

# **Compensation for Land Taken and Severed**

by

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**School of Law**

**Auckland, New Zealand**

**1978**

## **FOREWORD**

by

**Byron O'Keefe**

**Author of the Legal Concept and Principles of Land Valuation**

I am pleased to have the opportunity of contributing a Foreword to Mr Squire Speedy's timely and very useful exposition of some of the complexities of arriving at proper compensation for severance loss occasioned by the taking of land for public purposes. Severance is damage to part of an owner's land in consequence of the resumption of another part resulting in physical severance - for example bisection. Severance disturbs unity of ownership and use, and the claim for compensation is closely related to that for injurious affection.

Although virtually all the "taking" Acts in Australia and New Zealand provide for payment for injurious affection by severance to the residual land, there appears to be no established assessment formula. Because of this, Mr Speedy's material breaks new ground by collating and analysing the main legal and valualational aspects of the problem of compensation for severance loss. The author and the Legal Research Foundation are to be complimented on the dissemination of this valuable information.

J.A.B. O'Keefe  
February 1978

## PREFACE

This research work in an abridged form, was presented to the 9th Pan Pacific Conference of Real Estate Appraisers, Valuers and Counsellors held at Vancouver in the summer of 1977. It was intended as a reference paper for the benefit of practising valuers and students in both New Zealand and overseas in those countries which have a similar land tenure and judicial system for land compulsorily required.

Compensation problems are frequently complex, overlaid with special rules and technicalities, and amplified by the often large sums of money involved. It is hoped that this study makes a useful contribution to the subject.

I am grateful to my firm, L.L. Speedy & Sons, to the Valuation Division of the School of Architecture of the University of Auckland for making facilities available for the research and preparing this work, and to the New Zealand Institute of Valuers and the Appraisal Institute of Canada (Institut Canadien Des Evaluateurs) for giving me the opportunity to present the paper at the Congress. Thanks are due to Ms Denise Moore of the School of Architecture for some assistance with the illustrations.

I am also grateful to the Legal Research Foundation for publishing this work, and to Byron O'Keefe of the Faculty of Law, University of Auckland for reading the script and writing the foreword.

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February 1978

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## COMPENSATION FOR LAND TAKEN AND SEVERED

“No freeman shall be disseised of his tenement except by the law of the land”

Magna Carta

### Introduction

The law and valuation practice of eminent domain is concerned with complete interference with a citizen's private property in the public interest, which in democratic societies has important constraints, set by statutes and the vast realm of common law reaching back past what Winston Churchill described as the “Glorious legend of the ‘Charter of an Englishman's liberties’”, Magna Carta 1215.

Eminent domain must embrace economics because the very nature of eminent domain is concerned with the re-allocation of scarce economic resources. Because land is scarce where it is wanted, society has come to accept the fact that the sovereign powers of government may be used against an owner in the general public interest. In this way the monopolistic powers of the individual are overcome, but at a cost to the individual and his freedom. It has become part of the British tradition of justice – indeed, in all societies which value the freedom of the individual – that such owners should be fairly compensated. Although the issues have been overlaid with legal and technical niceties, they must be based on the economic realities of the market within the context of the compulsory giving up of one economic resource and its conversion into money, equivalent to the dispossessed owner's economic loss. A failure to consider the practical economics of the market place could not lead to a just conclusion.

It matters not in which particular country, or economic society, or period of time in which we live, for under them all the economic forces will continue to operate, laws of man notwithstanding. For justice to be accorded the dispossessed owner, society must fairly allocate sufficient of its scarce resources to provide a just economic measure of value.

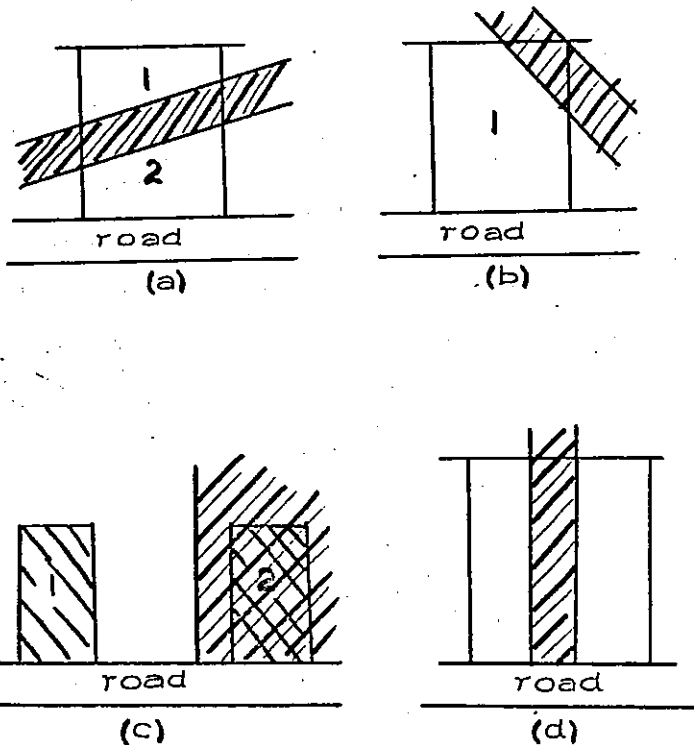


*Fig. 1 – Churchill described Magna Carta as the:  
“glorious legend of the ‘Charter of Englishman's liberties’”.*

### Severance Damages

Under the "English Rules" system of compensation which many ex-British colonial countries follow, there is no complete definition of severance. Nevertheless, the term is often used by valuers and the courts as it helps to describe the detrimental effect the partial taking of land has on the severed residue land. Severance does not refer to the value of the residue land, nor to the value of the part taken. It refers to the loss in value to an owner's interest in an economic holding of land, as a result of part being compulsorily acquired.

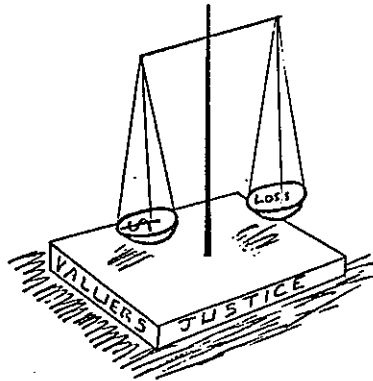
When an owner's land is severed it may be cut into two or more separate parcels, or as more commonly occurs, the residue balance may be a single physical entity. The severed part which is compulsorily acquired is usually referred to as the part 'taken' in New Zealand and sometimes elsewhere, but 'resumed' by the Australian States, 'acquired' by the Australian Commonwealth, 'expropriated' in Canada and England, and 'condemned' in the United States.



*Fig. 2 – Severance refers to the taking resulting in the original land being (a) Cut into two (or more) parcels; or (b) The severed residue may be a single physical entity; or (c) The severed residue may be a single economic unit but not necessarily physically contiguous; or (d) Severed residue may receive betterment.*

Under the English Rules system, severance loss is usually incorporated within the wider phrase "injurious affection". While the terms are almost synonymous, the use of the term "severance" is usually confined to those aspects of injurious affection or depreciation in the market value of the residue land, which results directly from the partial taking which physically, legally and economically severs the residue from the part taken. Such loss is, however, usually limited to the extent that it is not offset by betterment or enhancement in value of the severed residue land as a result of the public work.

While the dispossessed owner and the courts are essentially concerned with the owner's total loss caused by the taking, under New Zealand law it is necessary to state separately the amount claimed for the land taken and for the land injuriously affected.<sup>1</sup> Thus, it is a matter of valuation practice and often legal convenience to assess damages for the depreciation in value of the severed residue land injuriously affected as "severance". This practice sharply contrasts with the position in the United States and occasionally elsewhere, where the term "severance" is generally used for valuation and judicial proceedings in place of our term "injurious affection". In some countries and states a fine distinction is drawn for valuation and claim purposes between the loss caused purely by the severance, and the loss caused by the detrimental affect of the public work. Fortunately, in New Zealand we are concerned with the total loss in value of the land as a result of the taking, which in such circumstances is usually found by the before-and-after method of valuation.



*Fig. 3 – "Compensation" is a metaphorical expression, the idea derived from a pair of balances.*

Standard legal abbreviations have been used.

Valuation references are as follows:

NZV The New Zealand Valuer;

Val The Valuer (Australian Commonwealth);

LVCB J.P. McVeach & E.J. Babe, *Land Valuation Case Book* 1967 Wellington Butterworths.

1 Public Works Act 1928, s.51 (NZ).

## Principle of Equivalence

"Compensation" is a metaphorical expression, the idea being derived from a pair of balances. It is to be proportionate to the loss sustained, an equivalent to what is taken from the owner. It was never contemplated that the community should profit at the expense of the owner. It only requires proof by the owner of injury to his property. To pay less would be a violation of the fundamental provision of Magna Carta. The price which the land taken would fetch on the open market is not necessarily the proper test of the amount of compensation if an additional burden is thrown on certain other lands belonging to the person whose land is taken.<sup>2</sup>

The principle of equivalence is that statutory compensation cannot, and must not, exceed the owner's total loss. The owner is to be paid neither less nor more than his loss.<sup>3</sup> The principle is at the root of compensation, because to do otherwise would be unfair on both parties. Unfair on the owner to pay him less than his entitlement, unfair on the acquiring authority who has been given the power of compulsory acquisition in the public interest. While the enunciation of this most fundamental of all eminent domain principles is easy, and its justice is self evident, its application to particular circumstances is difficult. Neither is it easy to spell out a general criterion which will be applicable in all cases.<sup>4</sup>

The fundamental principle can be expressed by saying that an owner's compensation should be equivalent to what he has lost by reason of the compulsory acquisition. What is to be considered is the loss *caused* by the compulsory acquisition. It is important that regardless of what losses are caused by the taking, there should be no duplication. The final global sum must be the equivalent of what the owner has lost by reason of the compulsory acquisition, neither more nor less.<sup>5</sup>

Compensation *prima facie* refers to compensation for loss. It is necessary to find the money equivalent for the loss, that is the pecuniary value to the owner contained in the asset.<sup>6</sup> As severance (by whatever name it is called) is a statutory right in addition to the value of the severed land taken, the principle of equivalence applies equally to its assessment. While it may be referred to as "damage"<sup>7</sup> caused by severing the land taken from the owner's residue land, it is the total owner's loss which has to be found. While an owner is undoubtedly entitled to the money equivalent of his loss sustained by being deprived of the land taken from him, such loss must naturally and reasonably stem from the taking. The owner is not entitled to receive more than a fair assessment of the

2 *Russell v Minister of Lands* (1898) 17 NZLR 241 at 253; 1 GLR 15; *Horn v Sunderland Corporation* [1941] 2 KB 26 at 49; [1941] 1 All ER 480.

