

10/11/60

Memorandum No. 89 (1960)

Subject: Study No. 36 - Condemnation (Taking Possession
and Passage of Title)

The revised recommendation and statute relating to taking possession and passage of title in eminent domain cases are attached hereto for final approval. At the September meeting, the Commission did not finally consider whether it approved the suggested changes in the supplementary legislation which appears here on page 39. It should be compared with the supplementary legislation appearing in the tentative recommendation dated June 23, 1960 which was distributed for the September meeting.

A tax refund statute has been drafted to correspond to the tax cancellation provisions that now appear in Revenue and Taxation Code Section 4986. The statute is an amendment to Section 5096 of the Revenue and Taxation Code, which is the present refund statute. It appears on page 34. The statute will apply to any case where property is acquired for public use -- not just in eminent domain situations. Hence, it is presented here as a separate bill since its content is not within the title of a bill relating to eminent domain. Contained in the same bill are the other proposed sections relating to taxation. Section 1252.1 has been modified slightly to be consistent with the proposed Section 5096. There was no need for any change in the last subdivision of Section 1248.

In the principal bill, Section 1243.7 as it appears on page 18 has

been modified in accordance with the Commission's directions. Section 1255a, on page 27, has been altered to make the restrictions on abandonment applicable in all eminent domain cases -- not just in immediate possession cases. A subdivision (4) has been added to Section 1255a to provide for compensation upon abandonment in possession cases.

Please note the constitutional amendment as it has been revised. We had attempted to clean up this monstrosity by deleting all of the procedural provisions from it. Now, because of a fear that the constitutional amendment will be passed and the statute won't, all of the procedural provisions must be retained, for there are no statutory procedural provisions. The net effect is that, in the immediate possession portions of the Constitution, we have been successful in deleting only the words "provided, that". The section has been lengthened, not shortened.

So far as the fear that the amendment will pass and the statutes won't is concerned, it must be remembered that the amendment will not be voted on, if at all, until November of 1962. Even if the Legislature does pass the constitutional amendment without also passing our statutes so that there is no law granting the power of immediate possession, it is inconceivable that the Legislature would fail to remedy the situation in 1962, long before the constitutional amendment is voted on.

If it seems undesirable to rely upon a special session in 1962 to correct such an oversight, there is the possibility of placing conditional language in the resolution proposing the constitutional amendment. Section 1 of Article 18 of the Constitution provides:

Any amendment or amendments to this Constitution may be proposed in the Senate or Assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such

proposed amendment or amendments shall be entered in their Journals, with the yeas and nays taken thereon; and it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people in such manner, and at such time, and after such publication as may be deemed expedient. . . .

This language does not necessarily preclude the Legislature from deciding that it will submit a proposed amendment to the people only if a proposed bill passes. The Attorney General has given an opinion that a subsequent session of the Legislature may not rescind or modify a constitutional amendment proposed by a previous session (26 Ops. Cal. Atty. Gen. 178 (1955)), but rescinding previous action is far different from deciding that the matter won't be submitted at all unless some other act is passed.

It would be desirable to establish the principle that a constitutional amendment may be conditionally proposed. It seems to be the most practical way to delete procedural provisions and other matters that properly belong in statutes from the Constitution.

Respectfully submitted,

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T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

Relating to

TAKING POSSESSION AND PASSAGE OF TITLE
IN EMINENT DOMAIN PROCEEDINGS

NOTE: This is a tentative recommendation and proposed statute prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Taking Possession and Passage of Title

in Eminent Domain Proceedings

Some of the principal problems in the field of eminent domain are those involved in determining when possession of or title to the condemned property should pass to the condemner. Related problems involve the determination of the time when the condemnee loses the right to place improvements on the property for which he may be compensated, when the risk of loss of the improvements shifts to the condemner, when interest on the award should commence and abate and when taxes should be prorated.

After studying these matters, the Law Revision Commission has concluded that in many instances the existing law is unfair either to condemnees or to condemning agencies or to both. In other instances, the law is uncertain or difficult to ascertain. To remedy these defects, the Commission recommends the following revisions in the law.

