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## COMMENTS

### COMPENSATION FOR PARTIAL TAKINGS IN TEXAS

#### A. CHRIS HEINRICHS

A condemnation proceeding is perhaps the most frustrating legal experience which a person might encounter.<sup>1</sup> Rarely does a landowner feel that the compensation to which he is entitled is fair, just, or adequate.<sup>2</sup> As a result, all attempts to devise one standard formula for the computation of adequate damages have failed, due largely to the individuality of each case.<sup>3</sup> This comment will not endeavor to create such a formula; it will, however, strive to examine the various means employed by the Texas courts in their effort to achieve an equitable, or at least a tolerable, solution in cases involving a partial taking of land.

Eminent domain is the "right of the state . . . to condemn private property for public use . . . upon paying the owner a due compensation."<sup>4</sup> This authority is inherent in organized society<sup>5</sup> and is also conferred by the Con-

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1. One writer has compared eminent domain proceedings with capital punishment as being the harshest laws in our society. In support of this view, Speir remarks that: [T]he exercise of the law of eminent domain can create the most recognizable effect upon more people and the community than any other general law or individual exercise of government authority. Speir, *Eminent Domain Proceedings: Legal Basis for Appraising*, 10 BAYLOR L. REV. 1, 2 (1958).

2. U.S. CONST. amend. V provides that private property shall not be taken for public use, without "just compensation." Although the Texas Constitution, Article I, Section 17 differs in language ["No person's property shall be taken . . . for or applied to public use without adequate compensation being made . . ."], "adequate" and "just" compensation have been held to be synonymous. *State v. Hale*, 96 S.W.2d 135, 141 (Tex. Civ. App.—Austin 1936), *modified on other grounds*, 136 Tex. 29, 146 S.W.2d 731 (1941).

3. In discussing the concept and scope of the Fifth Amendment, the United States Supreme Court stressed that it has tried to be liberal in deciding what is, and what is not, just compensation. Justice Douglas, speaking for the majority of the Court in *United States v. Cors*, 337 U.S. 325, 332 (1949) remarked that:

The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. . . . the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined. The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases [citations omitted].

4. *Fort Worth & D.C. Ry. v. Ammons*, 215 S.W.2d 407, 409 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.).

5. *Texas Hwy. Dep't v. Weber*, 147 Tex. 628, 631, 219 S.W.2d 70, 72 (1949).

stitutions of the United States and Texas.<sup>6</sup> The power of eminent domain was explained by the United State Supreme Court as follows:

The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and as said in *Boom v. Patterson*, 98 U.S. 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the federal Constitution and in the Constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised.<sup>7</sup>

Condemnation proceedings can give rise to two distinct types of "takings"—whole and partial. A whole taking occurs when the entire tract of land possessed by the landowner is appropriated. Compensation in such a situation is limited to the market value of the land at the time and place of taking<sup>8</sup> with market value being defined as "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying."<sup>9</sup> This computation of damages in a whole taking represents a very direct approach, in contrast to partial taking situations.<sup>10</sup>

When a partial taking occurs, the landowner is left with a residue of his property hereinafter referred to as his remainder.<sup>11</sup> Although, at first

6. U.S. CONST. amend. V; TEX. CONST. art. I, § 17.

7. *United States v. Jones*, 109 U.S. 513, 518 (1883).

8. TEX. REV. CIV. STAT. ANN. art. 3265, § 2 (1968); *Lower Nueces River Water Supply Dist. v. Sellers*, 323 S.W.2d 324, 332 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.).

9. *State v. Carpenter*, 126 Tex. 604, 618-19, 89 S.W.2d 979, 980 (1936).

10. Speir suggests that the model instruction to the jury in whole taking situations should be as follows:

What do you find from a preponderance of the evidence is the cash market value of the subject property of (date—being the date of taking)?

Answer in dollars and cents \_\_\_\_\_.

Speir, *Eminent Domain Proceedings: Legal Basis for Appraising*, 10 BAYLOR L. REV. 1, 7 (1958). Compare this instruction with those quoted later to fully appreciate the complexities of computing damages in partial takings.

11. Although it is generally clear that there has been either a whole or a partial taking, occasionally it is difficult to determine whether in fact a piece of land should be considered as a remainder. A "whole taking" may occur even if part of the owner's land is untouched; on the other hand, a partial taking may be declared even though the land condemned and the remaining tract are not contiguous parcels of land. As one court expressed:

Tracts under common ownership which are physically separated may be united by their being used as a part of a single unit of operation, or, conversely, tracts of land which are physically contiguous may be considered separated from one another for these purposes if they are put by their owners to separate and distinct uses whereby they are operated by their owners not as a unit, but separately and distinctly.

*Southern Pipe Line Corp. v. Deitch*, 451 S.W.2d 814, 817-18 (Tex. Civ. App.—Corpus Christi 1970, writ granted).

The problem of distinguishing a single tract of land from separate ones was thor-

glance, there seems to be no reason for treating the severed section differently than a whole parcel when computing damages for its taking, an example will indicate the necessity to do so. Suppose a party has a 10-acre tract which has a water hole for his cattle on the far eastern side of the land. A 1-acre strip in the middle of his land is taken for the purpose of building a highway, completely separating the western tract from the watering hole. The landowner has lost, for all practical purposes, the value of the western tract as grazing land, and he is forced to crowd his cattle onto the eastern 4½ acres. Should this man be forced to accede to an award of the reasonable market value of the 1-acre strip? The law clearly says not.<sup>12</sup> As Nichols states in his well-known treatise:

Compensation is awarded not merely for the land taken, but for the taking of property. The remaining land is not taken, but the damage to such land results from the taking and must be included when compensation for the taking is reckoned. This distinction is of the utmost importance.<sup>13</sup>

There are two main formulae used to determine a landowner's compensation when there has been a partial taking of his land.<sup>14</sup> One of these is

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oughly discussed in *Calvert v. City of Denton*, 375 S.W.2d 522 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.). The court concluded that the question should be whether or not the tracts are of such a dissimilar character that they should be valued separately, or whether the uses of the lands are not so divergent as to require such a treatment. *Id.* at 525-26. See *City of Denton v. Hunt*, 235 S.W.2d 212, 214-15 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.). See generally *Worsham, Problems Peculiar to a Partial Taking in Condemnation*, 13 Sw. L.J. 412, 423-24 (1959); 4A P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14.2, at 14-45, 14-46 (3d rev. ed. 1971).

12. It is well settled that a landowner is entitled to compensation not only for the condemned land, but also for severance damages which the remainder has suffered as a result of the taking. *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *State v. Carpenter*, 126 Tex. 604, 609, 89 S.W.2d 194, 196 (1936); *Southern Pipe Line Corp. v. Deitch*, 451 S.W.2d 814, 817 (Tex. Civ. App.—Corpus Christi 1970, writ granted); *City of Lubbock v. Thiel*, 352 S.W.2d 799, 800 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.); *Northern Natural Gas Co. v. Johnson*, 278 S.W.2d 410, 412 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.); TEX. REV. CIV. STAT. ANN. art. 3265, § 3 (1968). See 4A P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14.2, at 14-36, and § 14.21, at 14-49, 14-52 (3d rev. ed. 1971); 1 L. ORGEL, *VALUATION UNDER EMINENT DOMAIN* 226 (2d ed. 1953); M. RAYBURN, *TEXAS LAW OF CONDEMNATION* § 92, at 322-24 (1960). "To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice." *United States v. Grizzard*, 219 U.S. 180, 185-86 (1911).

13. 4A P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14.21, at 14-52 (3d rev. ed. 1971).

14. See 4A P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14.23 (3d rev. ed. 1971); 1 L. ORGEL, *VALUATION UNDER EMINENT DOMAIN* § 48, at 232 (2d ed. 1953); *Palmore, Damages Recoverable in a Partial Taking*, in *INSTITUTE ON EMINENT DOMAIN* 57 (1968).

A third formula which is very seldom employed, adds the market value of the land taken with the difference between the damages and the benefits to the remainder. Mo-

the "before and after" test. When applying this theory, the jury is instructed to find the difference between the market value of the entire tract and that of the remainder after the taking. This will reflect the value of the condemned land as well as the measure of damages to the remainder. The "before and after" test was applied in Texas cases prior to 1936,<sup>15</sup> and it is the standard which the Court of Appeals for the Fifth Circuit still uses in resolving controversies concerning Texas land.<sup>16</sup> Another view is that the damages to each part should not be treated as a unit, but should be kept separate and distinct.<sup>17</sup> Thus the second important formula which is utilized is the "part taken plus damages" test. In this method, the measure of damages is the market value of the land taken plus the difference in market values of the remainder immediately before and immediately after the taking. Texas courts have almost unanimously adhered to this rule since *State v. Carpenter*<sup>18</sup> was decided in 1936.<sup>19</sup>

#### THE TEXAS STANDARD

In the seminal case of *State v. Carpenter*,<sup>20</sup> the state sought to condemn 8.03 acres for highway purposes across a tract of about 240 acres which was owned by Carpenter and his wife. The trial court had instructed the

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ran v. Ross, 21 P. 958, 959 (Cal. 1889); *Colorado M. Ry. v. Brown*, 25 P. 87, 88 (Colo. 1890); *Department of Pub. Works & Bldgs. v. Barton*, 19 N.E.2d 935, 937 (Ill. 1939); *State v. Walker*, 129 So. 2d 35, 37 (La. Ct. App. 1961); *Bailey v. State Hwy. & Pub. Works Comm.*, 199 S.E. 25, 26 (N.C. 1938). See generally 4A P. NICHOLS, THE LAW OF EMINENT DOMAIN § 14.23, at 14-94, 14-95 (3d rev. ed. 1971).

15. E.g., *Fort Worth & R.G. Ry. v. Downie*, 82 Tex. 383, 387, 17 S.W. 620, 621 (1891); *Gulf, C. & S.F. Ry. v. Helsley*, 62 Tex. 593, 596 (1884); *Texas Pipe Line Co. v. Watkins*, 26 S.W.2d 1103, 1105 (Tex. Civ. App.—Beaumont 1930, no writ); *Pochila v. Calvert, W. & B.V. Ry.*, 72 S.W. 255, 256 (Tex. Civ. App. 1903, no writ).

16. E.g., *United States v. Trout*, 386 F.2d 216, 219 (5th Cir. 1967).

17. This is the position which Texas courts have subsequently adopted. See *State v. Carpenter*, 126 Tex. 604, 609-10, 89 S.W.2d 194, 197 (1936); *City of San Antonio v. Congregation of the Sisters of Charity*, 404 S.W.2d 333, 336 (Tex. Civ. App.—Eastland 1966, no writ).