3 *Crisp & Gunn Co-op Ltd v City of Hobart* (1962) 110 CLR 538; 19 Val 3 (July 1966) 250 at 257.

4 *Mizen Bros v Mitcham Urban District Council*, unreported, cited in *Horn v Sunderland Corporation* [1941] 2 KB 26; [1941] 1 All ER 480; *Crisp & Gunn Co-op Ltd v City of Hobart* (1962) 110 CLR 538; 19 Val 3 (July 1966) 250; *Birmingham City Corporation v West Midland Baptist (Trust)* [1970] AC 874; [1969] 3 All ER 172; 67 LGR 571; 20 P & CR 1052.

5 *Berger Paints & Myers v Wellington City Council* [1975] 1 NZLR 184; 22 NZV 9 (March 1975) 370 at 378; *Hull & Humber Investment Co. Ltd v Hull Corporation* [1965] 2 QB 145; [1965] 1 All ER 429 at 433-4.

6 *Birmingham City Corporation v West Midland Baptist (Trust)* [1970] AC 874; [1969] 3 All ER 172; 67 LGR 571; 20 P & CR 1052.

7 *Wm Collins & Sons Pty Ltd v The Co-ordinator General of Public Works*, Land Ct, Brisbane (1969) 22 Val 5 (January 1973) 397 at 409.

loss nor be compensated on a basis which results in him being in a substantially better position than he was at the date of the taking.<sup>8</sup>

The assessment of the equivalent loss must be based on the value of the property at the relevant date, but as it existed before the acquiring authority exercised its statutory powers.<sup>9</sup> Likewise any diminution of value from the same cause must be excluded.<sup>10</sup> It is necessary for all circumstances to be taken into consideration to see what sum of money will place the dispossessed owner in a position as nearly as possible to what he was in before the taking. His test of loss is the value to him of the taken land.<sup>11</sup>

The principle of equivalence is not only a judicial and valuation problem but also an economic one, because nothing really compensates an unwilling owner for his non-monetary losses which arise from his attachment to a property or from any sentimental, personal or aesthetic reason. A genuine unwilling seller probably has an inflated idea of its worth. The economic concept is to convert land values and losses to their equivalent monetary value in the impersonal market place. Compulsory acquisition is an economic metamorphosis of that owner's equivalent loss.

Summed up, the principle of equivalence refers to the fundamental principle that the owner's compensation should be equivalent to what he has lost by reason of the compulsory acquisition.

### Full Compensation

All persons suffering damage for land taken or injuriously affected (by severance) are entitled to "full compensation".<sup>12</sup> The principle of equivalence for loss sustained, expressed as "just" or "fair" compensation, lies behind claims under most governmental jurisdictions in the free world. In those countries which follow the English rules, including Australia, Canada and New Zealand, and subject to minor differences in the wording and terminology used in the statutes, it can be said that an owner is entitled to not only the market value of the land taken, but also the value of the land to the owner. Unless the dispossessed owner gets the value of the land to him he is not getting "full" compensation,<sup>13</sup> but the term "value to the owner" has a special meaning.

Where land is injuriously affected or severed, the compensation payable is for the depreciation in its market sense. If the statute did not give compensation nothing can be claimed. It is necessary to look to the statutes and the common law for the remedy which only gives the market value of the land, namely the

8 *Berger Paints & Myers v Wellington City Council* [1975] 1 NZLR 184; 22 NZV 9 (March 1975) 370.

9 *Lucas & Chesterfield Gas & Water Board (In re)* [1909] 1 KB 16; [1908-10] All ER Rep 251; *Cedar Rapids Manufacturing & Power Co v Lacoste* [1914] AC 569; [1914-15] All ER Rep 571; 16 DLR 168; 20 Val 1 (January 1968) 70; *Raja Vyricherla v The Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317.

10 *Marshall v Commissioner of Irrigation & Water Supply* Land App Ct, Rockhampton (1973) 23 Val 8 (October 1975) 640 at 645; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495; (1952) 82 CLR 545; [1948] 1 ALR 145; [1952] ALR 205.

11 *Spencer v Commonwealth of Australia* (1907) 5 CLR 418; 14 ALR 253; *Russell v Minister of Lands* (1898) 17 NZLR 241; 1 GLR 15; *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37; 11 Val 131.

12 Public Works Act, s.42 (NZ).

13 *Marshall v Minister of Works* [1950] NZLR 339; [1950] GLR 20; LVCB 127.

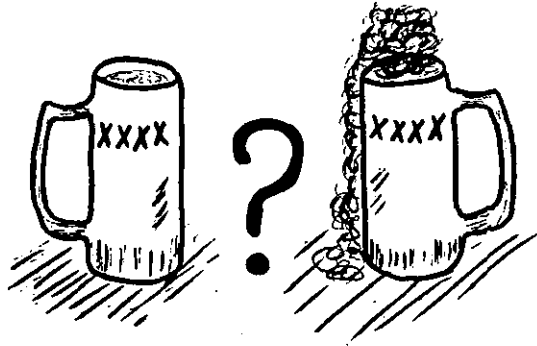


Fig. 4 – What does “full” compensation mean?

price for which the land could be sold on the market after reasonable steps. When a statute gives a right, strict compliance with it is imperative.<sup>14</sup>

The restriction on the assessment of compensation to the value of land is not to affect the assessment of compensation for any matter which is not directly based on the value of land for which a right to compensation is conferred under the taking statute or any other act.<sup>15</sup>

While some items of claim for compensation are specifically provided for within the taking statutes, others are based on judicial meanings,<sup>16</sup> of the term “full compensation”, which results in some uncertainty. But the lack of a precise meaning has had the advantage that the common law interpretation gives a measure of flexibility which can be used, according to conditions and circumstances, to award a dispossessed owner a sum which will fairly and adequately compensate him for his loss of land.<sup>17</sup> However, all claims for compensation must stem from a statutory right.<sup>18</sup> This has been held to mean that the claimant is entitled to full compensation for all the losses and damage suffered, but that he must be reasonable about it.<sup>19</sup> This does not entitle an owner to an amount additional to the value of the land in respect of loss of profit that could have been derived from the land had it not been taken.<sup>20</sup> Full compensation might authorise a claim for loss of profit as such, but care must be

14 *Russell v Minister of Lands* (1898) 17 NZLR 241; 1 GLR 15.

15 Finance Act (No. 3) 1944, s29 (1) (b) (NZ).

16 *Napier City Council v Napier Park Racing Club*, Land Valuation Ct, Napier (1964); 19 NZV (June 1965) 235; *Mackay v Stratford Borough Council* [1957] NZLR 96; LVCB 233; *Wells v Newmarket Borough Council* [1932] NZLR 50; [1931] GLR 590.

17 *Poverty Bay Catchment Board v Forge* [1956] NZLR 811; LVCB 225.

18 *Minister of Transport v Edwards*, Ct of Appeal (1963) 18 Val 17 (July 1965) 565; *Sisters of Charity of Rockingham v R* [1922] 2 AC 315; 67 DLR 209; *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418.

19 *Wills v City of Adelaide* (1962) 108 CLR 1; [1963] ALR 270; 17 Val 7 (July 1963) 540.

20 *Barber v Manawatu-Oroua River Board*, Land Valuation Ct, Palmerston North (1953); LVCB 414; *Marshall v Commissioner of Taxes* [1953] NZLR 335; *Irvine Oil Co. Ltd v R* [1945] Ex CR 228; [1946] 4 DLR 625; *Minister of Works v Green & McCahill (Contractors) Ltd* [1965] NZLR 580; LVCB 384; *Marshall v Minister of Works* [1950] NZLR 339; [1950] GLR 20; LVCB 127.

taken to ensure that there is no overlapping in the total award.<sup>21</sup> For compensation purposes land in the hands of the owner at the relevant date is regarded "just" as capital for whatever purpose he may choose to use it.<sup>22</sup> Yet it is a cardinal principle of compensation law that the owner is entitled to be put back into the position he enjoyed before the taking.<sup>23</sup> He is entitled to be compensated for damages suffered by the exercise of the powers under the taking act.<sup>24</sup>

The value to the owner means that to be fully compensated he must receive his equivalent total loss, which may include the following items directly or indirectly in New Zealand:

1. The value of the land taken;
2. The net loss in value of the severed land;
3. Disturbance losses, but subject to special principles relating to such losses;
4. An allowance for delay in payment, awarded as interest;
5. Allowable costs relating to the compulsory acquisition;
6. A solatium for home loss of \$2,000 may be paid in certain limited circumstances.

Under the principle of equivalence an owner is entitled to receive the money equivalent of the loss for being deprived of his land, but any such item of loss must be shown to be not too remote and the rational and reasonable consequence of the taking. The owner is not entitled to receive more than a fair assessment of the amount nor to be compensated on a basis which envisages a substantially better position than he occupied immediately prior to taking.<sup>25</sup>

### **Nomenclature Not Important**

At times, the loss to the severed residue land may fall under the heading of injurious affection, severance or disturbance, but as a general rule the name under which the claim has been made is not important, providing a proper loss has been sustained.<sup>26</sup> In many cases it would be difficult to separate out the various matters that should be taken into account,<sup>27</sup> even though in New Zealand the total claim must be divided into the value of the land taken and the loss to the residue by the severance.<sup>28</sup> However, a distinction should be drawn between property loss and costs such as valuation fees,<sup>29</sup> which come under the

21 *Berger Paints & Myers v Wellington City Council* [1975] 1 NZLR 184; 22 NZV 9 (March 1975) 370.

22 *Turner v Minister of Public Instruction* (1956) 95 245.

23 *Clifford Westaway v The Council of the Shire of Landborough* (1944) Land Ct, Brisbane; 19 Val 6 (April 1967) 535.