Immediate Possession

Among the most important questions in this area of eminent domain law are those involving the respective rights of the parties in immediate possession cases. The Constitution of this State, in Section 14 of Article I, grants certain specified public agencies the right to take possession of property sought to be condemned immediately upon commencement of eminent domain proceedings or any time thereafter if the condemnation is for right of way or reservoir

purposes. The Constitution requires the condemning agency to deposit a sum of money, in an amount determined by the court, sufficient to secure to the owner payment of the compensation he is entitled to receive for the taking "as soon as the same can be ascertained according to law."

The statutes implementing the constitutional provision provide that, at least three days prior to the taking of possession, the condemner must either personally serve on or mail to the owners and occupants of the property a notice that possession is to be taken. The names and addresses of the owners may be ascertained from the latest secured assessment roll of the county in which the property is located. If the condemnation is for highway purposes, the condemnee may withdraw 75 per cent of the deposit.

The Commission has concluded that the law relating to the taking of immediate possession needs to be revised to protect more adequately the rights of persons whose property is taken. Accordingly, the Commission makes the following recommendations.

1. Order of immediate possession. There are now no statutes specifying the procedure to be followed in obtaining an order of immediate possession, but in practice the order of immediate possession is issued upon ex parte application by the condemner. The Commission believes that this procedure does not need to be changed, but it should be explicitly set forth in the statutes. Therefore, the Commission recommends the enactment of statutes providing that the condemner, after issuance of summons, may apply to the court, ex parte, for an order authorizing immediate possession. However, the statutes should indicate

that the order is not to be routinely granted; the court should not issue the order unless it determines that the plaintiff is entitled to take the property by eminent domain and is entitled to obtain immediate possession of the property under the Constitution.

2. Notice of order to owners and occupants. At the present time, both the owners of the property being taken and the occupants must be notified that possession is to be taken. But the condemner is permitted to give this notice as little as three days before possession is actually taken. The notice may be given either by personal service or by certified mail. If the mail is delayed or if there is an intervening weekend or holiday, an owner or occupant may be deprived of possession without any advance notice. Moreover, under existing law, the condemner is permitted to determine the names and addresses of the owners of the property from the latest secured assessment roll in the county in which the property is located. If the property was sold to a new owner after the tax lien date (the first Monday in March) preceding the commencement of the condemnation proceeding, the actual owner of the property might be sent no notice at all, for his name would not be on the "latest secured assessment roll."

The Commission believes that the present law does not provide assurance that reasonable efforts will be made to notify an owner or occupant in sufficient time to enable him to prepare to vacate the property or to seek relief against the taking.

Accordingly, the Commission recommends that the condemner should not be able to take possession of the property unless the record owners and the occupants of the property are notified thereof at least 20 days prior to the date possession is to be taken. But the court should have the power to shorten the required notification time if emergencies arise. If the person to be served has not been served with summons and has not appeared, notice should be given by personal service of a copy of the order authorizing immediate possession or, if personal service cannot be made, by mailing a copy of the order to the last known address of the person to be served. Service of the order should be made on the persons revealed by the records to be the owners of the property, whether or not their names appear on the "latest secured assessment roll."

3. Delay in effective date of order. Within the 20-day period after notice is given, the owner or an occupant of the property to be taken should be able to apply to the court for an order delaying the effective date of immediate possession in order to prevent unnecessary hardship. There is no provision in existing law granting a condemnee this right.

4. Withdrawal of deposit. Although the Constitution requires the condemner to make a deposit and gives the condemnee the right to challenge the amount deposited, the right is of little practical value because, unless the property is taken for highway purposes, there is no right to withdraw any of the deposit. If the property is taken for highway purposes, the condemnee is permitted to withdraw only 75 per cent of the deposit, but this often leaves nothing for the owner after lienholders are paid. Thus, in many cases, the condemnee must vacate the property, locate new property to replace that taken and move to the new location at a time when there is little or no money

available from the condemnation. To remedy this situation the Commission recommends that the condemnee be authorized to withdraw the entire deposit that has been made by the condemner. This will make the money for the taking available to the condemnee at the time that he needs it most.