18. 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (1936).

19. See, e.g., *City of Pearland v. Alexander*, 483 S.W.2d 244, 247 (Tex. Sup. 1972); *City of Austin v. Cannizzo*, 153 Tex. 324, 329, 267 S.W.2d 808, 812 (1954); *State v. Wilson*, 439 S.W.2d 134, 136-37 (Tex. Civ. App.—Tyler 1969, no writ); *Willcockson v. Colorado River Municipal Water Dist.*, 436 S.W.2d 203, 210 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.); *South Texas Elec. Coop., Inc. v. Ermis*, 396 S.W.2d 955, 958 (Tex. Civ. App.—Corpus Christi 1965, no writ); *County of Nueces v. Salley*, 348 S.W.2d 397, 399 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.); *Taub v. Houston I.S.D.*, 339 S.W.2d 227, 230 (Tex. Civ. App.—Eastland 1960, writ ref'd n.r.e.); *City of Corsicana v. Marino*, 282 S.W.2d 720, 721 (Tex. Civ. App.—Waco 1955, no writ); *Wallace v. Van Zandt County*, 264 S.W.2d 202, 203-04 (Tex. Civ. App.—Dallas 1954, no writ); *City of Trinity v. McPhail*, 131 S.W.2d 803, 805 (Tex. Civ. App.—Galveston 1939, no writ).

20. 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (1936).

jury to determine the market value of the condemned land as a part of the whole tract, and then to calculate the reduction in market price of the remainder due to the taking.<sup>21</sup> The Commission of Appeals, however, recognized that by considering the condemned land as part of the whole while computing its market value, the jury necessarily included a part of the damages to the remainder.<sup>22</sup> There was thus an opportunity for the jury to erroneously award double damages. Realizing the potential abuse which such a formula would encourage, the court concluded:

[T]o avoid the possibility of double damages, the value of the part taken should be ascertained by considering such portion alone, and not as a part of the larger tract; unless, of course the issue of damages to the remainder of the tract is not involved.<sup>23</sup>

The Texas Supreme Court adopted the rule that the damages to the remainder should be determined by taking the difference between the market values of the remainder immediately before and immediately after the appropriation, taking into consideration "the nature of the improvement, and the use to which the land taken is to be put."<sup>24</sup> With this skeleton, the court proceeded to suggest a set of special issues to be submitted to the jury in condemnation cases involving a partial taking of the land.<sup>25</sup> Since this de-

21. In affirming the judgment of the trial court, the Waco Court of Civil Appeals expressed their ruling thusly:

The strip of land actually taken in this case constituted a part of a reasonably large and well-improved farm. If it had a greater value as a part of such farm than it would have, considering its size, shape, and location, if segregated therefrom and constituting an isolated tract of unimproved farming land, appellees were entitled to such enhanced value.

*State v. Carpenter*, 55 S.W.2d 219, 221 (Tex. Civ. App.—Waco 1932), *rev'd*, 126 Tex. 604, 89 S.W.2d 194 (1936).

22. *State v. Carpenter*, 126 Tex. 604, 608, 89 S.W.2d 194, 196 (1936).

23. *Id.* at 609-10, 89 S.W.2d at 197.

24. *Id.* at 610, 89 S.W.2d at 197. The market value of the condemned land is determined as of the date of taking, *Barshop v. City of Houston*, 442 S.W.2d 682, 685 (Tex. Sup. 1969); *San Antonio & A. P. Ry. v. Ruby*, 80 Tex. 172, 176, 15 S.W. 1040, 1041 (1891), which, statutorily, is the time of the hearing. TEX. REV. CIV. STAT. ANN. art. 3265, §§ 2, 3 (1968).

There is a controversy whether the date of taking should be the date when the proposed condemnation project is announced, rather than the date of the hearing or the actual appropriation. Presently it appears that any loss which the landowner suffers between the date of announcement and the date of taking is not compensable. In *State v. Vaughan*, 319 S.W.2d 349, 354-55 (Tex. Civ. App.—Austin 1958, no writ), the landowner's loss of rents due to tenants moving from his property because of the condemnation announcement was merely incidental to the taking, and he is entitled to no such damages. And in *Naumann v. Urban Renewal Agency*, 411 S.W.2d 803, 805 (Tex. Civ. App.—Austin 1967, writ *ref'd n.r.e.*) the date of taking was not the time that the city adopted a plan for condemnation by resolution, but rather was the time required by article 3265, §§ 2, 3. See Comment, *Depreciation Damages: A Condemnor's Windfall*, 51 NEB. L. REV. 147 (1971); Comment, *Eminent Domain—Enhanced Value Due to Project as an Element of Market Value in Texas Condemnation Law*, 2 ST. MARY'S L.J. 193, 195-96 (1970); Note, *Eminent Domain*, 3 ST. MARY'S L.J. 339, 343-44 (1971).

25. *Id.* at 618, 89 S.W.2d at 201-02. The court emphatically stressed that these

cision, these issues have been almost reverently followed by Texas courts.<sup>26</sup> The suggested issues and instructions include:

Question No. 1. From a preponderance of the evidence what do you find was the market value of the strip of land condemned by the state for highway purposes at the time it was condemned, considered as severed land?

Answer in dollars and cents.

Question No. 2. From a preponderance of the evidence what do you find was the market value of defendants' tract of land, exclusive of the strip of land condemned, immediately before the strip was taken for highway purposes?

Answer in dollars and cents.

Question No. 3. Excluding increase in value, if any, and decrease in value, if any, by reason of benefits or injuries received by defendants in common with the community generally and not peculiar to them and connected with their ownership, use, and enjoyment of the particular tract of land across which the strip of land has been condemned, and taking into consideration the uses to which the strip condemned is to be subjected, what do you find from a preponderance of the evidence was the market value of the remainder of defendants' tract of land immediately after the taking of the strip condemned for highway purposes?

Answer in dollars and cents.

You are instructed that the term "market value" is the price which the property would bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it.<sup>27</sup>

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issues were merely suggested as a practical guide in condemnation cases, and would not be used in all such cases. "This opinion must not be construed as attempting to furnish an inflexible rule to be followed in all similar cases . . . . Fair and just compensation . . . is the end sought to be attained. We realize that this result cannot be reached in every case by following the general rules here outlined." *Id.* at 620, 89 S.W.2d 979, 981 (on rehearing).

26. Cases cited note 20 *supra*. In a dissenting opinion, Justice Garwood revealed the sanctity which surrounds the *Carpenter* decision by referring to it as "a sort of bible." *City of Austin v. Cannizzo*, 153 Tex. 324, 336, 267 S.W.2d 808, 816 (1954).

27. *State v. Carpenter*, 126 Tex. 604, 618, 89 S.W.2d 194, 201-02 (1936). The difficulty in applying this willing seller/willing buyer test is discussed by Rayburn when he writes:

The fact must be faced, that almost universally, a condemnation proceeding finds a citizen landowner, who would probably not be willing to sell under any circumstances on a voluntary basis, being required to sell his land to the condemnor, whether he wants to or not, or is a willing seller or not. At the very outset, the court, or other evaluating body, is faced with an artificial, unrealistic, and entirely nebulous, and highly speculative conclusion, that the landowner is, or ever will be, under the proceeding, a "willing seller."

M. RAYBURN, TEXAS LAW OF CONDEMNATION § 92, at 324 (1960). This contradiction is further mystified by the refusal of the courts to accept evidence of condemnation awards when comparing similar sales. The rationale for this evidentiary rule is that a purchase by a condemning authority is not free and voluntary and thus does not

It should be noted, however, that the court in *Carpenter* in no way intended their decision to be binding on every case involving a partial taking of land. The court recognized that cases vary in their factual circumstances, and that different rules should be applied where to do so would insure a just and adequate compensation.<sup>28</sup> Because of the near unanimity in their adherence to the principles laid down in *Carpenter*, many Texas courts have nonetheless been reluctant to apply any other evaluation theory in eminent domain proceedings.<sup>29</sup>

### *Market Value*

*Carpenter* firmly established the market value as the measure of damages in Texas eminent domain cases;<sup>30</sup> the method by which juries were to compute this market value was the next difficulty to be overcome. If the market value concept were not applied in computing the damages and compensation, large numbers of special issues would be presented to juries in an effort to calculate adequate compensation.<sup>31</sup> Special issues such as the individual costs of replacing a fence, restoring a water well to capacity, or mending a barn or other improvement would be figured and added to any additional damages in order to award the compensation.<sup>32</sup> Any damages to

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meet the willing seller/willing buyer test. *Gomez Leon v. State*, 426 S.W.2d 562, 565 (Tex. Sup. 1968); *State v. Curtis*, 361 S.W.2d 448, 450 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.); *Menchaca v. San Antonio I.S.D.*, 297 S.W.2d 363, 365 (Tex. Civ. App.—Waco 1956, writ dismissed). It seems paradoxical that the state claims to compensate a "willing seller," and yet this compensation cannot be shown in a subsequent suit. See also C. McCORMICK, EVIDENCE § 199, at 472 (2d ed. 1972).

28. *State v. Carpenter*, 126 Tex. 604, 617-18, 620, 89 S.W.2d 194, 201, *motion for rehearing overruled*, 89 S.W.2d 979, 981 (1936).

29. One writer made the following observation on the supremacy of *Carpenter*:

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 bears 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.

Comment, *Eminent Domain—Benefits vs. Money as Compensation in a Partial Taking*, 4 ST. MARY'S L.J. 64, 65 n.8 (1972).

30. *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (1936); *accord*, *City of Austin v. Cannizzo*, 153 Tex. 324, 329-30, 267 S.W.2d 808, 812 (1954); see M. RAYBURN, TEXAS LAW OF CONDEMNATION § 92, at 321 (1960). It is error to allow a witness to testify as to the worth or value of a piece of land, without first showing that he is testifying as to the market value of the land. See *Tennessee Gas Transmission Co. v. Wood*, 331 S.W.2d 808, 810 (Tex. Civ. App.—San Antonio 1960, no writ).