24 *O'Brien v Chapman* (1910) 29 NZLR 1053.

25 *Wm Collins & Sons Pty Ltd v The Co-ordinator General of Public Works*, Land Ct, Brisbane (1969) 22 Val 6 (April 1973) 457; *Harvey v Crawley Development Corporation* [1957] 1 QB 485; [1957] 1 All ER 504.

26 *Vecchio v Commissioner of Main Roads*, Land Ct, Brisbane (1963); 18 Val 5 (January 1965) 386 at 390; *Minister of Works v Robinson* (1965) 13 LGRA 390; 19 Val 1 (January 1966) 92 at 95.

27 *Wm Collins & Sons Pty Ltd v The Co-ordinator General of Public Works*, Land Ct, Brisbane (1969) 22 Val 5 (January 1973) 397; *Walker v Ware Hadham & Buntingford Railway Co.*, (1865) LR 1 Eq 195; 35 LJ Ch. 94.

28 Public Works Act 1928, s.51 (1) (c).

29 *Standfield v Commissioner of Main Roads*, Land Ct, Brisbane (1968) 21 Val 8 (October 1971) 624, 631.

heading of "any other matter",<sup>30</sup> and not disturbance. The point is not whether there is disturbance, but whether there is loss caused by the compulsory acquisition;<sup>31</sup> because an owner is entitled to full compensation, and there is no need here to treat the entire claim for compensation as the "value of the land". All losses arising, other than the value of the land taken, may in New Zealand be considered under the heading of injurious affection.<sup>32</sup>

### Principle of Liberality

The principle of liberality is that when land is taken compulsorily from an owner, compensation should be assessed liberally.<sup>33</sup> This does not alter the principle of equivalence, nor the test of value.<sup>34</sup> What it means is that in such cases doubts are to be resolved in favour of the dispossessed owner.<sup>35</sup> This approach is in contrast to taxation cases.<sup>36</sup> It does not enable the courts to take into consideration the age and health of the owner nor to be influenced by sympathy or the desire to be generous to the owner.<sup>37</sup> The emphasis is on the matter of doubt, which if it exists means that the court should lean towards the owner<sup>38</sup> as may be justified by evidence,<sup>39</sup> but on fairly generous<sup>40</sup> rather thaniggardly terms.<sup>41</sup>

An application of the principle of liberality is in the valuation of land taken and for land severed by the use of the hypothetical subdivisional approach,

30 Finance Act (No. 3) 1944, s.29(1)(b)(NZ).

31 *Berger Paints & Myers v Wellington City Council* [1975] 1 NZLR 184; 22 NZV 9 (March 1975) 370.

32 *Langford v Waimari County*, Supreme Ct NZ (Admin Div) (1974); 22 NZV 11 (September 1975) 455.

33 *Townsend v Blacktown Municipal Council*, Land and Valuation Ct, NSW (1966); 19 Val 6 (April 1967) 533; *Russell v Minister of Lands* (1898) 17 NZLR 241; 1 GLR 15; *Poulton v Licensing Control Commission*, Supreme Ct NZ (1957) 16 NZV 3 (September 1958) 36; *Marshall v Minister of Works* [1950] NZLR 339; [1950] GLR 20; LVCB 127; *Garrett v Lackey* (1882) 3 NSWLR 237; *Mulhern v Lower Hutt City Corporation*, Land Valuation Ct, Wellington (1955) 13 NZV 3 (September 1955) 34; *Kennington v Lower Hutt City Corporation*, Land Valuation Ct, Wellington (1960) 17 NZV 8 (December 1960) 307; *Hazell v Minister of Land and Works* 24 Val 5 (1976) (January 1977) 504 at 509.

34 *Tawharanui Farm Ltd v Auckland Regional Authority* [1976] 2 NZLR 230; 23 NZV 23 (December 1976) 212; *Commissioner of Succession Duties (S.A.) v Executor Trustees Ltd* (1947) 74 CLR 358.

35 *Stanfield v Commissioner of Main Roads*, Land Ct, Brisbane (1968) 21 Val 8 (October 1971) 624, 631.

36 *Commissioner of Succession Duties (S.A.) v Executor Trustees Ltd* (1947) 74 CLR 358; *Wm Collins & Sons Pty Ltd v The Co-ordinator General of Public Works*, Land Ct, Brisbane (1969) 22 Val 6 (April 1973) 457 at 461; *Tawharanui Farm Ltd v Auckland Regional Authority* [1976] 2 NZLR 230; 23 NZV 23 (December 1976) 212; *Inland Revenue Commissioners v Clay* [1914] 3 KB 466; [1914-15] All ER Rep 882.

37 *Trotter v Minister of Works*, Land Valuation Ct, Dunedin (1966) 19 NZV 12 (December 1966) 479.

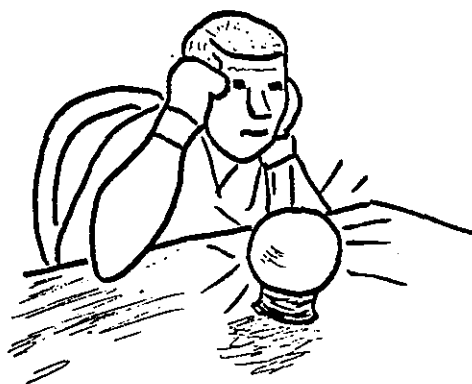
38 *Kennington v Lower Hutt City Corporation*, Land Valuation Ct, Wellington (1960) 17 NZV 8 (December 1960) 307; *Stanfield v Commissioner of Main Roads*, Land Ct, Brisbane (1968) 21 Val 8 (October 1971) 624, 631.

39 *Trotter v Minister of Works*, Land Valuation Ct, Dunedin (1966); 19 NZV 12 (December 1966) 479.

40 *Mulhern v Lower Hutt City Corporation*, Land Valuation Ct, Wellington (1955) 13 NZV 3 (September 1955) 34.

41 *Kennington v Lower Hutt City Corporation*, Land Valuation Ct, Wellington (1960) 17 NZV 8 (December 1960) 307.





*Fig. 5 – By the principle of liberality, genuine doubts are to be resolved in favour of the dispossessed owner.*

where the amount of deduction from gross realisation for an allowance for subdivision profit is strictly limited.<sup>42</sup>

The underlying principle of liberality can be seen in the rule that a statute which takes away private property compulsorily should receive a wide meaning.<sup>43</sup>

#### **Right to Compensation for Severance Loss**

The right to make a claim for injurious affection to the residue of an owner's land severed after compulsory acquisition is a statutory right<sup>44</sup> which has existed for over 130 years,<sup>45</sup> and has been incorporated within the legislation of various Commonwealth and other countries.

For a claim for injurious affection by severance to the residue lands to succeed, the severed land must have been part of an economic unit.<sup>46</sup> Under the English Rules system the question of whether the land is contiguous or separated by a roadway or within the neighbourhood is irrelevant; it is sufficient that the owner's other lands have depreciated in value as a result of the compulsory acquisition.<sup>47</sup> Any matter which injuriously affects the residue land as a direct result of the taking may give rise to a claim. Even loss of amenity and privacy can be taken into account as long as it causes an economic loss by depreciating the value of the severed land.<sup>48</sup>

42 *Lower Hutt City Corporation v Dyke* [1954] NZLR 166; LVCB 165; *Herring v Railways Department* (1955) 17 NZV 8 (June 1960) 229.

43 *Berger Paints & Myers v Wellington City Council* [1975] 1 NZLR 184; 22 NZV 9 (March 1975) 370; *Plimmer v Wellington City Corporation* (1884) 9 App Cas 699 at 714.

44 *Sisters of Charity of Rockingham v R* [1922] 2 AC 315; 67 DLR 209.

45 Land Clauses Consolidation Act 1845 s.68 (UK); Public Works Act 1928 s.42 (NZ).

46 *Minister of Works v Antonio* [1966] SASR 54; (1966) 19 Val 5 (January 1967) 440.

47 Public Works Act 1928, s.42(1)(NZ); *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153; [1886-90] All ER Rep 901; *R v Consolidated Motors Ltd* [1949] Ex CR 254; [1949] 3 DLR 729; *R v Potvin* [1952] Ex CR 436.

48 *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418.

The principle of loss by severance applies where several pieces of land are held by an owner such that the possession and control of each gives an enhanced value to all of them.<sup>49</sup> If one piece is taken whose anticipated subsequent use is expected to or does depreciate the value of the severed residue land, a claim for injurious affection (by severance) arises. But mere ownership of the residue is insufficient for a claim for severance. The land injuriously affected by severance must be so connected or related to the severed residue land that the owner is prejudiced in his ability to use or dispose of it.<sup>50</sup>

A claim for depreciation in value caused by the intended construction of the public work or in respect of its use can only arise in respect of land actually taken from the owner. It is sufficient for a claim of detrimental affection to arise if the lands depreciated in value were held under such conditions that the unity of ownership was conducive to the advantage of the property comprised in one holding. If no lands are taken, there can be no claim for injurious affection. Where the detrimental work is carried out partly on lands taken from the claimant and partly on other lands, the claim is reduced in accordance with the circumstances.<sup>51</sup>

### **Economic Loss on Severance**

Severance damage arises when the value of the severed residue land as part of the original economic holding is greater than its value as a new, separate holding. The emphasis in compensation claims is the monetary sum which must represent the economic loss arising from the partial taking and the physical, legal and economic implications of the severance. Such economic loss may be conveniently classified in three ways.

The first concerns the reduction in existing or potential periodic income or equivalent benefits, that is, loss of rent or similar income or economic benefits of ownership and possession. All such losses must be reduced to their net present value expressed by the valuer in terms of current market value. Secondly, operating costs may be increased by the awkward size or shape of the residue land.

The third loss arises from any increase in development costs of the residue site disproportionate to the original cost. A site may involve certain fixed costs which after severance would be spread over a smaller area. Also extra development costs may arise because of the shape of the residue site. As the loss of part of the original holding will result in a smaller area for development, except in the special situation of betterment, the existing or potential utilisation will suffer economic loss which may be proportionate to the original area and relative value; or it may be that there is an accelerated loss amounting to the opposite of plottage. This negative plottage effect may be such as to reduce the highest and best use of the residue land and so reduce the optimum economic development. A legal consequence might be to bring about a change in town

49 *Sisters of Charity of Rockingham v R* [1922] 2 AC 315; 67 DLR 209; *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153; [1886-90] All ER Rep 901; *Holditch v Canadian Northern Ontario Railway* [1916] 1 AC 536; 27 DLR 14; *Minister of Works v Antonio* [1966] SASR 54; (1966) 19 Val 5 (January 1967) 440.