There may in some cases be a danger that the amount ultimately awarded the condemnee will be less than the amount deposited and withdrawn, and the condemner may have difficulty in recovering back the difference. For this reason, the court should have the power in appropriate cases to require the filing of an undertaking to secure the condemner against loss.

5. Vacating the order of immediate possession. There is no provision in the existing law that permits the condemnee to contest the right of the condemner to take the property prior to the time possession is taken. Legally, the condemnee has the right to raise the question whether the condemnation is for a public use in every condemnation proceeding. The question of the necessity for the taking of the particular property involved may be raised by a condemnee under certain limited circumstances. But the right to raise these questions may be a meaningless right if, at the time the questions are raised, the condemner has already demolished all improvements on the property, denuded the site of all vegetation, constructed pipes, flumes and conduits and inundated the property with water. The Commission recommends, therefore, that the owner or the occupant of the property to be taken be given the right to contest the condemner's right to take the property by eminent domain or his right to obtain immediate possession of the property, or both, by a motion to vacate the order for immediate possession made prior to the time possession

is taken. An order vacating or refusing to vacate an order of immediate possession should be appealable. An appeal should not automatically stay proceedings under the order of immediate possession, but either the trial or appellate court should have the right to stay proceedings until the appeal is decided.

Possession Pending Appeal

Under existing law, any condemner is permitted to take possession of the property to be condemned after entry of judgment even though an appeal is pending. However, it has been held that the condemner waives his right of appeal by taking possession of the property. This rule seems unfair to the condemner: if the condemner takes possession, it will have to pay the award even though it is based upon an error by the trial court, but if it chooses to attack the award by appeal, a needed public improvement may be delayed for a period of years or even have to be abandoned if rising costs exceed the amount available for the construction of the improvement.

The Commission recommends that the statutes permitting the condemner to take possession pending appeal be revised to provide that the condemner does not waive its right of appeal by the taking of possession.

Passage of Title

Related to the question of possession is the question of title. At the present time, if immediate possession is not taken, title passes upon the recording of the final order of condemnation. However, if possession is taken prior to that time under an order of immediate possession, title passes to the condemner upon withdrawal of the deposit by the condemnee. There is no similar provision for the passage of title when possession is taken after judgment but pending appeal under Section 1254. The Commission

recommends that the rules relating to passage of title be made uniform. Title should pass in all condemnation proceedings upon the recording of the final order of condemnation.

Compensation for Improvements

The present law relating to compensation for improvements on condemned property is uncertain. First, while Section 1249 of the Code of Civil Procedure provides that the condemnee is not entitled to compensation for any improvements placed upon the property after the service of summons, there is no explicit provision indicating that the condemnee is entitled to compensation for improvements that are on the property at that time. Second, the first sentence of Section 1249 is open to the interpretation that the value of the real property as enhanced by its improvements is fixed as of the date summons is issued, even though the improvements are destroyed prior to the time the property is actually taken.

The Commission recommends that legislation be enacted providing that the condemnee is entitled to compensation for the improvements on the property on the date of service of summons unless they are removed or destroyed prior to the date the condemner takes title to or possession of the property.

Property Taxes

Property taxes are prorated from the date the condemner either takes title to or takes possession of the property if the condemner is a public agency. However, under present law the condemnee loses the benefit of this proration if he has already paid the taxes and special assessments, for there is no provision for refund by the taxing authority or reimbursement by the condemner. To remedy this, the Commission recommends that

a provision for refund be added to the Revenue and Taxation Code.

A condemnee should also be entitled to a proration of property taxes even though the condemner is not a public agency. In such cases, the condemner should be required to reimburse the condemnee for the pro rata share of the taxes that have been paid and are attributable to the portion of the tax year following the date the condemner acquires the title to or the possession of the property.

Abandonment by the Condemner

Under existing law, even though the condemner has taken possession and constructed the contemplated improvement on the property, the condemner may abandon the proceedings at any time until 30 days after final judgment and get back the money it deposited. It is true that the condemner must compensate the owner for the use of the property and any damage to it. But the land owner who has been forced to give up his home or his business and to relocate in another area may find that it is as great a hardship to be forced, in effect, to buy back the original property as it was to be forced to move initially. The deposit may have been withdrawn and expended in the acquisition of a new location; the good will of the business may have been reestablished in the new location; or the original property may be so altered that it is no longer useful to the condemnee.