31. See *State v. Carpenter*, 126 Tex. 604, 611-12, 89 S.W.2d 194, 198 (1936).

32. In *Parker County v. Jackson*, 23 S.W. 924, 925 (Tex. Civ. App. 1893, no writ), the trial court charged the jury to determine the cost to plaintiff of rebuilding a fence and erecting facilities for stock water. This was held to be error by the court of civil appeals, and the market value concept was subsequently used to determine the landowner's damages. This case is an excellent example, however, to show the extremes which would occur if the market value standard wasn't employed. Juries would probably be faced with insurmountable numbers of elements of damage to consider,



the use of the land would be determined apart from the other elements of damage and then included in the total award. The market value concept eliminates the necessity of individually introducing these elements of damage to a jury and condenses them to purely evidentiary consideration.<sup>33</sup> A jury is now able to consider the various elements of damage in its computation of the market values of the land,<sup>34</sup> but it only needs to determine the amounts required by the three special issues proposed by *Carpenter*.

The definition and scope of market value was extended in *City of Austin v. Cannizzo*.<sup>35</sup> In an effort to clarify the *Carpenter* doctrine, the Texas Supreme Court arbitrated two separate "market value" problems in this case. The first point of error alleged that the trial court erred "in holding that for the 4.57 acre tract of land to have a market value there must have been a sufficient number of recent sales of comparable property in the immediate vicinity of said tract to establish a prevailing price . . . ."<sup>36</sup> The

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and even then a just compensation is not guaranteed.

Perhaps the ultimate absurdity was faced in *Idaho & W. Ry. v. Coey*, 131 P. 810 (Wash. 1913) where it was held that the tendency of gophers and squirrels to propagate on a railroad right of way was a proper element to be considered in evaluating the damage to the remainder. The ridiculousness of presenting such an item of damage to the jury was surpassed only by the indignities suffered by the local gopher and squirrel populations.

33. See *State v. Carpenter*, 126 Tex. 604, 614, 89 S.W.2d 194, 199 (1936).

34. See *Sample v. Tennessee Gas Transmission Co.*, 151 Tex. 401, 406, 251 S.W.2d 221, 224 (1952); *State v. Carpenter*, 126 Tex. 604, 614, 89 S.W.2d 194, 199 (1936); *Currie v. Glasscock County*, 212 S.W. 533, 534 (Tex. Civ. App.—El Paso 1919, no writ); *Parker County v. Jackson*, 23 S.W. 924, 925 (Tex. Civ. App. 1893, no writ). See *Worsham, Problems Peculiar to a Partial Taking in Condemnation*, 13 Sw. L.J. 412, 421 (1959); M. RAYBURN, *TEXAS LAW OF CONDEMNATION* § 124, at 394-95 (1960); 4A P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14.24, at 14-128-30 (3d rev. ed. 1971).

It is not proper to instruct the jury that they may or may not consider certain elements of damage. *State v. Carpenter*, 126 Tex. 604, 614, 89 S.W.2d 194, 199 (1936). The burden is on the landowner to bring forward all elements of damage that are foreseeable in any degree and that might have a bearing upon the market value of either the remainder or the land taken. *City of LaGrange v. Pieratt*, 142 Tex. 23, 27, 175 S.W.2d 243, 246 (1943).

35. 153 Tex. 324, 267 S.W.2d 808 (1954).

36. *Id.* at 328, 267 S.W.2d at 811. Comparable sales of similar land has always been a primary method of determining market value in condemnation cases. C. McCORMICK, *EVIDENCE* § 199, at 471-73 (2d ed. 1972). The land being compared must be so situated and so similar in character as to afford a fair basis of comparison, and the sales must not be too remote in time or distance to be treated as similar sales. *City of Abilene v. Blackburn*, 447 S.W.2d 474, 476 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.); *Housing Authority v. Shambry*, 252 S.W.2d 963, 966 (Tex. Civ. App.—Austin 1952, writ ref'd n.r.e.). Although it is within the trial court's discretion to determine whether the claimed comparable sales are so similar as to be admissible, *City of Abilene v. Blackburn*, 447 S.W.2d 474, 476 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.); *Holcombe v. City of Houston*, 351 S.W.2d 69, 73 (Tex. Civ. App.—Houston 1961, no writ), variances due to trees, gullies, size or shape will usually go to the weight and not the admissibility of the evidence. *City of Austin v. Bergstrom*, 448 S.W.2d 246, 250 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.); *Hays v. State*,

trial court and the court of civil appeals both held that in the absence of these recent comparable sales, the landowners should be awarded the intrinsic value of the land instead of its market value.<sup>37</sup> This decision was based on the erroneous conclusion that if there were no comparable sales, the land does not have a market value,<sup>38</sup> and thus the intrinsic value of the land was the measure of damages which should be awarded.<sup>39</sup> The Texas Supreme Court, however, found this reasoning to be faulty and declared that market value is not restricted to the prevailing price, and is still the legal measure of damages even without such information.<sup>40</sup> The court concluded by commenting that "although there is authority for the proposition that where property has no market value its intrinsic value may be shown, we have no such case before us."<sup>41</sup>

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342 S.W.2d 167, 172 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.). However, comparisons of improved with unimproved lands are not allowed, *Southern Pac. Co. v. State*, 438 S.W.2d 413, 418-19 (Tex. Civ. App.—El Paso 1969, no writ), nor are sales to condemning agencies. *Gomez Leon v. State*, 426 S.W.2d 562, 565 (Tex. Sup. 1968). See generally M. RAYBURN, TEXAS LAW OF CONDEMNATION § 140(1), at 425, and § 140(2), at 425-26 (1960).

37. *City of Austin v. Cannizzo*, 153 Tex. 324, 329, 267 S.W.2d 808, 812 (1954). In *West Texas Hotel Co. v. City of El Paso*, 83 S.W.2d 772 (Tex. Civ. App.—El Paso 1935, writ dism'd), the court sought to explain the concept of intrinsic value when it stated:

The real or intrinsic value of property is represented by that sum of money which is a fair equivalent of such property. The proper determination of such real or intrinsic value of property is by the application of sound judgment and common sense in a consideration of the elements which an ordinarily prudent and intelligent business man would consider in the ascertainment thereof. In the ascertainment thereof among the elements that may be taken into consideration is the location, cost and character of improvements, rental history, if any, location as to future growth of the City, sales of adjacent property, if any, the uses to which the property is put or of which it is reasonably susceptible.

*Id.* at 776-77. See M. RAYBURN, TEXAS LAW OF CONDEMNATION § 93, at 329-33 (1960).

38. *City of Austin v. Cannizzo*, 153 Tex. 324, 329, 267 S.W.2d 808, 812 (1954).

39. See *Lower Nueces River Water Supply Dist. v. Sellers*, 323 S.W.2d 324, 332 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.); *City of Corsicana v. Marino*, 282 S.W.2d 720, 722 (Tex. Civ. App.—Waco 1955, no writ); *State v. Schlick*, 175 S.W.2d 688, 692 (Tex. Civ. App.—Galveston 1943), *rev'd on other grounds*, 179 S.W.2d 246, 249-50 (1944); *Foley Bros. Dry Goods Co. v. Settegast*, 133 S.W.2d 228, 232 (Tex. Civ. App.—Galveston 1939, writ ref'd); *City of Trinity v. McPhail*, 131 S.W.2d 803, 806 (Tex. Civ. App.—Galveston 1939, no writ); *Lower Colorado River Authority v. Hughes*, 122 S.W.2d 222, 223 (Tex. Civ. App.—Austin 1938, writ dism'd); *Taylor County v. Olds*, 67 S.W.2d 1102, 1105 (Tex. Civ. App.—Eastland 1934, writ dism'd). *But see* *City of San Antonio v. Congregation of the Sisters of Charity*, 404 S.W.2d 333, 337 (Tex. Civ. App.—Eastland 1966, no writ) and *State v. Waco I.S.D.*, 364 S.W.2d 263, 266 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) where the reasonable cost of providing substitute facilities was determined to be the measure of damages in takings involving school campuses where there was no market value of the land as a matter of law. See generally M. RAYBURN, TEXAS LAW OF CONDEMNATION § 93 (1960).

40. *City of Austin v. Cannizzo*, 153 Tex. 324, 329, 267 S.W.2d 808, 812 (1954).

41. *Id.* at 330, 267 S.W.2d at 812. Rayburn feels that there are very few situations in which the land taken would not have a market value. When such a case did arise,

*Uses of the Land Taken*

The second point on which the court in *Cannizzo* held was whether it was error to admit evidence of the commercial adaptability of the condemned property despite valid existing zoning ordinances in the area.<sup>42</sup> *Carpenter* established that, when applying the willing seller-willing buyer definition of market value, all factors should be considered which would influence negotiations between such a seller and buyer.<sup>43</sup> This includes all reasonable uses for which the land is adaptable, or, in reasonable probability, would soon become adaptable.<sup>44</sup> Only those uses which are highly

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he favors combining the issues formulated in *Carpenter* with the replacement costs to the landowner. As he comments in his well-known treatise:

The only cases that come to mind, or are listed in the law books, as being peculiarly susceptible to being valued by the intrinsic method, are those of churches, institutions, and public buildings. Practically all other property . . . has a ready market value . . . .

Churches, colleges and public institutions, although hard to sell, do have a market value, and . . . a just result has been obtained . . . by the application of the Ultimate Issues of market value as enjoined by the *Carpenter* and *Cannizzo* cases, but aided by the device, of allowing the introduction of evidence as to what it would cost to replace the buildings and improvements . . . .

The intrinsic method of valuation of lands taken, or damaged is, recognized only in the event, that no market value exists, but then on the other hand, the area for examining the possibility of there being a market, is so enlarged, and the horizons expanded so far, that it would be difficult to envision a case, that could not at least at the present time, be encompassed within the idea of MARKET VALUE, AND THE DIFFERENCE IN MARKET VALUE, BEFORE AND AFTER, AS BEING THE TRUE MEASURE OF DAMAGE TO LAND AND IMPROVEMENTS.

M. RAYBURN, TEXAS LAW OF CONDEMNATION § 93, at 332, 336 (1960) (author's emphasis). This "reasonable substitute" rule was successfully employed in *State v. Waco I.S.D.*, 364 S.W.2d 263, 266 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) and *City of San Antonio v. Congregation of the Sisters of Charity*, 404 S.W.2d 333, 337 (Tex. Civ. App.—Eastland 1966, no writ) which will be discussed later, more thoroughly, in this comment.

42. *City of Austin v. Cannizzo*, 153 Tex. 324, 328, 267 S.W.2d 808, 811 (1954).

43. *State v. Carpenter*, 126 Tex. 604, 613, 615, 89 S.W.2d 194, 199, 200 (1936).