50 *Holditch v Canadian Northern Ontario Railway* [1916] 1 AC 536; 27 DLR 14.

51 *Sisters of Charity of Rockingham v R* [1922] 2 AC 315; 67 DLR 209; *Edwards v Minister of Transport* [1964] 2 QB 134; [1964] 1 All ER 483; 18 Val 7 (July 1965) 565.

planning controls or their application to the residue site which could result in a smaller or less intensive physical development, thereby increasing the economic loss by the severance.

The economic implications of severance loss are illustrated by reference to Figure 7 which uses an application of the theory of "economic" rent as a surplus, first discovered by James Anderson in 1777 and later popularised by the classical economists Adam Smith, James Mill and Ricardo, but first illustrated in graphical form by W.S. Jevons in 1871.<sup>52</sup> Because I have used urban land with a development potential as an illustration in place of the classical economists' elementary rural economy, the principle of economic rent has been substantially adapted, principally in respect of the application of units of capital and the resulting output of value.

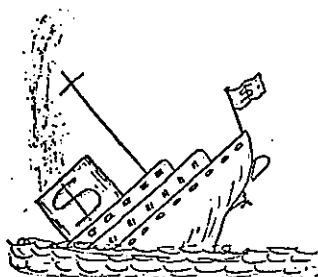


Fig. 6 – Development costs of land are "sunk" costs.

Suppose a given parcel of land (before severance), could have had applied to it various amounts of investment capital. Various hypothetical development projects are possible but any capital when actually applied to land is legally fixed to the land and economically "sunk" in the land.<sup>53</sup> The resulting value from units of added or marginal capital will depend on the added or marginal value which such units of capital will give to the land. The marginal value output will depend on the economic characteristics of the land as well as those of the capital improvements applied to the particular site. This follows the the valuers' well known principle that cost does not necessarily equal value. To emphasise the economic fusing of sunk capital, (or "cost" to the valuer), the units of capital applied to the site have been given here the new technical term "agercavic" capital, from the Latin *ager*, land; and *cavus*, sunken. The added value arises economically from the periodic output and its equivalent capitalised net present value, is a form of the classical economic "surplus", for which the technical word "geophoric" output or value is here given, from the Greek, *ge*, earth; and *phora*, rent. The original term of economic rent is now misleading and an unfortunate choice of technical terminology.

The introduction of these two new terms emphasises the underlying economic aspects of inputs of (agercavic) capital and outputs of (geophoric) land

52 W.S. Jevons, *The Theory of Political Economy*, (Harmondsworth, Penguin 1970) pp.217-224.

53 Alfred Marshall, *Principles of Economics*, (London, Macmillan & Co. Ltd., 8th ed 1920) (First published 1890), p.8.



As the "before" severance value consists of areas  $a + b + c$  and the "after" severance value is the area  $c$ , and the value of severed land taken as part of the original land is area  $a$ ; the severance loss is shown by the area  $b$ . The total loss in value of land will therefore be areas  $a + b$ .

To sum up: Whenever the value of the severed residue land as an economic part of the original holding (shown as areas  $b + c$ ), exceeds the value of the severed residual land as a new separate economic holding (area  $c$ ), severance loss will result (as shown by area  $b$ ).

### **Disturbance by Severance**

Disturbance to any business being carried on the residue land prior to the severance may be a proper claim for damages, but the rules in respect of disturbance generally must be observed.<sup>55</sup>

Where land is valued in a higher use than the then existing use, disturbance can only be claimed if the value under the existing use, plus loss by way of disturbance, exceeds the higher use value.<sup>56</sup> It may happen that a claimant is carrying on a business on a site whose highest and best use would necessitate the destruction of that business, or specialised improvements, in order to gain the full market price of the land. If the value in that higher use exceeds the value in existing use plus the disturbance, then the higher use value prevails. It is not correct to take the value of the land in its highest and best use, and then to add the loss by disturbance for a lower use. A valuer must make up his mind whether higher compensation will result from a valuation on existing use plus compensation for disturbance, or on the highest and best use value and no disturbance.

The *Horn* principle has established that when land which is being used for agricultural purposes is ripe for subdivision into lots for building purposes, compensation for disturbance shall be awarded only to the extent, if any, that the value of the land for agricultural purposes plus compensation for disturbance to the business being earned on the land exceeds the value of the land for building use.<sup>57</sup> This problem may arise when farm land becomes ripe for building purposes,<sup>58</sup> or when any site becomes economically suitable for redevelopment for a higher use.

*The Milledge* principle which follows the *Horn* principle is that disturbance is not a separate subject of compensation. Compensation must include not only what any prudent purchaser would give for the land but also any additional amount which he would find it worthwhile to pay for the site with the owner's business on it, rather than fail to obtain the land. Hence, this value is only

55 *Berger Paints & Myers v Wellington City Council* [1975] 1 NZLR 184; 22 NZV 9, (March 1975) 370; *Pomona Orchards Ltd v Minister of Works* [1958] NZLR 88; LVCB 259; *Commissioner of Inland Revenue v Glasgow & South-Western Railway* (1887) 12 App Cas 315; *Crisp & Gunn Co-op Ltd v City of Hobart* (1962) 110 CLR 538; 19 Val 3 (July 1966) 250.

56 *Milledge v The Commonwealth* (1953) 90 CLR 151 at 157; [1953] ALR 199; *Crisp & Gunn Co-op Ltd v City of Hobart* (1962) 110 CLR 538; 19 Val 3 (July 1966) 250; *Block Buildings Ringwood Pty Ltd v City of Ringwood* (1969) 20 Val 8 (October 1969) 765; *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083; 26 Val 1 (January 1968) 413; *Wm Collins & Sons Pty Ltd v Co-ordinator General of Public Works*, Land Ct, Brisbane (1969) 22 Val 5 (January 1973) 397 at 413.

57 *Horn v Sunderland Corporation* [1914] 2 KB 26; [1941] 1 All ER 480.

58 *Ibid.*

relevant when the use being carried on is the kind of use a hypothetical purchaser would wish to continue; that is, the value to the actual owner for the precise use at the relevant date. If the valuation is made on the basis of some better use, there is no justification for any additional amount because of the disturbance.<sup>59</sup>

### The Disturbance Paradox

A paradox in the valuation use of the term 'disturbance' arises because it is not a separate item as such for compensation;<sup>60</sup> it is merely a convenient way of assessing compensation for loss of value of the land to the owner.<sup>61</sup> In calculating loss of value of either the land taken or land severed or both, where the taking or severance will result in disturbance loss to the business, an owner is entitled to the higher of:

- (a) The value of the land in its highest and best use; or
- (b) The value of the land in its existing use to which the value of the business disturbance contributes value.

Disturbance as a valuation matter will be the net difference between the two approaches, but it is calculated only as a means of arriving at the value of the land taken or severed.

The position is analogous to the valuation of improvements to land which is no longer in its highest and best use. Farm improvements would have no value to land ripe for subdivision similar to the *Horn* principle; while existing improvements may have no value to a site when it is ripe for redevelopment, similar to the *Milledge* principle.

All loss suffered by a dispossessed owner is not necessarily compensatable as disturbance. To be so regarded, the item must first be not too remote; and secondly, it must be a natural and reasonable consequence of the dispossession of the owner.<sup>62</sup> But an owner is entitled to recover any expense or loss to which he has been put by reason of being disturbed.<sup>63</sup>

### Business Disturbance

The disturbance paradox principle applies also to the destruction of business goodwill and the costs of closing down a business. Where the taking of land destroys the carrying on of the business on the land or severed residue, there are two possibilities. The first is that when the business is not destroyed but may be

59 *Milledge v The Commonwealth* (1953) 90 CLR 151 at 157; [1953] ALR 199; *Standard Fuel Co. v Toronto Terminals Railway Co.*, [1935] 3 DLR 657; *Horn v Sunderland Corporation* [1941] 2 KB 26; [1941] 1 All ER 480; *Crisp & Gun Co-op Ltd v City of Hobart* (1962) 110 CLR 538; 19 Val 3 (July 1966) 250 at 257; *Wm Collins & Sons Pty Ltd v The Co-ordinator General of Public Works*, Land Ct, Brisbane (1969) 22 Val 5 (January 1973) 397 at 401; *Inland Revenue Commissioners v Glasgow & South-Western Railway Co.*, (1887) 12 App Cas 315.

60 "Disturbance or any other matter not directly based on the value of land" is provided for in the Acquisition of Land (Assessment of Compensation Act 1919 (UK)).

61 *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083; 26 Val 1 (January 1968) 413.

62 *Harvey v Crawley Development Corporation* [1957] 1 QB 485; [1957] 1 All ER 504; *Wm Collins & Sons Pty Ltd v The Co-ordinator General of Public Works*, Land Ct, Brisbane (1969) 22 Val 5 (January 1973) 397.

63 *Pomona Orchards Ltd v Minister of Works* [1958] NZLR 88; LVCB 259; *Hadley v Lower Hutt City* Supreme Ct (Admin Div) (1971) Wild C.J.; 21 NZV 11 (March 1972) 436.

re-established on a suitable alternative site, the associated losses are factors to be taken into account in assessing the value of the land. Some of the costs will come under the heading of "matters arising other than value of the land". The second possibility is that the business goodwill will be completely destroyed if the business cannot for some good reason be re-established elsewhere. While the paradox principle will apply, what can be conveniently called the *Reeve*<sup>64</sup> principle can also apply to the going-concern value of a business. If the value of the business based on its earning capacity exceeds the value of the tangible assets and that business was destroyed by the acquisition, the business has lost business goodwill.<sup>65</sup> Accordingly, compensation should include an amount equal to the whole of the undertaking regarded as a going concern, as the owner would be deprived of that total sum by the loss of the land. This then is the value of the land to the owner.