The Commission recommends that if the condemnee has substantially changed his position as a result of the condemnation and cannot be restored to his original position, the condemner should not have the right to abandon the condemnation. If in other cases the condemnation is abandoned or is not completed for any other reason, provision should be made

for compensating the condemnee for the damage he has suffered and for any loss or injury to his property that may have occurred while the plaintiff was in possession.

Interest

Interest upon the award in eminent domain cases runs from the date of entry of judgment unless possession is taken prior to entry of judgment, in which case interest is computed from the effective date of the order for possession. After judgment, interest ceases upon payment of the judgment to the condemnee or into court for his benefit. Of course, if any portion of a deposit is withdrawn, interest ceases to accrue on the portion withdrawn on the date of its withdrawal. These rules are settled, but they are difficult to find because they are scattered through both cases and statutes.

The Commission recommends the enactment of legislation which would gather the rules on interest in eminent domain cases into one section.

Constitutional Revision

The Commission has concluded that the provisions of Section 14 of Article I of the State Constitution that grant the right of immediate possession should be revised. These provisions grant the right of immediate possession only to specified public agencies in right of way and reservoir cases. As has been shown above, they do not assure the property owner that he will actually receive compensation at the time his property is taken.

When they were adopted these provisions reversed a long-standing policy of this State that property may not be taken unless compensation has first been

made, which was originally adopted as a part of the present Constitution in 1879. Prior to that time, the Constitution had merely required that the owner of property taken for public use be given just compensation, and it was held that payment might be made within a reasonable time after the taking. In 1879, the present Constitution was adopted with the provision that private property may not be taken or damaged for public use "without just compensation having first been made." In Steinhart v. Superior Court¹ the Supreme Court held, in reliance upon this provision, that a statute authorizing a condemner to take possession of property after depositing a sum of money in court was unconstitutional because there was no provision for the payment of any portion of this money to the owner. The provisions of the Constitution that now authorize immediate possession without payment to the owner "having first been made" were adopted to overcome the Steinhart case.

The Commission believes that the policy underlying the Steinhart decision and the original provisions of the 1879 Constitution is sound and the contrary policy of the present provisions of the Constitution is undesirable. A person's property should not be taken from him unless he has the right to be paid concurrently for the property, for it is at the time of the taking that he must meet the expenses of locating and purchasing property to replace that taken and of moving to the new location.

Another defect in the present Constitutional provisions is that they severely limit the agencies by which and the purposes for which immediate possession may be taken. The right of immediate possession is of great value to the public, for it permits the immediate construction of needed public projects. The Legislature should, therefore, have the power to

1. 137 Cal. 575 (1902).

decide from time to time what agencies are to have the power and for what purposes the power may be exercised. It should not be necessary to amend the Constitution each time a change in the needs of the people of the State warrants either an extension or contraction of the purposes for which the right of immediate possession may be exercised.

Therefore, the Commission recommends that an amendment to the Constitution be proposed to the people of the State of California that would contain the following provisions:

1. The Constitution should guarantee the owner the right to be compensated promptly whenever immediate possession of his property is taken.

2. The Legislature should be given the power to determine what agencies should have the right to take immediate possession and the procedure to be followed in such cases, subject to the constitutional right of the owner to be promptly compensated. It should not be necessary to amend the Constitution to alter procedures every time that it is found that the existing immediate possession procedures are faulty.