This is not completely true. There are elements which would affect the market value, but which aren't entitled to consideration by a jury. The special value of the land to either the landowner or the condemnor may not be considered as an element of market value, *United States v. Miller*, 317 U.S. 369, 375 (1943), nor can the landowner's sentimental value for the land be introduced into evidence. *State v. Doom*, 278 S.W. 255, 257 (Tex. Civ. App.—Austin 1925, no writ); *Cane Belt Ry. v. Hughes*, 72 S.W. 1020 (Tex. Civ. App. 1903, no writ). It is also error to introduce evidence as to the business profits from the land unless the business cannot be carried on elsewhere, *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 575 (1898), or evidence of any injuries caused to the business due to its removal from the established location. *State v. Villarreal*, 319 S.W.2d 408, 410 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.).

44. *City of Pearland v. Alexander*, 483 S.W.2d 244, 248 (Tex. Sup. 1972); *State v. Walker*, 441 S.W.2d 168, 175 (Tex. Sup. 1969); *State v. Carpenter*, 126 Tex. 604, 611, 89 S.W.2d 194, 198, *motion for rehearing overruled*, 89 S.W.2d 979, 981 (1936). See M. RAYBURN, TEXAS LAW OF CONDEMNATION § 93, at 336 (1960); Note, *Eminent Domain*, 4 ST. MARY'S L.J. 395 (1972). "Stated another way, value may reflect not

speculative or conjectural should be excluded.<sup>45</sup> Because of the ever-present possibility of removal or lifting of the zoning ordinances, the court in *Cannizzo* adopted the rule propounded by Nichols as follows:

When however a particular use of property is prohibited or restricted by law, but there is a reasonable probability that the prohibition or restriction will be modified or removed in the near future, the effect of such probability upon the value of the property may be taken into consideration.<sup>46</sup>

When the trial court admits evidence of prospective uses not presently available, the court in *Cannizzo* suggested that the *Carpenter* definition of market value should be expanded to include "*the taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.*"<sup>47</sup>

The court's opinion in *Herndon v. Housing Authority of City of Dallas*<sup>48</sup> and the language of the *Carpenter* decision, however, seem to take displeasure at any additional instruction given to the jury. In *Herndon*, a case involving a whole taking, the landowner claimed that the trial court erred in not instructing the jury to consider the most valuable use of the land.<sup>49</sup> The Dallas Court of Civil Appeals held that the jury had been given the correct *Carpenter* definition of market value and that it was not necessary to instruct the jury to consider evidence which had just been presented to it.<sup>50</sup> "The fact that the court permitted the evidence to be introduced and argued ought to make it obvious to the jury that it was proper for them to consider it."<sup>51</sup> The court in *Carpenter* had also expressed its opinion as to additional instruction:

[I]n submitting the simple issue of the difference in the market value before and after, it seems to us proper that same should be submitted

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only the use to which the property is presently devoted but also that use to which it may readily be converted." *Calvert v. City of Denton*, 375 S.W.2d 522, 525 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.).

45. *State v. Walker*, 441 S.W.2d 168, 175 (Tex. Sup. 1969); *State v. Carpenter*, 126 Tex. 604, 615, 89 S.W.2d 194, 200 (1936); M. RAYBURN, TEXAS LAW OF CONDEMNATION § 93, at 337 (1960).

46. *City of Austin v. Cannizzo*, 153 Tex. 324, 333, 267 S.W.2d 808, 814 (1954), quoting 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 319, at 669 (2d ed. 1951); accord, *State v. Rankin*, 445 S.W.2d 581, 583 (Tex. Civ. App.—Corpus Christi 1969, no writ); *Jacobs v. State*, 384 S.W.2d 438, 439 (Tex. Civ. App.—Fort Worth 1964, no writ). See generally M. RAYBURN, TEXAS LAW OF CONDEMNATION § 92, at 326-28 (1960). It has been held, however, that the land must be valued as presently zoned and a premium allowed for the reasonable probability of an imminent change in zoning. *United States v. 50.8 Acres of Land*, 149 F. Supp. 749, 752 (E.D.N.Y. 1957).

47. *City of Austin v. Cannizzo*, 153 Tex. 324, 334, 267 S.W.2d 808, 815 (1954) (court's emphasis).

48. 261 S.W.2d 221 (Tex. Civ. App.—Dallas 1953, writ ref'd).

49. *Id.* at 222.

50. *Id.* at 222.

51. *Id.* at 222.

without instructions from the court, other than the formal definition of market value. It appears to us that in most if not all cases the whole matter of what may be considered by the jury and what may not be considered will be best determined by the trial court in the admission and exclusion of testimony rather than by instructions to the jury. In that way the possibility of instructions upon the weight of the evidence, and also the possibility of the jury allowing damages upon the basis of special items, rather than determining the ultimate question of the difference in market value, will be avoided.<sup>52</sup>

The *Cannizzo* addition to the definition of market value did not change the law of *Carpenter*, but merely attempted to extend it in specified situations, and therefore, the solidarity of this aspect of *Carpenter* remained intact.<sup>53</sup>

#### "Considered as Severed Land"

Another evidentiary problem which evolved from *Carpenter* concerned the interpretation of the phrase "considered as severed land" which is included in the instructions to the jury.<sup>54</sup> The purpose of considering the condemned tract as "severed land" is to avoid the awarding of double damages.<sup>55</sup> Although the phrase seems to be self-explanatory, there have been problems in its application.<sup>56</sup> One difficulty in applying the phrase occurs

52. *State v. Carpenter*, 126 Tex. 604, 614-15, 89 S.W.2d 194, 200 (1936).

53. The logic which the courts in *Herndon v. Housing Authority*, 261 S.W.2d 221 (Tex. Civ. App.—Dallas 1953, writ ref'd) and *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194 (1936) employed is very convincing. If the court allows the introduction of evidence concerning the uses or possible uses to which land is to be put, it seems obvious that the jury will understand that they may consider this. Also, the danger that the court will inadvertently emphasize the importance of such consideration is eliminated.

54. The first issue suggested in *Carpenter* requests the jury to consider the market value of the land taken when "considered as severed land." It is not necessarily error, however, for an expert witness to testify as to the value of the land without referring to the term "considered as severed land." *Jackson v. State*, 441 S.W.2d 279, 283 (Tex. Civ. App.—Dallas 1969, no writ); *Coastal Transmission Corp. v. Lennox*, 331 S.W.2d 778, 782 (Tex. Civ. App.—San Antonio 1960, no writ); *City of Houston v. Collins*, 310 S.W.2d 697, 702 (Tex. Civ. App.—Houston 1958, no writ) where the court said:

We cannot, however, find any basis in that case [*State v. Carpenter*] for the contention that the court intended to place the landowner in a verbal strait-jacket by having to refer to the land being taken as severed land whenever he referred to it in interrogating a witness about its value.

There is a presumption that the jury observed the court's charge as to considering the part taken as "severed land" unless the contrary appears. *City of Houston v. Collins*, 310 S.W.2d 697, 703 (Tex. Civ. App.—Houston 1958, no writ); *State v. Davis*, 140 S.W.2d 861, 864 (Tex. Civ. App.—Fort Worth 1940, no writ).

55. *State v. Walker*, 441 S.W.2d 168, 175 (Tex. Sup. 1969); *State v. Carpenter*, 126 Tex. 604, 608-10, 89 S.W.2d 194, 196-97 (1936). Nichols expresses the rule thusly:

A separate award should not, however, be given for the value of the land taken, considering the entire tract, and another sum for damages to the remaining land, for in such a case the same loss would be paid for twice.

4A P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14.231, at 14-106 (3d rev. ed. 1971).

56. For a criticism of the concept of "severed land," see Bickley, *Statutory*

when the condemned tract is so closely related to that of the remainder that the part taken would be substantially reduced in value if it were sold as a separate parcel.<sup>57</sup> Rayburn suggests that it should be considered as a technical term which signifies a hypothetical segregation in order to avoid double damages, and not that the part taken should be valued as if it exists entirely severed from the entire tract.<sup>58</sup> This view was followed in *State v. Walker*<sup>59</sup> where the court emphasized that "the market value of the land taken must be based upon a consideration of evidence in regard to the market value of the land taken, considered entirely apart from the increase or decrease in the value of the remaining land."<sup>60</sup>

When damages to the remainder are claimed and compensation awarded therefore, the landowner is assured adequate compensation and the danger of awarding double damages is avoided.<sup>61</sup> If, however, there are no damages to the remainder, or if such damages have been waived, the danger of awarding double damages is eliminated.<sup>62</sup> "In such a case, valuation of the part taken as a separate and unrelated tract may deprive the owner of a substantial element of value which cannot be compensated by includ-

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*Changes in Eminent Domain Proceedings Now Under Consideration*, in INSTITUTE ON EMINENT DOMAIN 233, 243 (1959). Rayburn expresses his doubts thusly:

Whatever may be said about the pros and cons of the argument, on the meaning of "considered as severed land," we think from the practical standpoint that the triers of fact in Texas have always and probably always will, assign a market value to that part taken, which bears a direct proportion, or percentage of its value, compared to a valuation of the entire tract, lot, or parcel of land.

M. RAYBURN, TEXAS LAW OF CONDEMNATION § 135, at 415 (1960). See generally 4A P. NICHOLS, THE LAW OF EMINENT DOMAIN § 14.23, at 14-106, 14-108, 14-109 (3d rev. ed. 1971); 1 L. ORGEL, VALUATION UNDER EMINENT DOMAIN § 50, at 235 (2d ed. 1953); Note, *Eminent Domain—Damages*, 44 TEXAS L. REV. 1621, 1624-26 (1966).

57. See *City of Richardson v. Smith*, 494 S.W.2d 933, 937 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.); *Jackson v. State*, 441 S.W.2d 279, 282 (Tex. Civ. App.—Dallas 1969, no writ). See also M. RAYBURN, TEXAS LAW OF CONDEMNATION § 135, at 415-16 (1960).

58. M. RAYBURN, TEXAS LAW OF CONDEMNATION § 135, at 414 (1960).

59. 441 S.W.2d 168 (Tex. Sup. 1969).

60. *Id.* at 175.

61. If the market value of the land taken, considered as severed land, is worth less than it would if considered as part of the entire tract, the landowner is still entitled to severance damages. Hopefully, these severance damages will adequately compensate the owner for his loss due to the taking, and thus there will be no deprivation to the landowner for the land to be considered severally. When there are no severance damages awarded, however, the landowner might be inadequately compensated if the part taken is considered as severed land. Therefore, in order to assure the fair compensation, the jury can consider the land taken as it relates to the value of the entire tract. "Ordinarily this relationship gives it a greater value than the value inherent in it as a separate tract." 4A P. NICHOLS, THE LAW OF EMINENT DOMAIN § 14.231, at 14-104 (3d rev. ed. 1971).