### Injurious Affection from use of Severed Land

The principle of injurious affection to severed land from the use by the acquiring authority of the land taken, has a history of over one hundred years. The *Stockport*<sup>66</sup> rule established that an owner was entitled to compensation for the use of, or acts done on, lands taken which detrimentally affect any severed residue land. In the early days it applied particularly to noise and vibration from railways,<sup>67</sup> and more recently from similar causes from roads, motorways<sup>68</sup> and airports.<sup>69</sup> It has also applied to the detrimental presence of sewer works.<sup>70</sup> The rule also applies to depreciation in value of residue lands from the anticipated detrimental legal use of the land by the acquiring authority.<sup>71</sup> The right to compensate for detrimental affection does not apply to use or anticipated use which is not carried on taken lands.<sup>72</sup> Where damage arises partly on the owner's taken land and partly on other lands, an owner cannot claim the whole of the damage which arises, but only that part which he can attribute to activities on his former land.<sup>73</sup>

64 *The Commonwealth v Reeve* (1948) 78 CLR 410; [1949] ALR 561; 10 Val 338; *Wm Collins & Sons Pty Ltd v The Co-ordinator General of Public Works*, Land Ct, Brisbane (1969) 22 Val 5 (January 1973) 397 at 403; *Crisp & Gunn Co-op Ltd v City of Hobart* (1962) 110 CLR 538; 19 Val 3 (July 1966) 250.

65 S.L. Speedy, "The Valuation of Goodwill and Going Concerns", 20 NZV 4 (December 1967) pp.157-167.

66 *Stockport, Timberley & Altringham Railway Co.*, (In re) (1864) 33 LJQB 251; *Broadbent v Imperial Gas Co.*, (1875) 26 LJ Ch 277; (1859) 7 HL CAS 600; *Minister of Transport v Edwards*, Ct of Appeal (1963) 18 Val 7 (July 1965) 565; *Seller v Minister of Works* [1934] NZLR 988; *Langford v Waimari County*, Supreme Ct NZ (Admin Div) (1974); 22 NZV 11 (September 1975) 455.

67 *Stockport, Timberley & Altringham Railway Co.*, (In re) (1864) 33 LJQB 251; *Sisters of Charity of Rockingham v R* [1922] 2 AC 315; 67 DLR 209.

68 *Cohen v Commissioner for Main Roads* (1968) 88 WN (Pt 1) (NSW) 244; 15 LGRA 423; 20 Val (January 1969) 394; *Pomona Orchards Ltd v Minister of Works* [1958] NZLR 88; LVCB 259.

69 *R v Halin* [1944] SCR 119; [1944] 1 DLR 625.

70 *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153; [1886-90] All ER Rep 901; *Howard v The Minister* (1939) 14 LGR (NSW) 74.

71 *Horton v Colwyn Bay* [1908] 1 KB 327.

72 *City of Glasgow Union Railway Co. v Hunter* (1870) LR 2 HL(Sc) 78.

73 *Sisters of Charity of Rockingham v R* [1922] 2 AC 315; 67 DLR 209; *Horton v Colwyn Bay* [1908] 1 KB 327; *Edwards v Minister of Transport* [1964] 2 QB 134; [1964] 1 All ER 483; 18 Val 7 (July 1965) 565.

### Betterment on Severance

The principle has long since been established that a dispossessed owner should be given sufficient compensation to place him in the same monetary position as he was prior to the compulsory taking. To do so has been considered only just; consequently any depreciation in the value of his severed land should also be taken into consideration. It follows from the principle of equivalence, that for an owner to be fully compensated for his loss – but not more than nor less than that loss – any appreciation in the value of his severed residue land as a result of the public work should equally be taken into consideration in assessing the net loss.

The principle of off-setting a claim by betterment (or enhancement) has existed for over a century under common law<sup>74</sup> and has generally been followed in countries which have followed the British legal tradition, including Australia,<sup>75</sup> Canada<sup>76</sup> and New Zealand,<sup>77</sup> though it was given statutory recognition in New Zealand in 1944,<sup>78</sup> this did not occur in England until 1961.<sup>79</sup>

The New Zealand statute does not define betterment, nor compensation, and it is not specific about whether separate amounts are to be assessed for betterment and compensation, or whether a net figure is to be assessed. Whether separate amounts can in fact be assessed will depend on the circumstances of each case. Generally, the onus is on the owner to establish that his loss exceeds the betterment accruing to the remainder of his land.<sup>80</sup> Of course, the assessment of compensation where betterment is a factor can be reached by the same processes as used in the estimating of loss by severance.<sup>81</sup>

The most frequently encountered betterment cases are those relating to roadways, where the extra legal frontage adds considerable value to the extent of substantially off-setting the loss in value of the land taken.<sup>82</sup> (See Fig. 2(d)) The

- 74 *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37; 11 Val 131; *Countess Ossalinsky and Mayor etc. of Manchester* (In re) (1883). See Browne & Allan's Law of Compensation, 2nd ed 659 DC; *Lucas & Chesterfield Gas & Water Board* (In re) [1909] 1 KB 16; [1908-10] All ER Rep 251; *Cedar Rapids Manufacturing & Power Co. v Lacoste* [1914] AC 569; [1914-15] All ER Rep 571; 16 DLR 168; 20 Val 1 (January 1968) 70; *Fraser v Fraserville City* [1917] AC 187 at 194; 34 DLR 211; *Pointe Gourde Quarrying & Transport Co. Ltd v Sub-Intendent of Crown Lands* [1947] AC 565; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495; (1952) 82 CLR 545; [1948] 1 ALR 145; [1952] ALR 205; *Viscount Camrose v Basingstoke Corporation* [1966] 3 All ER 161; *Marshall v Commissioner of Irrigation & Water Supply*, Land App Ct, Rockhampton (1973) 23 Val 8 (October 1975) 640.
- 75 *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495; (1952) 82 CLR 545; [1948] 1 ALR 145; [1952] ALR 205.
- 76 *Cedar Rapids Manufacturing & Power Co. v Lacoste* [1914] AC 569; [1914-15] All ER Rep 571; 16 DLR 168; 20 Val 1 (January 1968) 70.
- 77 *Hone te Anga v Kawa Drainage Board* (1914) 33 NZLR 1139; 16 GLR 696.
- 78 Finance Act (No. 3) 1944, s.29(1)(e)(NZ).
- 79 English Land Compensation Act 1961, s.6(1).
- 80 *Christchurch City Council v Industrial Projects Ltd* [1967] NZLR 1043; 20 NZV 4 (October 1967) 198.
- 81 *Brell v Penrith City Council* (1964) 11 LGRA 156; 18 Val 650 (October 1965).
- 82 *Montgomery Investments Ltd v Minister of Works* [1962] NZLR 453 (LVC); LVCB 453; *Brell v Penrith City Council* (1964) 11 LGRA 156; 18 Val 650 (October 1965); *Townsend v Blacktown Municipal Council*, Land and Valuation Ct, NSW (1966); 19 Val 6 (April 1967) 533.



taking of land for a park may enhance the value of a potential subdivision.<sup>83</sup> In rural areas, betterment has been a mitigating factor in claims relating to land taken for drainage of lands subject to flooding,<sup>84</sup> and for lands taken for irrigation works.<sup>85</sup>

It is not a breach of the principle of full compensation to take into account any betterment in assessing the net damages arising from the loss of land taken, plus any detrimental affection as a result of the public work.<sup>86</sup> Where an owner has received benefits from a public work sufficient to offset the monetary loss, the acquiring authority should not be called upon to compensate an owner for interference with his property rights of a trivial nature or inconvenience rather than monetary loss. A deduction for betterment is justified only if there is convincing evidence that the value of some part of the owner's severed residue land has increased to a reasonable extent by reason of the public work.<sup>87</sup>

### **No Enhancement in Value from Prospect of the Public Work**

Any increase or reduction in the value of the land taken as a result of the public work, or the prospect of such work, is not to be taken into account in assessing the amount of compensation.<sup>88</sup> However, this rule does not apply to the value of the residue land not taken.

The *Cedar Rapids* principle<sup>89</sup> is that the value of the land is to be tested by the imaginary market which would have ruled had the land been exposed for sale before the prospect of the public work.

The principle of disregarding the prospect of the work in assessing the loss, usually refers to the physical aspects of the work. The "work" is a liberal expression. In road widening it means the taking of the land and the setting back of fences and is not limited to the consequent formation of the roadway.<sup>90</sup> The principle also applies to restrictions placed on the land as the first step in the taking, such as town-planning designation.<sup>91</sup>

It is now well settled that compensation for compulsory acquisition cannot include any increase in value which is entirely due to the public work.<sup>92</sup> The land must be valued as it stands and not as it would stand when the land has been acquired.<sup>93</sup>

### **Loss of Potential on Severance**

Where land which is severed has suffered a reduction in potentiality, such loss is claimable in so far as the potentialities had formed part of the value of the

83 *Parkes Development Pty Ltd v Burwood Municipal Council* (1970) 92 WN (NSW) 249; 21 Val 1 (January 1970) 67.

84 *Candy v Thames Valley Drainage Board* [1956] NZLR 416; LVCB 205.

85 *Marshall v Commissioner of Irrigation & Water Supply*, Land App Ct, Rockhampton (1973) 23 Val 8 (October 1975) 640.

86 *Roseman v Henderson Borough* (1958) 9 MCD 349; LVCB 601.

87 *Candy v Thames Valley Drainage Board* [1956] NZLR 416; LVCB 205.

88 Finance Act (No. 3) 1944, s.29(1)(e)(NZ).

89 *Cedar Rapids Manufacturing & Power Co v Lacoste* [1914] AC 569; [1914-15] All ER Rep 571; 16 DLR 168; 20 Val 1 (January 1968) 70.

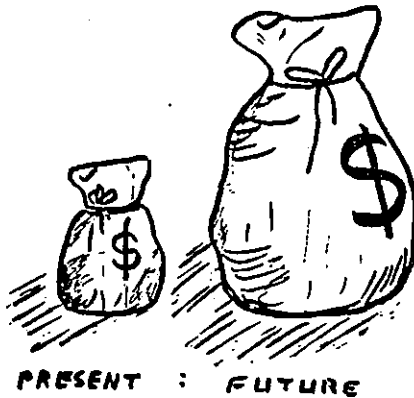
90 *Palmerston North City v Manson & Barr Ltd*, Land Valuation Ct, Palmerston North, Archer J. (1955); LVCB 424; 14 NZV 1 (March 1956) 235; *Sullivan v Mayor etc. of Masterton* (1909) 28 NZLR 921; 12 GLR 140.

