constitution is a value rather than tangible substance.

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123 3 NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6206 (1) (3d rev. ed. 1965). *See also* Hopkins County Levee Imp. Dist. No. 3 v. Hooten, 252 S.W. 325, 326 (Tex. Civ. App.—Texarkana 1923, no writ).

124 Hopkins County Levee Imp. Dist. No. 3 v. Hooten, 252 S.W. 325, 326 (Tex. Civ. App.—Texarkana 1923, no writ).

125 If these jurisdictions would recognize that payment is not being made in benefits, but benefits are only being set-off from the money compensation actually being made, then logic would require that benefits must also be set-off from the value for the land actually taken. Since this *result* is not favored by the courts in these jurisdictions, such a recognition is unlikely to occur.

126 See note 71, *supra*.

127 1 L. ORGEL, VALUATIONS UNDER THE LAW OF EMINENT DOMAIN § 7, at 48 (2d ed. 1953).

128 *Id.*

129 Bauman v. Ross, 167 U.S. 548, 17 S. Ct. 966, 42 L. Ed. 270 (1897).

The real departure from logic occurs in those states whose constitution requires compensation for *damages* as well as for the land *taken*.[130] In these states, benefits are not deducted from the value of the land taken but *are* deducted from *damages* to the remainder, yet the express language of that state's constitution provides for no such distinction.[131]

The dichotomy of valuation for compensation for the land taken and for damages to the remainder seems to over-balance the equities in favor of the condemnee. When valuation for compensation is broken into two elements (damages for the taking and severance damages), the owner receives non-monetary advantages if the special benefits exceed the full "money" compensation for the land taken.[132] It seems arbitrary to give compensation for the land taken a higher constitutional status (by not allowing reduction of benefits) than is given to compensation for damages, from which benefits may be deducted.[133]

The Imaginary or Conjectural Nature of Benefits

"The Constitution requires the compensation to be paid in money, *not in real or imaginary benefits derived from such improvements.*"[134]

It was often argued by early courts that benefits are too difficult to ascertain, uncertain in character or nature, and speculative or remote.[135] From these decisions evolved the distinction between special and general benefits. An unwillingness to recognize benefits as valid elements in compensation was also expressed because of a fear that benefits would not be fairly estimated by the jury or court anxious to keep down the cost of the improvement and taxes.[136] This view has found little support in recent case decisions by either the majority or minority states. The courts have come to recognize that while not all benefits are ascertainable and should be excluded, certainly the testimony of a qualified

130 TEX. CONST. art. I, § 17. "[N]o person's property shall be taken, damaged or destroyed for or applied to public use, without adequate compensation being made, ..."

131 It becomes extremely difficult to perceive any valid reason for application of such a distinction to determination of just compensation under these state constitutions, especially in light of such decisions as State v. Hale, 96 S.W.2d 135 (Tex. Civ. App.—Austin 1936), *rev'd on other grounds*, 136 Tex. 29, 146 S.W.2d 731 (1941). This case held "[t]here is, . . . no essential difference between 'adequate compensation' under our State Constitution, and 'just compensation' under the Fifth Amendment to the Federal Constitution . . . . The two expressions, when used in this connection are synonymous." *Id.* at 141 (emphasis added).

132 Comment, *Partial Takings—Severence Damages and Just Compensation*, 34 S. CAL. L. REV. 319 (1961).

133 Commonwealth, Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. Ct. App. 1963).

134 Buffalo Bayou, B. & C. R.R. v. Ferris, 26 Tex. 588, 597 (1863) (emphasis added).

135 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 7, at 44 (2d ed. 1953).

136 3 NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6206(1) (3d rev. ed. 1965).

"expert-appraiser" can determine special benefits as accurately as he can determine what a fictitious buyer will pay for improved land.[137]

The Arbitrary Exercise of Taxing Powers

"Indeed, it would be impracticable, in taxation, to apply the rule generally, and assess the expenses of public works upon each citizen in exact proportion to the supposed benefit he may be expected to derive from them."[138]

Several states have expressed the view that the setting off of benefits from the value of the land taken was an exercise of the taxing power and an infringement of the "equal protection clause" of the fourteenth amendment to the United States Constitution.[139] This theory was argued on the point that the rule compelled one property owner who lost only part of his property to accept benefits as compensation while it awarded an unreduced compensation to landowners whose entire property was taken.[140] But as to the setting off of these benefits from the damages to the remainder, the court held this was proper. Such set-off was applicable in all cases where damages were alleged and awarded whether or not part of the landowner's property was taken. This particular issue has not been dealt with in recent years but no doubt, is still unresolved.

CONCLUSION

At first glance the rules on set-off of benefits seem clear and settled, especially if the reader is concerned with only one jurisdiction. Yet only cursory research reveals a dramatic conflict of authority. Allegations of "unconstitutional" are made from both sides of the conflict with reference to the other. The concepts of equity are applied to each view with opposite results.

The jurisdictions are divided with twenty-seven states supporting the proposition that special but not general benefits may be deducted from any damages alleged to the remainder, but that neither special nor general benefits may be deducted from the value of the land actually taken. The condemnee must be paid "at least" the market value of the land taken irrespective of and unreduced by any benefits.

The most favorable argument in support of the majority view seems to be the argument for equity. If the condemnee's compensation may be

137 Commonwealth, Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. Ct. App. 1963).
138 Commonwealth v. Sessions of Middlesex, 9 Mass. 387, 388 n.1(a) (1812).
139 Matter of City of New York, 83 N.E. 299 (N.Y. 1907).
140 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 7, at 50 (2d ed. 1953).

awarded relative to the value of his neighbor's land (a questionable contention), then equity would require that he should be compensated for the value of the part taken not reduced by any benefits. Benefits could be deducted from the value of the remainder since in all cases whether a taking occurs or not, benefits can be deducted from alleged damages claimed by any citizen. The other arguments propounded to support the majority view have less to commend them. The requirement that compensation must be paid in "money" is not only a meaningless argument, but leads to another fallacy; that is, the "money" requirement makes necessary the dichotomy of valuation of the land actually taken and the remainder. From this dichotomy, these states have given a higher constitutional status to the value of the land taken than is given to "damages" to the remainder.

Twenty states comprise the minority view. These states allow benefits to be set off from the entire compensation awarded. They refuse to draw the artificial dichotomy between compensation for damages to the remainder and compensation for the land taken; both have equal constitutional status under this view.

The minority view seems best supported by logic although less supported by authority. Yet the substantial support expressed for this view by the Supreme Court fully compensates for any deficiency in authority for the minority view.

Both the federal courts and the minority view state courts interpret the Constitution as allowing benefits to be set off from the total compensation. The argument for equity under this view calls for a "balancing of the equities" between the condemnee and the condemnor not only to protect the interest of the public, but to avoid the "double compensation" danger inherent in the majority view. There is no requirement within the minority view that compensation must be paid in money, although most minority view states refer to benefits not as compensation but as an offset element in determining what "just compensation" should be.