62. *State v. Carpenter*, 126 Tex. 604, 609-10, 89 S.W.2d 194, 197 (1936); *City of Richardson v. Smith*, 494 S.W.2d 933, 935 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

ing it in damage to the remainder."<sup>63</sup> The Dallas Court of Civil Appeals in *City of Richardson v. Smith*<sup>64</sup> did not feel that *Carpenter* resolved the question of whether the part taken can be considered as part of the whole when there has been no claim of damages to the remainder.<sup>65</sup> Upon this premise the court held that where there are no damages to the remainder, the jury need not consider the land taken as severed property, but rather can consider this land in relation to the entire tract.<sup>66</sup>

If a condemned tract is a self-sufficient economic unit, independent of the parent tract, its value should be ascertained by considering this tract alone, and not as a part of the entire tract.<sup>67</sup> The opposite situation was confronted in *City of Tyler v. Brogan*<sup>68</sup> where the part taken was deemed *not* to be a self-sufficient economic unit independent of the remainder.<sup>69</sup> The Tyler Court of Civil Appeals concluded that in such cases the market value should be ascertained by evaluating the portion taken as a *proportionate part of the entire tract*.<sup>70</sup> In effect, *Brogan* is correct when it determined that land without economic self-sufficiency should not be valued as "severed land" but rather as part of the entire tract; however, the decision erred in adopting Rayburn's rule that in *all* such cases the condemned land should be considered as a proportionate part of the entire tract.<sup>71</sup> In *City of Richardson v. Smith*,<sup>72</sup> the city took 55 acres out of a 213-acre tract for use as a park. In this particular situation, 49 of the condemned acres were lowlands subject to much flooding, and its market value, when considered as severed land, was much less than its value as a part of the whole tract of land.<sup>73</sup> There was no claim of damages to the remainder of the land, and thus there would be no compensation for the decreased market

63. *City of Richardson v. Smith*, 494 S.W.2d 933, 937 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

64. *Id.*

65. *Id.* at 937.

66. *Id.* at 936, 938. See *McFaddin v. State*, 373 S.W.2d 259, 261 (Tex. Civ. App.—Beaumont 1963, writ ref'd n.r.e.) (jury allowed to consider the value of the entire tract and then prorate the value of the part taken from this amount).

67. *State v. Meyer*, 391 S.W.2d 471, 479-82 (Tex. Civ. App.—Corpus Christ 1965), *aff'd*, 403 S.W.2d 366 (Tex. Sup. 1966); *Southern Pipe Line Corp. v. Deitch*, 451 S.W.2d 814, 817 (Tex. Civ. App.—Corpus Christi 1970, writ granted); *City of Tyler v. Brogan*, 437 S.W.2d 609, 613 (Tex. Civ. App.—Tyler 1969, no writ); M. RAYBURN, TEXAS LAW OF CONDEMNATION § 135, at 99-100 (Supp. 1973).

68. 437 S.W.2d 609 (Tex. Civ. App.—Tyler 1969, no writ).

69. *Id.* at 613.

70. *Id.* at 613.

71. *Id.* at 613. This rule was first propounded by Rayburn in the 1969 supplement to his treatise and subsequently adopted by this court. See M. RAYBURN, TEXAS LAW OF CONDEMNATION § 135, at 84 (Supp. 1969).

72. 494 S.W.2d 933 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

73. *Id.* at 935-36. It was agreed between the parties that the land taken was not a self-sufficient economic unit; therefore, the rule of law applied in *City of Tyler v. Brogan*, 437 S.W.2d 609, 613 (Tex. Civ. App.—Tyler 1969, no writ) was applicable. The land taken could be evaluated as a part of the entire tract.

value of the remainder. If the *Carpenter* formula had been followed, the condemnee would have received the reduced market value of the severed land plus no damages to the remainder as a result of the taking. The court, considering the inequities which would flow from such a determination, followed the example of *Brogan* and the land was valued as a part of the entire tract.<sup>74</sup> In so doing, however, the court rejected the precise method of valuation used in *Brogan* where the tract taken was considered as a proportionate part of the whole area, commenting that this method of valuation "does not do justice when the part taken differs in material respects from the remaining land."<sup>75</sup> In *Brogan*, the part taken and the remainder were almost identical in quality and value and the proportionate theory could properly and fairly be used. Conversely, in *City of Richardson v. Smith*,<sup>76</sup> the part taken was worth far less per acre than the remainder. If the proportionate value theory had been applied, the landowner would have received an amount in excess of the fair market value.<sup>77</sup> Likewise where the land taken has a higher per acre value than the value per acre of the remaining land, the proportionate value theory is inapplicable.<sup>78</sup> Thus, when no damages to the remainder are found or claimed, the jury can consider the market value of the part taken when considered as a part of the entire tract; whether they can consider the land as a proportionate loss to the whole, however, is a question of evidence depending on whether or not the tracts are similar in their material aspects.<sup>79</sup> If they are not sufficiently similar, the parties can show "the market value of the whole tract and the relative

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74. *City of Richardson v. Smith*, 494 S.W.2d 933, 938 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

75. *Id.* at 938.

76. *Id.*

77. *Id.* at 938-39. This is a matter of simple mathematics. Since the part taken was worth less per acre than the remaining land, which was suitable for a housing development, if the values per acre of the entire tract are averaged, the condemned land's value will be proportionately increased. Although this would be satisfactory to landowners, it is a violation of the concepts of adequate compensation and a willing seller/willing buyer definition of market value. The method of evaluation must be the same whether the value of the part taken is more or less than the average value of the entire tract. *Id.* at 939. See also *Nelson v. State*, 401 S.W.2d 880, 884 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

78. *Nelson v. State*, 401 S.W.2d 880, 883 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.). In *State v. Meyer*, 403 S.W.2d 366, 375 (Tex. Sup. 1966), it was held not proper to average lower priced acreage on uncondemned land with the higher priced frontage being condemned on the theory that the newly abutting land would be increased in value. The court decided that the net effect of trying this method of proportionate valuation was the offsetting of the market value of the land taken with the enhanced value of the remainder. This would violate the rule that a landowner is entitled to be paid in cash for the part taken, which is the basis for the three-issue charge as outlined in *Carpenter*. See also Note, *Eminent Domain—Damages*, 44 TEXAS L. REV. 1621, 1626 n.25 (1966).

79. See *City of Richardson v. Smith*, 494 S.W.2d 933, 938-39 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).



values of the part taken and the remainder before the taking as components of that total value, considering the physical characteristics of each and the uses to which each is adaptable."<sup>80</sup>

### *Benefits and Injuries to Remainder*

*Carpenter* confirmed that all reasonable factors can be considered by the jury in determining the market value of a piece of land.<sup>81</sup> But it also established that a diminution in the value of the remainder may be offset by any uses or improvements which are to be performed or constructed on the part taken, if the improvements enhance the value of the remainder.<sup>82</sup> Likewise, any injuries to the market value of the remainder caused by the anticipated use of the part taken may increase the compensation allowed the landowner.<sup>83</sup> In order for the jury to consider an alleged benefit or injury, however, it must be peculiar to the remaining land, and not to the community in general.<sup>84</sup> This distinction was described most aptly in the following manner:

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80. *Id.* at 939.

81. *State v. Carpenter*, 126 Tex. 604, 613, 615, 89 S.W.2d 194, 199, 200 (1936).

82. *Id.* at 617, 89 S.W.2d at 201. *See State v. Meyer*, 403 S.W.2d 366, 372 (Tex. Sup. 1966); *City of Waco v. Craven*, 54 S.W.2d 883, 886 (Tex. Civ. App.—Waco 1932, no writ); TEX. REV. CIV. STAT. ANN. art. 3265, § 3 (1968) which states:

When only a portion of a tract or parcel of a person's real estate is condemned, the commissioners shall estimate the injuries sustained and the benefits received thereby by the owner; whether the remaining portion is increased or diminished in value by reason of such condemnation, and the extent of such increase or diminution and shall assess the damages accordingly.

*See also 29A C.J.S. Eminent Domain* § 183(b), at 790 (1965); 22 TEX. JUR. 2d *Eminent Domain* § 185, at 291 (1961).

83. *State v. Meyer*, 403 S.W.2d 366, 372 (Tex. Sup. 1966); *State v. Carpenter*, 126 Tex. 604, 617, 89 S.W.2d 194, 201 (1936); *State v. Wilson*, 439 S.W.2d 134, 136-37 (Tex. Civ. App.—Tyler 1969, no writ); TEX. REV. CIV. STAT. ANN. art. 3265, § 3 (1968); 29A C.J.S. *Eminent Domain* § 183(b), at 790 (1965); 22 TEX. JUR. 2d *Eminent Domain* § 185, at 291 (1961).

84. *State v. Carpenter*, 126 Tex. 604, 617, 89 S.W.2d 194, 201 (1936); *Carter v. City of Tyler*, 454 S.W.2d 771, 774 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.); *State v. Wilson*, 439 S.W.2d 134, 136-37 (Tex. Civ. App.—Tyler 1969, no writ); *State v. South Main Baptist Church*, 361 S.W.2d 898, 901 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.); *Strickland v. City of Friona*, 294 S.W.2d 254, 258 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.); *City of Corsicana v. Marino*, 282 S.W.2d 720, 722 (Tex. Civ. App.—Waco 1955, no writ); *City of Waco v. Craven*, 54 S.W.2d 883, 886 (Tex. Civ. App.—Waco 1932, no writ); *Hall v. Wilbarger County*, 37 S.W.2d 1041, 1047 (Tex. Civ. App.—Amarillo 1931), *aff'd*, 55 S.W.2d 797 (Tex. Comm'n App. 1932, holding approved); *Pochila v. Calvert, W. & B. V. Ry.*, 72 S.W. 255, 256 (Tex. Civ. App. 1903, no writ); *Parker County v. Jackson*, 23 S.W. 924, 926 (Tex. Civ. App. 1893, no writ); TEX. REV. CIV. STAT. ANN. art. 3265, § 4 (1968). *See generally* M. RAYBURN, TEXAS LAW OF CONDEMNATION, § 139, at 423 (1960); 29A C.J.S. *Eminent Domain* § 183(b), at 790 (1965); 22 TEX. JUR. 2d *Eminent Domain* § 185, at 291 (1961). Whether particular items of benefit or damage are common or special is a question for jury determination. *See Worsham, Problems Peculiar to a Partial Taking in Condemnation*, 13 Sw. L.J. 412, 421 (1959).