91 *Lewis v Christchurch Drainage Board* [1972] NZLR 229; 22 NZV 7 (September 1974) 294.

92 *South Eastern Railway Co. v London County Council* [1915] 2 Ch 252.

93 *Raja Vyricherla v The Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317.

land before resumption, as potentialities possessed by land are part of its value.<sup>94</sup> In assessing the amount of compensation the valuer may take into account not only the present use of the land, but also any other more beneficial purpose which it appears in the reasonably near future to be capable of being used.<sup>95</sup> The prices paid for neighbouring land provide a guide to market value, but where the land possesses potentialities of such an unusual nature that the prices paid for the other lands are not properly comparable, recourse should be had to other methods of valuation.<sup>96</sup> While the value consists of all advantages which the land possesses, both present and future, it is the present value alone of those advantages that falls to be determined.<sup>97</sup> Thus, the value of land is still on the basis of a willing purchaser and willing seller even though the land has additional advantages.<sup>98</sup> Where a property has unusual or even unique features as to its potentialities, there may be no market to guide a valuer. Nevertheless, it is necessary for a valuer to ascertain as best he can, from the materials before him, what a willing vendor might reasonably expect to get from a willing buyer for the land in its location with its potentialities.<sup>99</sup>



*Fig. 8 – It is the current market value which is to be found; present realities and not future hopes as if they were realised.*

Potentialities should not be too remote, as expectation is not of itself enough. In any event, any expectation should be discounted for the delay before realisation.<sup>100</sup> It is always necessary to value the present value alone, and to

94 *Marshall v Minister of Works* [1950] NZLR 339; [1950] GLR 20; LVCB 127.

95 *R v Brown* (1867) LR 2 QB 630.

96 *Marshall v Minister of Works* [1950] NZLR 339; [1950] GLR 20; LVCB 127.

97 *Cedar Rapids Manufacturing & Power Co. v Lacoste* [1914] AC 569; [1914-15] All ER Rep 571; 16 DLR 168; 20 Val 1 (January 1968) 70.

98 *Spencer v Commonwealth of Australia* (1907) 5 CLR 418; 14 ALR 253.

99 *Raja Vyricherla v The Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317; *Whararoa 2E Block, Maori Trustee v Ministry of Works* [1959] NZLR 7; [1959] AC 1; [1958] 3 All ER 336; LVCB 272. *Berger Paints & Myers v Wellington City Council* [1975] 1 NZLR 184; 22 NZV 9 (March 1975) 370.

100 *Verebes Investments Pty Ltd v Commissioner for Main Roads, Land and Valuation Ct* (1972); 22 Val 6 (April 1973) 466.

consider possibilities, but not as if those possibilities were realised.<sup>101</sup> Neither is the special potentiality to be assessed on a mathematical basis by estimating the loss of profits arising from the inability to develop that potentiality. While the loss of such profit may be some guide it is not the controlling factor. Any future profitability is generally reflected in its market value.<sup>102</sup>

It is up to a competent valuer to assess the market value of the property with any such potentiality.<sup>103</sup> It may be that if the potentiality is capable of being realised in the near future it will give added value over and above its value in its existing use.<sup>104</sup>

Land which has a potential value may be valued either by valuing the land inclusive of potential, or by valuing it as it stands and then adding something for the potential. If available comparable sales also have a similar potential, direct comparison may well be the most suitable method. Where such comparable sales of the potential do not exist, it is necessary to value the land by such comparable sales as may exist without the potential, and then to allow for the added value which a potential gives to the land. Whatever method is used it is not an acceptable practice to assume the existence of the possibilities on which the potential is based.<sup>105</sup> Sometimes it may be necessary to value the potential on such materials that are available without indulging in feats of imagination.<sup>106</sup>

It must be re-emphasised that it is the current market value which is to be found and not future potentialities as if they existed. For example, a builder is only entitled to the market value of his land and not to compensation for loss of anticipated profits from not being able to build homes on the land.<sup>107</sup> This follows the *Pastoral Finance*<sup>108</sup> principle that no man would pay for land in addition to its market value the capitalised value of the savings and additional profits which would be expected from its use. An owner is entitled to the market value of the land and not for profit or savings he would expect to make from the property.

The operative phrase is "market value". No doubt the market as revealed by comparable sales will have already taken future potentialities into account in a process akin to discounting those future profit expectations at a rate to allow for time and risk.

In all such cases, the value is based on what a willing seller might be expected to get for the land at the relevant date if it was sold on the open market, with

101 *Cedar Rapids Manufacturing & Power Co. v Lacoste* [1914] AC 569; [1914-15] All ER Rep 571; 16 DLR 168; 20 Val 1 (January 1968) 70; *Lucas & Chesterfield Gas & Water Board (In re)* [1909] 1 KB 16; [1908-10] All ER Rep 251.

102 *Berger Paints & Myers v Wellington City Council* [1975] 1 NZLR 184; 22 NZV 9 (March 1975) 370; *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083; 26 Val 1 (January 1968) 413.

103 *McCallum v Mt Maunganui Borough* [1960] NZLR 1101; LVCB 318.

104 *Minister of Works v Green & McCahil (Contractors) Ltd* [1965] NZLR 580; LVCB 384.

105 *Hutt River Board v Lower Hutt City Council* [1960] NZLR 1107; LVCB 324.

106 *Raja Vyricherla v The Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317; *Marshall v Minister of Works* [1950] NZLR 339; [1950] GLR 20; LVCB 127; *Hutt River Board v Lower Hutt City Council* [1960] NZLR 1107; LVCB 324.

107 *Collins v Feltham Urban District Council* [1937] 4 All ER 189.

108 *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083; 26 Val 1 (January 1968) 413.

the proviso that the owner and the hypothetical buyer are adequately informed of all relevant circumstances.<sup>109</sup>

### **Before-and-After Principle**

The before-and-after method of assessing loss by severance or other injurious affection is well established and approved by the valuing and appraisal professions<sup>110</sup> and by courts in various states and countries.<sup>111</sup> But it must be recognised that it is not the only method by which severance loss may be valued, and is not invariably accepted in severance claims.<sup>112</sup>

In its elementary form the loss by severance is found by deducting from the value of the land before taking, the value of the residue land after taking. The method will take into consideration all appropriate losses as well as increases in the value of any land of the owner.<sup>113</sup> The enhancement factor is a very important and essential ingredient of the matters requiring consideration. That is, the owner's total holding which is detrimentally or beneficially affected must be valued before the taking, and then immediately after the taking to find the direct pecuniary injury,<sup>114</sup> the basic elements of which are the respective values at the relevant date.<sup>115</sup>

The before-and-after method is *prima facie* the measure of compensation for severance but there may be other factors. Further, it may be unreliable when only a small parcel of land is taken. For example, in a recent road widening case a depth table approach plus allowance for loss of trees and the like was considered sounder.<sup>116</sup> In such cases the severance can cause a much greater injurious affection to the residue than actual value of the land taken.<sup>117</sup>

109 *Whararoa 2E Block, Maori Trustee v Ministry of Works* [1959] NZLR 7; [1959] AC 1; [1958] 3 All ER 336; LVCB 272.

110 See *Principles and Practice of Urban Valuation in New Zealand*, NZ Institute of Valuers, Wellington, 1959, pp.248-9; J.F.N. Murray, *Principles and Practice of Valuation*, 1969, Sydney, Commonwealth Institute of Valuers, p.422; Alfred A. Ring, *The Valuation of Real Estate*, 1963, Englewood Cliffs, Prentice Hall, Inc.

111 Leading New Zealand cases include: *Russell v Minister of Lands* (1898) 17 NZLR 241; 1 GLR 15; *Fitzgerald v Kelburne & Karori Tramway Co. Ltd* (1902) 20 NZLR 406; *Montgomery Investments Ltd v Minister of Works* [1962] NZLR 453 (LVC) LVCB 453; *Prestige Homes Corporation Ltd v Minister of Works* (1968) 20 NZV 8 (December 1968) 383; *Langford v Waimari County*, Supreme Ct NZ (Admin Div) (1974); 22 NZV 11 (September 1975) 455. It has proven to be a valuable method in some Australian cases as well: See *Realty Corporation Ltd v Commissioner for Main Roads* (1940) 14 LGR (NSW) 204; *Boiadjeff v The Minister* [1963] NSW 1114; (1962) 8 LGRA 68 at 73; *Townsend v Blacktown Municipal Council*, Land and Valuation Ct, NSW (1966); 19 Val 6 (April 1967) 533; *Brell v Penrith City Council* (1964) 11 LGRA 156; 18 Val 650 (October 1965); *Commissioner of Main Roads v Stanfield* (1971) 21 Val 8 (October 1971) 631 at 633; *Davidson v Brisbane City Council* (1967) 19 Val 8 (October 1967) 721; *Freestone v Parramatta City Council*, Land and Valuation Ct, NSW (1974); 23 Val 3 (July 1974) 217.

112 See for example *Freestone v Parramatta City Council*, Land and Valuation Ct, NSW (1974); 23 Val 3 (July 1974) 217.

113 Finance Act (No. 3) 1944, s.29(2)(e).

114 *Townsend v Blacktown Municipal Council*, Land and Valuation Ct, NSW (1966); 19 Val 6 (April 1967) 533 at 534.

115 *March v City of Frankston* (No. 1) [1969] VR 350; 20 Val 4 (October 1968) 301 at 305.

116 *Langford v Waimari County*, Supreme Ct, NZ (Admin Div) (1974); 22 NZV 11 (September 1975) 455 at 456.

117 This occurred in the classic leading case *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418; *Langford v Waimari County*, Supreme Ct, NZ (Admin Div) (1974); 22 NZV 11 (September 1975) 455.