In order to be peculiar to a piece of property, the benefit must affect it directly, so as not to be shared by other property in the neighborhood, and the value of its use must be increased by improvement of the physical condition of the property.<sup>85</sup>

Special damages are merely incidental to the taking and may result from physical damages in the land, from its proximity to a desirable object, or from other causes. Thus, evidence of injuries caused by the closing of a street two blocks away is not admissible because the entire community shares this loss;<sup>86</sup> but if the remainder is enhanced in value because of the construction of a new access to the property, such evidence is admissible since it is peculiar to the land itself.<sup>87</sup>

To consider such a benefit or injury, there must be a claim of damages to the remainder.<sup>88</sup> In *State v. Meyer*,<sup>89</sup> the landowner filed a motion *in limine* requesting that the state be refrained from revealing to the jury that there was any remainder at all.<sup>90</sup> The state claimed that because the taking was for highway purposes, and since Meyer still retained access to the land taken, his remainder was benefited by the construction of the highway and should be considered in awarding the damages to which he was entitled.<sup>91</sup> The court overruled this contention and granted Meyer's motion *in limine*,

85. *Pochila v. Calvert, W. & B.V. Ry.*, 72 S.W. 255, 256 (Tex. Civ. App. 1903, no writ).

86. *City of Dallas v. Hallum*, 285 S.W.2d 431, 437 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

87. *Currie v. Glasscock*, 212 S.W. 533, 534 (Tex. Civ. App.—El Paso 1919, no writ).

88. *Hughes v. State*, 302 S.W.2d 747, 748 (Tex. Civ. App.—Eastland 1957, writ ref'd n.r.e.); *Steele v. City of Anson*, 229 S.W.2d 948 (Tex. Civ. App.—Eastland 1950, no writ); M. RAYBURN, TEXAS LAW OF CONDEMNATION § 138(1), at 422 and § 157, at 452 (1960). See Palmore, *Damages Recoverable in a Partial Taking*, 21 Sw. L.J. 740, 742 (1967).

89. 391 S.W.2d 471 (Tex. Civ. App.—Corpus Christi 1965), *aff'd*, 403 S.W.2d 366 (Tex. Sup. 1966).

90. *State v. Meyer*, 403 S.W.2d 366, 368-69 (Tex. Sup. 1966).

91. *Id.* at 369. It is well settled that access rights to a public road or highway is a valuable property right and thus must be compensated for if the access is taken. *State v. Meyer*, 391 S.W.2d 471, 479 (Tex. Civ. App.—Corpus Christi 1965), *aff'd*, 403 S.W.2d 366, 370 (Tex. Sup. 1966); *DuPuy v. City of Waco*, 396 S.W.2d 103, 108 (Tex. Sup. 1965); *City of San Antonio v. Pigeonhole Parking*, 158 Tex. 318, 320, 311 S.W.2d 218, 219 (1958); *Powell v. Houston & Tex. Cent. Ry.*, 104 Tex. 219, 222, 135 S.W. 1153, 1155 (1911); *Adams v. Grapotte*, 69 S.W.2d 460, 462 (Tex. Civ. App.—Eastland 1934), *aff'd*, 130 Tex. 587, 111 S.W.2d 690 (1938). The Supreme Court of Arizona summarized this concept in stating:

When the controlled access highway is constructed upon the right of way of the conventional highway and the owner's ingress and egress to abutting property has been destroyed or substantially impaired, he may recover damages therefor . . . . Other means of access such as frontage roads . . . may be taken into consideration in determining the amount which would be just under the circumstances. *State v. Thalberg*, 350 P.2d 988, 992 (Ariz. 1960). See generally Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEXAS L. REV. 733 (1969).

stating that once damages to the remainder are waived, the issue of benefits due to the acquisition of access rights becomes irrelevant to a determination of the fair market value of the land actually condemned, and this information should not be introduced to the jury.<sup>92</sup> Thus, when a landowner waives or disclaims damages to the remainder in a partial taking, any benefits accruing to this land because of the taking should not be considered in offsetting the market value of the land taken. The use to which the condemnor is going to put the land can only be used to offset or increase damages to the remainder, and does not affect the market value of the part taken.<sup>93</sup>

#### THE REASONABLE SUBSTITUTE RULE

Occasionally, there have been controversies where the *Carpenter* issues cannot be equitably applied. Fortunately, the courts seem to be flexible in adapting new compensation formulae when the unusual does occur. In *State v. Waco Independent School District*,<sup>94</sup> the condemnor took 7.40 acres of the grounds of a public high school. Included in the taking were all or part of six different buildings consisting of the vast majority of the classroom facilities of the school. The school district alleged that without these classroom buildings, the rest of the campus was worthless to the school system. It also claimed that a public high school does not have a market value since it is not the subject of barter and trade. The state argued that the issues of *Carpenter* were applicable, and that the market value is the proper standard in the determination of the damages due to the landowners. The trial court held *as a matter of law* that the condemned school property did not have a market value. Using the "reasonable substitute rule," the court instructed the jury that the measure of damages should be the reasonable cost of restoring the remaining 18.35 acres and facilities to the same or reasonably equal utility for high school purposes which the entire tract had offered before the taking.<sup>95</sup> The remainder of the tract only had value to the school district as a starting point for the rebuilding of the high school campus; thus the "before" and "after" values to the premises were solely dependent upon the cost of constructing substitute facilities.<sup>96</sup> The issue

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92. *State v. Meyer*, 403 S.W.2d 366, 373-74 (Tex. Sup. 1966).

93. *State v. Carpenter*, 126 Tex. 604, 617, 621, 89 S.W.2d 194, 201, *motion for rehearing overruled*, 89 S.W.2d 979, 981 (1936); *Tarrant County Water Control & Improv. Dist. No. 1 v. Hubbard*, 426 S.W.2d 330, 334 (Tex. Civ. App.—Tyler), *rev'd on other grounds*, 433 S.W.2d 681 (Tex. Sup. 1968); *State v. Meyer*, 391 S.W.2d 471, 479-80 (Tex. Civ. App.—Corpus Christi 1965), *aff'd*, 403 S.W.2d 366, 371 (Tex. Sup. 1966); *Dawson v. State*, 391 S.W.2d 565, 567 (Tex. Civ. App.—Dallas 1965, writ *dism'd*); *State v. Cartwright*, 351 S.W.2d 905, 906 (Tex. Civ. App.—Waco 1961, writ *ref'd n.r.e.*).

94. 364 S.W.2d 263 (Tex. Civ. App.—Waco 1963, writ *ref'd n.r.e.*).

95. *Id.* at 264.

96. *Id.* at 266.

concerning the replacement value was worded so as to avoid double damages,<sup>97</sup> and the Waco Court of Civil Appeals affirmed the judgment, adding the following philosophy:

There is a fundamental distinction between obligation resting on the agency condemning public property, and that of condemning private property. This distinction lies in the obligation thereby imposed on the condemnee. For example, a private party owes no duty to the public to continue its operation either at its original location or elsewhere. It can move, it can stay, or it can liquidate as it alone sees fit. Not so with a school system charged with a legal obligation to the public. A school system suffering the loss of one of its schools by condemnation must replace that school when the facility is necessary to the education of its children as shown by the undisputed evidence in this case. This is the legally imposed duty on the school district, and it has no other choice.<sup>98</sup>

Three years after the Waco decision, it was argued that since the court in *State v. Waco Independent School District*<sup>99</sup> limited its decision to public schools, article 3265<sup>100</sup> was unconstitutional because the judicial interpretation of the statute excluded private schools and was therefore arbitrary and violative of both the due process and equal protection clauses of the United States Constitution.<sup>101</sup> The Eastland Court of Civil Appeals, however, did not feel that this was the intended interpretation of the statute.<sup>102</sup> In extending the "reasonable substitute" rule to cases involving the partial taking of a private high school campus, the Eastland court stated that it was being consistent with both the *Carpenter* and *Waco* cases.<sup>103</sup> Thus neither a pub-

97. The trial court submitted the following issue to the jury:

What do you find from a preponderance of the evidence was the reasonable cost, on November 7, 1961, of land, if any, and facilities, if any, reasonably necessary to replace the 7.40 acres of land and facilities taken by the State with land, if any is required, and facilities of the same or reasonably equal utility for high school purposes as that to which the 7.40 acres and facilities were reasonably utilized immediately prior to the taking in question, and reasonably necessary, if any are reasonably necessary, to restore the remaining 18.35 acres of land and facilities to the same or reasonably equal utility for high school purposes as that to which the 18.35 acres of land and facilities were reasonably utilized immediately prior to the taking in question?

*Id.* at 264.

98. *Id.* at 268.

99. 364 S.W.2d 263 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.).

100. TEX. REV. CIV. STAT. ANN. art. 3265 (1968) prescribes the manner of determining damages in eminent domain situations.

101. *City of San Antonio v. Congregation of the Sisters of Charity*, 404 S.W.2d 333, 335 (Tex. Civ. App.—Eastland 1966, no writ).

102. In explaining their holding, the court remarked:

We do not believe that it was the holding in the Waco case, even by implication, that the owner of a private school whose land is condemned is, under the provisions of Article 3265, limited to a recovery under the market value test if the evidence shows that such test will not adequately compensate the owner for special damages suffered. In our opinion, a private school . . . is not by reason of Art. 3265 denied the right to adequate compensation.

*Id.* at 337.

103. *Id.* at 337.

lic nor a private school is limited to recovery under the market value test, if that test does not adequately compensate the school or school district for special damages suffered.

Although the three-issue formula of *Carpenter* was not followed in these cases, they do not represent a significant departure from that decision. In fact, the possibility of such circumstances arising had been noted in *Carpenter* when the court, on rehearing, remarked:

[I]f the improvements which are situated upon the portion of land taken are essential to the use and enjoyment of the remainder of the land, or if their replacement, by removal or reconstruction, is necessary in order to obviate depreciation in the value of the residue, the cost of removal, and/or reconstruction and/or replacement may be a proper inquiry in connection with the issue of diminished market value of the remainder.<sup>104</sup>

#### USELTON V. STATE

Recently, the case of *Uselton v. State*<sup>105</sup> added yet another dimension to Texas eminent domain law. Although the court did not attempt to change the law as set down in *Carpenter*, it did approve a new method of computing damages in a partial taking case. Uselton owned a rectangular 5.9-acre tract in Austin, Texas, of which 2.7 acres were condemned, resulting in a triangular bisection of the property.<sup>106</sup> Because of the irregularity in the shapes of the land taken and the remainder, the combined values of the two tracts, upon severance, was less than the value of the entire parcel.<sup>107</sup> The landowner claimed that if the condemned land were to be valued as severed land, he would be justly compensated only if the market value of the whole tract before the taking was considered as the basis from which to determine the diminution in market value of the remainder. The trial court, and subsequently the Supreme Court of Texas, agreed with Uselton's contentions and instructed the jury to determine the damages due Uselton by using the following formula.<sup>108</sup> First, the market value of the land taken, considered as severed land on the date of the taking, was calculated. Second, the market value of the entire tract immediately before the taking was determined, and from this the court deducted the market value of the land taken. This gave the theoretical value of the remainder of the tract, which replaced the second issue of *Carpenter* concerning the market value of the remainder immediately before the taking.<sup>109</sup>

104. *State v. Carpenter*, 126 Tex. 604, 619, 89 S.W.2d 979, 980-81 (1936).

105. 499 S.W.2d 92 (Tex. Sup. 1973).

106. *Id.* at 94.

107. *Id.* at 94.

108. This method of calculating damages will hereinafter be referred to as the *Uselton* formula.

109. The jury in *Carpenter* was required to determine the market value of the remainder of the tract, before the taking, considered apart from the land condemned.

Third, the market value of the remainder immediately after the taking was computed, and this figure was subtracted from the theoretical pre-taking value of the remainder. This figure represents the total damages to the remainder which was added to the market value of the land taken to determine the total award of damages to *Useton*.<sup>110</sup>

The court in *Useton* determined that the second issue of *Carpenter* could reasonably refer to the difference between the market values of the entire tract and the strip taken.<sup>111</sup> They reinforced their position by citing the following excerpt from the *Carpenter* case:

If it be true, as argued by counsel in this case, that the 8.03 acres of land taken was, when considered as a part of the farm, worth \$100 per acre, it necessarily follows that the value of the farm as a whole included the sum of \$803 by reason of this 8.03 acres being included therein. If, after the land was severed from the tract, the 8.03 acres was worth, as severed land, only \$100, it must follow, it seems to us, that, when proof was made of this fact, a jury would necessarily conclude that the value of the balance of the farm had been diminished \$703 by reason of the severance of the strip alone.<sup>112</sup>

The court in *Useton* felt that the principles and issues of *Carpenter* were actually followed in this case, and that it was a mere variation in the method of submitting issues.<sup>113</sup> However, the facts in this case do not lead to such a conclusion. In *Useton*, it was agreed that each of the separate tracts

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This was the second issue which the court in *Carpenter* suggested. In *Useton*, the market value of the remainder prior to the taking is determined by merely subtracting the value of the condemned land from the value of the entire tract. Theoretically, it seems that these two figures should be identical; however, the value of part of a tract to the entire tract will often mean that the severed value of that parcel will be less than it would be if considered as a part of the entire tract. As will later be discussed, it is this inherent inequity of the *Carpenter* formula which the *Useton* decision attempts to correct.

110. *Useton v. State*, 499 S.W.2d 92, 95 (Tex. Sup. 1973).

111. *Id.* at 97-98. The court said that such an interpretation is *necessitated* by the facts of the case. *Id.* at 98. If this be true, it would follow that a like interpretation will be necessary whenever a similar fact situation occurs. This would require a determination, in all partial takings, of whether the value of the entire tract is more than the combined value of the condemned land and the remainder. If it be so, the *Useton* formula would be followed; if not, the *Carpenter* issues would continue to be used. A strong argument in favor of a standard method of determining damages results from this dilemma.

112. *Id.* at 98, quoting *State v. Carpenter*, 126 Tex. 604, 620-21, 89 S.W.2d 979, 981 (1936).

113. *Useton v. State*, 499 S.W.2d 92, 98 (Tex. Sup. 1973). In seeking to reinforce their decision, the court remarked:

Inflexible adherence to the precise form and words of each issue as suggested in *Carpenter*, even when variation or clarification is necessary to arrive at fair and just compensation, would ignore other important admonitions and basic principles contained in the *Carpenter* opinion. In our opinion, the basic principles of the *Carpenter* case, especially in the determination of just compensation without any double recovery, were followed . . . .

. . . [W]e do not agree that the trial court made any change in the law.  
*Id.* at 98.

had a market value far less than their market value when considered as a part of the whole. Yet the court concluded that the second issue of *Carpenter*, that of the market value of the remaining land immediately before the taking, was satisfied by deducting the market value of the land taken, considered as severed property, from the market value of the entire tract.<sup>114</sup> It is obvious that if this were the situation, a higher value would be placed on the remainder than if the jury had calculated its market value exclusive of the strip taken.<sup>115</sup> Prior to *Uselton*, there was no authority to authorize a translation of the second issue submission announced in *Carpenter* as meaning the difference in market values employed by the court in *Uselton*. Instead, the market value of the remainder was determined similarly to the market value of the strip taken—it was considered as “severed land.”

As a result of *Uselton*, landowners who decide to entertain litigation after a partial taking may receive higher condemnation awards. In assessing damages to the remainder [D(C)], *Carpenter* instructs the jury to find the difference in the market values of the remainder immediately before [B] and immediately after [A] the taking, considered apart from the land taken [B-A = D(C)].<sup>116</sup> In *Uselton*, the damages to the remainder [D(U)] are found by taking the differences between the market value of the entire tract [W] and the market value of the land taken considered as severed land [T], and then deducting the market value of the remainder immediately after the taking [(W-T)-A = D(U)].<sup>117</sup> It is very difficult, if not impossible, to imagine a situation where contiguous pieces of property are worth more to the landowner when their individual market values are added, than when they are considered as a whole tract.<sup>118</sup> This is because the landowner can always divide the property and sell it in that form, thus he always has *at least* that much value. Therefore, the market value of the entire tract will always be worth as much or more than the summed individual market values of the land taken and the remainder considered severally.

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114. *Id.* at 98.

115. It is submitted that the decision in *Uselton* did not merely vary the issues suggested in *Carpenter*, but actually altered the method of computing damages in similar cases. Nevertheless, the case did abide by the concept that the only true test is that of just compensation, and that if this goal is unattainable through use of the *Carpenter* test, then another formula must be utilized.

116. *State v. Carpenter*, 126 Tex. 604, 618, 89 S.W.2d 194, 201 (1936).

117. *Uselton v. State*, 499 S.W.2d 92, 95 (Tex. Sup. 1973).

118. This is a matter of logic. A landowner can always divide his property in any manner he desires, including the division which the condemnation has made. Any profits he realizes by selling the land in its divided state is inherent in the very nature of the land. And, oftentimes, as occurred in *Uselton*, he can sell the land as an entirety for a higher price than if he divided it. Never can a landowner claim he has less value by considering the land as a whole. As a result, a piece of land is always worth at least as much, and usually more, to the landowner when considered as an entire tract than when considered in severed areas.

Consequently, when the market value of the taking is subtracted from the market value of the entire tract, as was done in *Uselton*, this figure must be *at least as much and probably more* than the market value of the remainder considered apart from the land taken  $[(W-T) \geq B]$ . And when the market value of the remainder after the taking is determined, the *amount awarded for damages to the remainder* by the *Uselton* formula will be *as much or more* than by applying the *Carpenter* issues  $[(W-T)-A \geq B-A]$ . Both the *Carpenter* and *Uselton* formulae compute the market value of the land taken and the damages to the remainder separately to insure the landowner his adequate compensation.<sup>119</sup> This is because the condemned property must be compensated for with cash, regardless of any increase in the value of the remainder as a result of benefits it has received as a result of the taking.<sup>120</sup> Therefore, if these two methods are properly applied, the total compensation (the market value of the land taken plus the damages to the remainder) will be as high, and usually higher, by applying the *Uselton* issues instead of the *Carpenter* issues  $[(W-T)-A+T \geq (B-A)+T]$ .

It is submitted that the *Uselton* formula is the most equitable method of determining a landowner's award. It is a combination of the favorable aspects of the *Carpenter* test and the "before and after" test, and it manages to eliminate the criticisms of each. It is a formula which can be applied in all partial taking cases where the "reasonable substitute" rule is inapplicable, and would afford a common standard for Texas courts to follow.

#### *The "Before and After" Test*

Ideally, the "before and after" test seems to guarantee adequate compensation for the landowner. One merely determines how much value the landowner had before the taking and the value he possesses after the taking,

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119. When applying either formula, the landowner is entitled to the market value of the condemned land, considered as severed property, without consideration of the remaining tract. See 4A P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14.231, at 14-106, 14-108, 14-109 (3d rev. ed. 1971); M. RAYBURN, *TEXAS LAW OF CONDEMNATION* § 108, at 372 (1960); 22 TEX. JUR. 2d *Eminent Domain* § 153, at 247-48 (1961).

120. *State v. Carpenter*, 126 Tex. 604, 609, 89 S.W.2d 194, 197 (1936); *Buffalo Bayou, B. & Colo. Ry. v. Ferris*, 26 Tex. 588, 603 (1863). See Peacock, *The Offset of Benefits Against Losses in Eminent Domain Cases in Taxes: A Critical Appraisal*, 44 TEXAS L. REV. 1564, 1564-65 (1966); Speir, *Eminent Domain Proceedings: Legal Basis for Appraising*, 10 BAYLOR L. REV. 1, 12-13 (1958); Worsham, *Problems Peculiar to a Partial Taking in Condemnation*, 13 SW. L.J. 412, 419 (1959); Note, *Eminent Domain—Damages*, 44 TEXAS L. REV. 1621, 1622-23 (1966). "[T]he constitutional guarantee of 'just compensation' means, in effect, compensation in money for the property taken, disregarding compensation in the form of actual or theoretical enhancement to the value of the remainder tract by reason of the use to which the condemned portion is to be put." Palmore, *Damages Recoverable in a Partial Taking*, 21 SW. L.J. 740, 741 (1967). See generally 27 AM. JUR. 2d *Eminent Domain* § 362, at 213-17 (1966).



the difference between these figures representing the total loss to the landowner. It therefore would seem that adequate compensation has been awarded.<sup>121</sup> However, when the jury is allowed to consider special benefits conferred upon the land due to the taking, adequate compensation would be denied. If the remainder's value after the taking is equal to the market value of the whole tract before the taking, as a result of the benefits which the land has received, the landowner would recover nothing. Indeed, by extending this formula to its possible extremity, the landowner might actually owe the condemning body any difference in the value, if the remaining land after the taking is worth more than the value of the entire tract prior to the taking. This position, of course, is untenable. The landowner is entitled to cash compensation for the land taken and the "before and after" test would fail in this requirement in such situations.<sup>122</sup>

#### *The "Part Taken Plus Damages" Test*

The "part taken plus damages" formula, which *Carpenter* solidified as the measure of damages used in Texas, eliminates the problem from which the "before and after" test suffers. In this test, the market value of the land taken and the damages to the remainder are considered separately and the landowner is guaranteed the cash value of the land taken considered as severed land, regardless of whether the remainder's value has increased, decreased, or remained unchanged.<sup>123</sup> *Carpenter*, however, fails to award adequate compensation in situations such as was presented in the *Usselton* case. When the sum of the separate market values of the land taken and the remainder is less than the market value of the entire tract, the award reached through the *Usselton* formula will always be greater than the compensation calculated by use of the *Carpenter* issues  $[(W-T-A)+T > (B-A)+T]$ . As a result, there are circumstances when the *Carpenter* test would fail to award adequate compensation, but where the *Usselton* formula would succeed.<sup>124</sup>

121. One writer feels that the "before and after" test is superior to the "artificial approach" of the "part taken plus damages" formula. See Palmore, *Damages Recoverable in a Partial Taking*, 21 Sw. L.J. 740, 742 (1967) and authorities cited therein.