Betterment or enhancement in value of the residue land can be an important factor in reducing or even eliminating<sup>118</sup> the net loss in value to the claimant's original land. In a New Zealand case the taking of a hectare for a roadway substantially increased the legal frontage to the severed residue and also increased the block value of the owner's potential subdivision. This occurred even though the total profit which could have been made from the subdivision was reduced. Originally the total expenditure outlay was about equally divided between the block value of the land and the estimated development costs. After severance, the land value slightly increased but the estimated cost of outlay was considerably reduced.<sup>119</sup> In another New Zealand claim, the taking authority completely eliminated access to residentially zoned land, thereby effectively reducing its potential value for subdivision to its existing rural use value.

The before-and-after method takes into consideration the loss in value of the land immediately prior to the taking, and the value of the severed residue immediately after the taking. In appropriate circumstances this approach should establish the net loss suffered by the dispossessed owner through the "taking, severance, injurious affection or loss from other causes", less due allowance for any betterment or enhancement of value.<sup>120</sup>

A practical difficulty in using the before-and-after method is that it is unreliable if any averaging value method is used, as it is the marginal difference between the two situations which has to be found.<sup>121</sup> It can also only be used within the limits of permissible use of the land.<sup>122</sup>

### Valuation Criterion

The valuation criterion for the amount of compensation for land taken or severed has been given statutory and common law recognition as being the amount which the land if sold on the open market by a willing seller on the specified date might be expected to realise.<sup>123</sup> This standard does not affect any other statutory right to compensation which is not based on the value of land. The use of the words "open market" and "willing seller" implies also a "willing buyer",<sup>124</sup> and has the practical effect of requiring that the capital value of the land has to be found.<sup>125</sup>

A willing purchaser is one who is willing to buy, but is not obliged nor under pressure to buy.<sup>126</sup> This was well expressed in the Canadian *Sun Life* case as:

"La valeur réelle est le prix qu'un vendeur qui n'est pas obligé de vendre, et  
118 *Brell v Penrith City Council* (1964) 11 LGRA 156; 18 Val 650 (October 1965).

119 *Montgomery Investments Ltd v Minister of Works* [1962] NZLR 453 (LVCB) 453.

120 *Townsend v Blacktown Municipal Council*, Land and Valuation Ct, NSW (1966); 19 Val 6 (April 1967) 533.

121 For general discussions on this point see Squire L. Speedy, *Property Investment*, 1973, Wellington, Butterworths, pp.142-145.

122 *Hordern v Sydney Municipal Council* (1940) 14 LGR (NSW) 200 at 205; 6 Val 203; *Freestone v Parramatta City Council*, Land and Valuation Ct, NSW (1974); 23 Val 3 (July 1974) 217.

123 Finance Act (No. 3) 2.29(1)(b)(NZ); Acquisition of Land (Assessment of Compensation) Act 1919, s.2(UK).

124 *Marshall v Minister of Works* [1950] NZLR 339; [1950] GLR 20; LVCB 127 at 131; *Spencer v Commonwealth of Australia* (1907) 5 CLR 418; 14 ALR 253.

125 *Whararoa 2E Block, Maori Trustee v Ministry of Works* [1959] NZLR 7; [1959] AC 1; [1958] 3 All ER 336; LVCB 272.

126 *Carlton Heights Ltd v Minister of Works* [1963] NZLR 973; LVCB 366 at 376.

qui n'est pas dépossédé malgré lui, mais qui désire vendre, réussira à avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter." (The real value is the price which a seller who is not obliged to sell, and who is not dispossessed against his will, but who desires to sell, will succeed in obtaining from a buyer who is not obliged to buy but who wishes to buy).<sup>127</sup>

### Willing Seller, Willing Buyer Concept

The concept of a willing seller in an open market creates, as the foundation of a claim for compensation for land compulsorily taken, an imaginary sale in the open market on a specified date by a willing buyer of the property as it then existed.<sup>128</sup> Such a sale is hypothetical and the willing buyer is likewise fictional, because no person actually does buy.<sup>129</sup> The price must be tested by the imaginary market which would have ruled had the land been exposed for sale before the public work was contemplated.<sup>130</sup> It is a principle of valuation that it must be assumed that a willing buyer can be found for the land.<sup>131</sup> There is no onus on the valuer to prove that the land is saleable or to nominate a willing buyer. This principle applies even though the only likely buyer is the owner himself. It must be assumed that both the seller and the hypothetical purchaser are adequately informed of all relevant circumstances in negotiating a price.<sup>132</sup>

The statutory valuation criterion also implies a reasonable and *bona fide* seller.<sup>133</sup> The value to the dispossessed owner must be found by normal methods of valuation and independently of the fact that the acquiring authority has taken the land compulsorily.<sup>134</sup> The statutory definition was not intended to create a new standard of valuation, but to apply to valuations for compensation the conception of "fair market value" long established in English and British Commonwealth law and assessed by a hypothetical sale between a willing seller and a willing buyer.<sup>135</sup>

The valuation criterion may also be viewed as the amount which a prudent man in the position of the owner would have been willing to give rather than fail to obtain land.<sup>136</sup> An owner is entitled to have for his land what it is worth to a man of ordinary prudence and foresight, not holding his land for merely

127 *City of Montreal v Sun Life Assurance Co. of Canada* [1952] 2 DLR 81 at 88.  
128 *Spencer v Commonwealth of Australia* (1907) 5 CLR 418 at 431; 14 ALR 253; *Marshall v Minister of Works* [1950] NZLR 339; [1950] GLR 20; LVCB 127 at 131.  
129 *Valuer-General v Wellington City Corporation* [1933] NZLR 855; [1933] GLR 637; *Valuer-General v Manning* [1952] NZLR 700; [1952] GLR 478; LVCB 156.  
130 *Cedar Rapids Manufacturing & Power Co. v Lacoste* [1914] AC 569; [1914-15] All ER Rep 571; 16 DLR 168; 20 Val 1 (January 1968) 70.  
131 *Commissioner of Crown Lands v Fitzgerald* (1961) LVCB 441 Land Valuation Ct, Gisborne (1961), Archer J.  
132 *Whararoa 2E Block, Maori Trustee v Ministry of Works* [1959] NZLR 7; [1959] AC 1; [1958] 3 All ER 336; LVCB 272; *R v Calder* [1969] NZLR 414; 20 NZV 9 (March 1969) 421.  
133 *Valuer-General v Manning* [1952] NZLR 700; [1952] GLR 478; LVCB 156.  
134 *Thomson v Levin Borough Council*, Land Valuation Ct, Wellington, Archer J. (1959); 17 NZV 4 (December 1959) 154.  
135 *Valuer-General v Wellington City Corporation* [1933] NZLR 855; [1933] GLR 637; *Valuer-General v Manning* [1952] NZLR 700; [1952] GLR 478; LVCB 156 at 160.  
136 *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083; 26 Val 1 (January 1968) 413; *Carlton Heights Ltd v Minister of Works* [1963] NZLR 973; LVCB 386; *Chapman v The Minister* [1966] NSW 65; 13 LGRA 1; 19 Val 2 (April 1966) 157; *Commonwealth of Australia v Arklay* (1952) 87 CLR 159; [1952] ALR 640; 12 Val 165.

speculative purposes, nor on the other hand anxious to sell for any compelling or private reason, but willing to sell as a business man would be to another such person, both of them alike uninfluenced by any consideration of sentiment or need. Both the willing seller and the hypothetical willing buyer are deemed to be reasonable men who are prepared to give proper but not excessive weight to all relevant circumstances.<sup>137</sup> Yet he would not overlook any ordinary business consideration, and would make full and careful inquiries on all relevant matters from public and other authorities.<sup>138</sup>

There is no difference in standards between a willing seller and a willing buyer, because the statute presupposes agreement between them upon a cash price which is acceptable and fair to both, and which represents the market value of the land.<sup>139</sup>

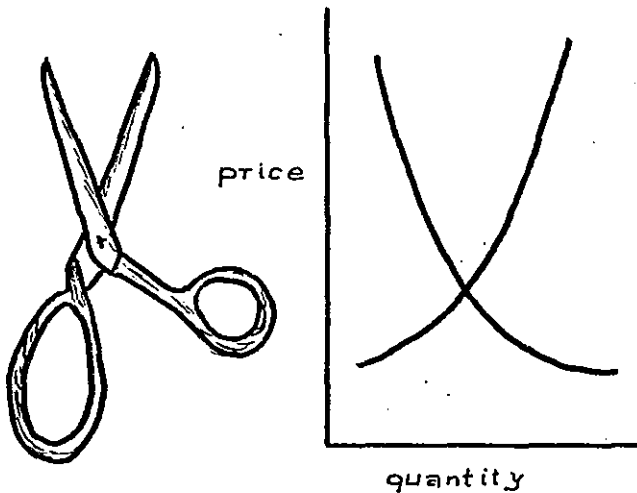


Fig. 9 – “Market price is like the cutting point of scissors”. Alfred Marshall

### Open Market Value

The economists’ traditional concept of market price has been depicted as a point on the intersection of the meeting point of Marshall’s<sup>140</sup> scissors on the graph of the supply and demand curves. Economists concentrate on *price* rather than *value*, which to them is just a word.<sup>141</sup> A market originally meant a meeting place set aside for trading, or even simply a purchase and sale.<sup>142</sup> The word has come to mean a system evolved by modern communication media to

137 *Spencer v Commonwealth of Australia* (1907) 5 CLR 418; 14 ALR 253.

138 *Verbes Investments Pty Ltd v Commissioner for Main Roads, Land and Valuation Ct* (1972); 22 Val 6 (April 1973) 466.

139 *Spencer v Commonwealth of Australia* (1907) 5 CLR 418; 14 ALR 253.

140 Alfred Marshall, *Principles of Economics*, (London, Macmillan & Co. Ltd 8th ed 1920) (First published 1890).

141 Joan Robinson, *The Accumulation of Capital*, 3rd ed 1969 (London, Macmillan & Co. Ltd) p.59.

142 *Charrington & Co. Ltd v Wooder* [1914] AC 71.

enable information to be transmitted and transactions to take place between any two people wherever situated. Any pattern of trading can now be said to form a market or perhaps a sub-market. The economists' approach to market has to be modified in respect of land because each parcel is legally and geographically unique. The practical application of the Aristotelian "just price", being a price which is neither too much nor too little, is still the practical standard of the modern concept of market value. There is not, in general, any market for land as compared with identical commodity markets as for shares or sugar.<sup>143</sup> Because of the literally unique characteristics of parcels of land, in practice the real estate market tends to develop or be recognised not as a market in the traditional sense, but rather a series of sub-markets related to the special characteristics of the properties whether it is physical, locational or otherwise. On the other hand, in real estate practice the trend of asked prices and concluded sales of comparable properties affords the background evidence from which buyers and sellers form their personal judgments in negotiating individual sales.