122. *State v. Carpenter*, 126 Tex. 604, 609, 89 S.W.2d 194, 197 (1936); *Travis County v. Trogdon*, 88 Tex. 302, 309, 31 S.W. 358, 360 (1895); *Dulaney v. Nolan County*, 85 Tex. 225, 227, 20 S.W. 70, 71 (1892). It has long been established that the landowner is entitled to be paid for the land taken without consideration of any benefits he might receive as a result of the taking. *Buffalo Bayou, B & Colo. Ry. v. Ferris*, 26 Tex. 588, 603 (1863). "In all cases where the element of offset on account of benefits is involved, it is necessary to ascertain the value of the portion actually taken so that compensation may be paid therefor in money." *State v. Carpenter*, 126 Tex. 604, 609, 89 S.W.2d 194, 197 (1936).

123. *State v. Carpenter*, 126 Tex. 604, 609, 89 S.W.2d 194, 197 (1936).

124. Again, this is due to the difference in computing severance damages which the two formulae use. The *Usselton* test determines these damages by considering the value of the remainder when considered as a part of the entire tract. The *Carpenter* rule,

*Sum of the Market Values of Land Taken and Remainder are Less than Market Value of the Entire Tract*

Assume that a rectangular piece of downtown property in a large metropolitan area had a market value of \$175,000 due to its adaptability as a site for an office building. Now suppose this land is diagonally divided by a condemnation proceeding so that a main street may be widened and a left-turn lane installed. The market values of the land taken and the remainder have been seriously damaged and each is worth only \$1,000 when considered apart from the entire tract. The following would be the results of applying the various tests:

FACTS OF CASE

Market Value of Entire Tract Before Taking	\$175,000
Market Value of Part Taken Considered as Severed Land	1,000
Market Value of Remainder Before Taking	87,500
Market Value of Remainder After Taking	1,000

THE "BEFORE AND AFTER" TEST

Market Value of Entire Tract Before Taking	\$175,000
Market Value of Remainder After Taking	— 1,000
Total Compensation	<u>\$174,000</u>

THE "CARPENTER" TEST

Market Value of Remainder Before Taking	\$ 87,500
Market Value of Remainder After Taking	— 1,000
Damages to Remainder	<u>86,500</u>
Market Value of Part Taken Considered as Severed Land	+ 1,000
Total Compensation	<u>\$ 87,500</u>

THE "USELTON" TEST

Market Value of Entire Tract Before Taking	\$175,000
Market Value of Part Taken Considered as Severed Land	— 1,000
Theoretical Market Value of Remainder Before Taking	<u>174,000</u>
Market Value of Remainder After Taking	— 1,000
Damages to Remainder	<u>173,000</u>
Market Value of Part Taken Considered as Severed Land	+ 1,000
Total Compensation	<u>\$174,000</u>

It is easily seen that in such situations, the *Carpenter* formula does not adequately compensate the landowner for his loss, while the "before and after" test and the *Uselton* issues do accomplish this end. Indeed, whenever the remainder has not increased in value due to the taking, the "before and after" and the *Uselton* tests will always reach the same result. This is seen from a reduction of the *Uselton* formula  $[(W-T)-A+T = D(U)]$  to a simpler form  $[W-A = D(U)]$ . This reduction takes the difference between the market value of the whole property and the market value of the remainder after the taking—the same formula as the "before and after" test. The reason that the two formulae are not entirely identical is that the *Uselton* test separates the compensation for the land taken and the damages to the remainder, which is the one shortcoming of the "before and after" test.

Therefore, when the remainder has increased in value, the "before and after" test will fail to adequately compensate the landowner, while the *Uselton* formula will achieve this desired result.<sup>125</sup> But, in the majority of the cases, these two tests are synonymous and will yield identical results.

#### *No Damages to the Remainder*

When no damage to the remainder is found or claimed, Texas courts have held that the land taken may be valued as a part of the entire tract and not as "severed land."<sup>126</sup> This rule evolved to avoid the obvious inequities which exist when a section of the land is much more valuable as a part of the whole tract, than it is when considered as severed land.<sup>127</sup> The "before and after" test will award adequate compensation in these cases, as will the *Uselton* issues, if the second issue, inquiring into whether the remainder has been damaged, is eliminated.<sup>128</sup> This would occur as a result

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however, values the remainder apart from its relative value to the entire tract. As was mathematically shown, this oftentimes deprives the landowner of his just compensation.

125. The advantage of using the *Uselton* formula when the remainder has increased in value can be seen by studying the following example. Assume that a piece of land is worth \$100,000, with the part taken worth \$35,000. If the remainder has increased in value to \$80,000 as a result of the taking, the following would result from applying the *Uselton* and the "before and after" tests:

FACTS OF CASE	
Market Value of Entire Tract Before Taking	\$100,000
Market Value of Part Taken Considered as Severed Land	35,000
Market Value of Remainder After Taking	\$ 80,000
THE "BEFORE AND AFTER" TEST	
Market Value of Entire Tract Before Taking	\$100,000
Market Value of Remainder After Taking	<u>— 80,000</u>
Total Compensation	\$ 20,000
THE "USELTON" TEST	
Issue No. 2 asks: Do you find from a preponderance of the evidence that the market value of the remainder of the defendant's tract of land not taken was decreased in market value as a result of the condemnation by the plaintiffs, giving consideration to the uses to which the part taken is to be subjected?	
Answer "yes" or "no."	No
Damages to Remainder	0
Market Value of Part Taken	<u>+ \$ 35,000</u>
Total Compensation	\$ 35,000

It can be seen that the separation of damages which the *Uselton* standard affords assures the landowner adequate compensation in similar situations. This example presumes that the market value of the land taken, considered as severed land, is identical with the value of this land when considered as part of the entire tract. This presumption is entirely for the purpose of demonstrating the inequity of the "before and after" test, and will later be discussed more thoroughly.

126. *City of Richardson v. Smith*, 494 S.W.2d 933, 936, 938 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

127. *Id.* at 937.

128. The following fact situation helps to illustrate the similarity between the *Uselton* and the "before and after" tests when no damages to the remainder are found or claimed. Consider the following fact situation:

of considering the taking and the severance damages simultaneously, and not separately—the method which the “before and after” test applies. It is probably more rational, however, to award the market value of the part taken considered as a part of the whole tract.<sup>129</sup> A similar method should be used when the remainder has increased in value,<sup>130</sup> and this method of valuation would encourage consistency in the determination of damages in partial taking cases.

#### CONCLUSION

Texas attorneys and courts must determine if the *Useton* issues are more favorable than the *Carpenter* issues which have been so religiously followed in Texas eminent domain cases. When damages to the remainder are claimed though, it appears that the *Useton* method of determining damages will result in higher, and perhaps fairer, condemnation awards. It eliminates the inequities of both the *Carpenter* and the “before and after” tests, and would provide for a uniform standard to be followed in eminent domain cases. It may seem presumptuous that a legal tyro would recommend the “retirement” of a case of the magnitude of *Carpenter*, but it should be re-

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#### FACTS OF CASE

Market Value of Entire Tract Before Taking	\$100,000
Market Value of Part Taken Considered as Severed Land	20,000
Market Value of Part Taken Considered as Part of the Entire Tract	30,000
Market Value of Remainder After Taking	\$ 70,000

#### THE “BEFORE AND AFTER” TEST

Market Value of Entire Tract Before Taking	\$100,000
Market Value of Remainder After Taking	— 70,000
Total Compensation	<u>\$ 30,000</u>

#### THE “USELTON” TEST

Market Value of Entire Tract Before Taking	\$100,000
Market Value of Part Taken Considered as Severed Land	— 20,000
Theoretical Market Value of Remainder Before Taking	80,000
Market Value of Remainder After Taking	— 70,000
Damages to Remainder	10,000
Market Value of Part Taken Considered as Severed Land	+ 20,000
Total Compensation	<u>\$ 30,000</u>

Again, both tests have awarded identical, and just, damages. The reason for this is that the formulae inherently consider the condemned tract as a part of the entire tract.

129. One of the main considerations behind the *Carpenter* and the *Useton* issues is the idea of separation of severance damages from damages for the land taken. To waive this concept in peculiar situations would only add to the general confusion. Therefore, it is suggested that when damages to the remainder are waived, or found to be non-existent, the rule of *City of Richardson v. Smith*, 494 S.W.2d 933 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) should be followed, and the landowner awarded the market value of the condemned land when considered as part of the entire tract.

130. When the value of the remainder has increased due to the taking, the landowner is wise to waive severance damages. Since he is entitled to cash damages for the land taken, without regard to the benefits enjoyed by the remainder, he can then have the condemned land valued when considered as a part of the entire tract. This would guarantee the owner his just compensation for the land taken.

1974]

COMMENT

233

membered that the Texas Supreme Court in *Useton* did not feel that they were altering the basic principles of the *Carpenter* decision.<sup>131</sup> In reality, it is merely an attempt to provide the most reasonable modern legal concepts for modern legal problems. And after all, isn't that what the law is all about?

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131. *Useton v. State*, 499 S.W.2d 92, 98 (Tex. Sup. 1973).