A distinction must be drawn to the difference between "value" and "price", which frequently are used interchangeably. In valuation work it is well recognised that "price" is not synonymous with "value", as sales at excessive prices which appear to be attributable to whim, extravagance or compelling needs of individual purchasers should be disregarded in the assessment of market value.<sup>144</sup>

In valuation work "market value" does not have a fixed meaning which must be allotted to it invariably. The term "market" must be construed with reference to the surrounding circumstances and the facts.<sup>145</sup> It is not a fancy price,<sup>146</sup> neither is it an extortionate price,<sup>147</sup> but the competition of the special needs of purchasers may be taken into account. In contrast, the owner is not to be considered a forced seller. While any price may well depend on the diplomacy of bargaining, the principal buyer who for a genuine business reason will pay a price higher than others, should not be excluded.<sup>148</sup> The "open market" may include a sale by auction, but it is not confined to that.<sup>149</sup> It may be a price realised by the normal marketing methods, but it is not a sale without reserve, and there is no ground to exclude from consideration the fact that because of its location, it presents a greater attraction to one or more persons than to anyone else.<sup>150</sup> While the value of a property is not to be measured necessarily by the price given by a buyer who is particularly in need of the particular piece of property, such a person must have an influence on its value in the open market.<sup>151</sup> The special adaptability of the land should be taken into account as such, but not any

143 *Raja Vyricherla v The Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317.

144 *Valuer-General v Manning* [1952] NZLR 700; [1952] GLR 478; LVCB 156.

145 *Charrington & Co. Ltd v Wooder* [1914] AC 71; *Valuer-General v Manning* [1952] NZLR 700; [1952] GLR 478; LVCB 156.

146 *Inland Revenue Commissioners v Clay* [1914] 3 KB 466; [1914-15] All ER Rep 882.

147 *Charrington & Co. Ltd v Wooder* [1914] AC 71.

148 *Lucas & Chesterfield Gas & Water Board (In re)* [1909] 1 KB 16; [1908-10] All ER Rep 251.

149 *Lumsden v Inland Revenue Commissioner* [1913] 3 KB 809.

150 *Glass v Commissioners of Inland Revenue* (1915) 52 Sc LR 414 cited in 3 NZTBR Case 11, 129 at 144.

151 *Inland Revenue v Matt's Trustees* (1906) 44 Sc LR 647; *Bradford-on-Avon Assessment Committee v White* [1898] 2 QB 630 at 639; *Robinson Brothers (Brewers) Ltd v Durham County Assessment Committee* [1937] 2 KB 445; aff'd [1938] AC 321.



personal attribute of the purchaser. In considering buyers the position must be considered generally, and not to exclude or include anybody in particular.<sup>152</sup> Market value simply means "value" which a willing seller not under compulsion to sell might reasonably expect to receive for his property if sold in the open market, in its then condition and free from encumbrances to a willing but not over-anxious buyer. Because of the lack of a regular, recognised market of virtually identical commodities, the term "market value" may be misleading when applied to land and is not to be preferred to the unqualified adequate term "value".<sup>153</sup>

Market value in reference to willing seller and willing buyer must refer to sales of reasonable vendors on the one hand and willing but prudent and informed purchasers on the other.<sup>154</sup> The use of the word "fair" to describe the market price adds little to the general meaning of market price, but it has been held to protect a lessee from being required to pay some extortionate price kept up by a combination of brewers or by some such similar device.<sup>155</sup>

### Conclusion

The problem of assessing compensation for land taken and severed by compulsory acquisitions under the power of eminent domain is more than a matter of law and technicalities, but of justice between society and man, as well as having psychological, administrative and economic dimensions.

It is concerned with psychological factors, if only because of the traumatic impact a compulsory taking of land has on a genuine unwilling seller. In such circumstances, it is not possible to place a sum on sentimental or aesthetic losses which the owner must suffer, even if it were allowed by law. The law clearly requires the value to be fixed on the basis of the hypothetical assumption of a willing seller, willing buyer. It is a necessary fictitious assumption that such persons exist, like their counterpart the "reasonable" man.

To this sum may be awarded a judicially just amount arising from factors other than those based on the value of the land taken, but within the strict statutory and common law rules usually referred to under the terms of injurious affection, severance, disturbance, interest and costs.

Eminent domain is also involved with economics, as a sum certain must be set for all present and future rights of ownership and possession for what are invariably uncertain. It is also concerned with the practical application of the laws of supply and demand which permeate all market considerations, the opportunity costs to the owner and society, and the practical need to discount all future potentialities to a net present value at a given date. Yet it is the very vagueness of practical interpretation of the problem which gives the judicial process the opportunity to balance the scales of just compensation with an economic equivalent for the dispossessed owner. It is the responsibility of a dispossessed owner's advisers to ensure that the courts are competently assisted in this important task.

152 *Raja Vyricherla v The Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317; *Carlton Heights Ltd v Minister of Works* [1963] NZLR 973; LVCB 366; *Commissioners of Inland Revenue v Grossman* [1937] AC 26.

153 *Mounthey to Young* (In re a Proposed Sale) [1947] NZLR 436; LVCB 81 at 90.

154 *Public Trustee to Mitchell* [1947] NZLR 697; LVCB 107.

155 *Charrington & Co. Ltd v Wooder* [1914] AC 71.

It should not be forgotten that, although the rules of law have been laid down, it is the practical interpretation and valuation principles and practices which have helped establish some of those selfsame rules and their impartial assessment which in the end will determine the quality of justice meted out.

Practical land acquisition under eminent domain is also an administrative problem, because in fact only a very few compulsory land acquisitions cases come to court. Most claims are resolved as a matter of administrative convenience between the opposing negotiators, aided no doubt by the unspoken knowledge and fear that the acquiring authority has all the necessary powers of eminent domain, and by the concern of the owner that litigation is usually delayed, worrying in its uncertainty, and expensive in time and emotional energy. It needs well-informed, impartial but understanding negotiators to reach a fair and just settlement within the rules of the compensation "game".

The modern concept of eminent domain is that private property may not be expropriated in the absence of clear enabling statutory authority.<sup>156</sup> The common law presumption is against confiscation of property without compensation.<sup>157</sup> Where a statute authorises the taking of land, if there is no provision for compensation, nothing can be claimed. Where a statute does give a right of compensation, strict compliance is imperative.<sup>158</sup> It is a canon of eminent domain that an intention to take away the property of a subject without giving him a legal right to compensation for its loss is not to be imputed in any legislation, unless the intention is expressed in unequivocal terms.<sup>159</sup> This principle applies equally to delegated legislative powers which are frequently given to local and ad hoc authorities.<sup>160</sup> A statute which takes away private property for compensation should be given a wide meaning.<sup>161</sup>

General or ambiguous words should not be used to take away legitimate and valuable rights from an owner without compensation if they are reasonably capable of being construed so as to avoid such a result, consistent with the general purpose of the transaction.<sup>162</sup>

The principles of eminent domain have developed from an admixture of legislative enabling statutes and common law interpretation. On the one hand, the legislature seeks to mitigate against the evils of excessive compensation which has resulted from the taking of lands being compulsory against the wish of the owner. The very nature of the word "compensation" implies a loss to the dispossessed owner which has to be made up. Unless he receives an amount equal to his pecuniary detriment, compensation would not be equivalent to his

156 *Thornlie Development Co. Pty Ltd v The Minister of Works*, Compensation Ct (1962); 17 Val 7 (July 1963) 534.

157 *Attorney General v De Kayser's Royal Hotel Ltd* [1920] AC 508 at 542; *Union of South Africa v Simmer and Jack Proprietary Mines* [1918] AC 591 at 603; *Commissioner of Public Works (Cape Colony) v Logan* [1903] AC 355; *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552; (1921) 29 CLR 448.

158 *Russell v Minister of Lands* (1898) 17 NZLR 241; 1 GLR 15.

159 *Central Control Board (Liquor Traffic) v Cannon Brewery Co. Ltd* [1919] AC 744; *Foster Wheeler Ltd v E. Green & Son Ltd* [1946] 1 All ER 63; *Newcastle Breweries v R* [1920] 1 KB 854.

160 *Municipal Council of Sydney v Campbell* [1925] AC 338.

161 *Berger Paints & Myers v Wellington City Council* [1975] 1 NZLR 184; 22 NZV 9, *Plimmer v Wellington City Corporation* (1884) 9 App Cas 699.

162 *Union of South Africa v Simmer and Jack Proprietary Mines* [1918] AC 591 at 603; *Commissioner of Public Works (Cape Colony) v Logan* [1903] AC 355.

compulsory sacrifice.<sup>163</sup> On the other hand, the function of the courts is to hold the scales of justice fairly between the owner and the taking authority. One court has viewed its task as to discourage, as far as it can, tyranny and oppression by one side and avarice and blackmail by the other.<sup>164</sup>

Nowadays there is much legislation which takes away private rights for the general public interest and it seems that owners must put up with these restrictions.<sup>165</sup> But a clear distinction must be drawn between loss of rights, and loss of possession and title, as the Magna Carta rule that no man shall be dispossessed of his lands except by the law of the land<sup>166</sup> is still a fundamental principle of private ownership of property.

163 *Horn v Sunderland Corporation* [1941] 2 KB 26; [1941] 1 All ER 480.

164 *Lion Brewery & Malting Co. Ltd v The Commissioner of Highways* (1965) 12 LGRA 413; 19 Val 451.

165 *Edwards v Minister of Transport* [1964] 2 QB 134; [1964] 1 All ER 483; 18 Val 7 (July 1965) 565. *Freestone v Parramatta City Council*, Land and Valuation Ct, NSW (1974); 23 Val 3 (July 1974) 217; *The Commonwealth v Morrison* (1972) 46 ALJR 453.

166 *Russell v Minister of Lands* (1898) 17 NZLR 241; 1 GLR 15.

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