3. The phrase "irrespective of any benefits to be proposed by such corporation" should be stricken from the Constitution. This phrase is applicable only to private corporations² and precludes such entities, in condemnations for rights of way or reservoirs, from setting off the benefits which will result to the condemnee's remaining land against the condemnee's claim for damages to such land.³ The phrase is discriminatory in that it

2. Moran v. Ross, 79 Cal. 549 (1889); People v. McReynolds, 31 Cal.App.2d 219, 223 (1939).

3. San Bernardino & Eastern Ry. v. Haven, 94 Cal. 489 (1892); Pacific Coast Ry. v. Porter, 74 Cal. 261 (1887).

is not applicable to unincorporated condemners⁴ and may be unconstitutional under the equal protection clause of the Federal Constitution.⁵ The phrase is uncertain in meaning, for some courts have held that it merely states a rule that is applicable to all condemners that "general" benefits may not be set off,⁶ while others have indicated that it refers to "special" benefits which all other condemners are permitted to set off.⁷

Supplementary Legislation

The Commission recommends that legislation be enacted extending the right of immediate possession to all condemners to become effective if and when the Constitution is amended to permit the Legislature to determine who should have the right of immediate possession and the conditions under which the right may be exercised. The right of the condemner to take the property is rarely disputed. But despite the fact that the only question for judicial decision in virtually all condemnation actions is the value of the property, present law permits possession to be taken prior to judgment only when certain public agencies are condemning property for right of way or reservoir purposes. Because possession cannot be obtained in other condemnation actions until judgment, many vitally needed public improvements are delayed even though there is no real issue in the case of the

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4. Moran v. Ross, 79 Cal. 549 (1889).
 5. See dissenting opinion of McFarland, J., in Beveridge v. Lewis, 137 Cal. 619, 626 (1902); see also concurring opinion of Beatty, C. J., in Moran v. Ross, 79 Cal. 549, 552 (1889).
 6. Beveridge v. Lewis, 137 Cal. 619, 624 - 626 (1889); cf. People v. Thompson, 43 Cal.2d 13, 28 (1954) and People v. McReynolds, 31 Cal. App.2d 219, 223 (1939).
 7. Cf. Collier v. Merced Irr. Dist., 213 Cal. 554, 571 (1931); People v. McReynolds, 31 Cal.App.2d 219, 223 (1939).

public's right to take the property. Many public improvements are financed by bond issues, and an undue delay in the acquisition of the property may delay construction to a sufficient extent that the improvement cannot be constructed at all with the funds realized by a particular bond issue or must be drastically curtailed in scope.

The Commission's recommendation would be effectuated by the enactment of the following measures:

10/7/60

An act to amend Sections 1243.5, 1249, 1253, 1254, 1255a and 1255b of, to renumber and amend Sections 1254.5 and 1254.7 of, and to add Sections 1243.4 and 1249.1 to, the Code of Civil Procedure, relating to eminent domain.

The people of the State of California do enact as follows:

SECTION 1. Section 1243.4 is added to the Code of Civil Procedure, to read:

1243.4. In any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the plaintiff may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought, in the manner and subject to the conditions prescribed by law.

SEC. 2. Section 1243.5 of the Code of Civil Procedure is amended to read:

1243.5. ~~[(a)]~~ (1) In any ~~[ease]~~ proceeding in eminent domain, if ~~[which] the [State,-a-county,-a-municipal-corporation,-a-public-corporation, or-a-district-takes-immediate-possession-of-lands-to-be-used-for-reservoir purposes,-or-a-right-of-way,-pursuant-to-Section-14-of-Article-I-of-the~~

Constitution-of-this-State,] plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the amount so determined in accordance with Section 1243.6, the plaintiff may at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

(2) If the court determines that the plaintiff is entitled to take the property by eminent domain and to take immediate possession thereof, and if the court determines that the plaintiff has deposited the amount determined pursuant to subdivision (1) of this section, the court shall, by order, authorize the plaintiff to take immediate possession of and to use the property sought to be condemned. The order authorizing immediate possession shall:

(a) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(b) State the purposes of the condemnation.

(c) State the amount of the deposit.

(d) State the date upon which the plaintiff is authorized to take possession of the property.

(3) [~~the State, or such county, municipal corporation, public corporation, or district, as the case may be, shall,~~] At least [~~three~~] 20 days prior to the time possession is taken, the plaintiff shall [~~personally~~] serve a copy of the order on [~~ex-mail-to~~] the record owner or owners of the property [~~, if known,~~] and on the person or persons, if any, in possession of the

property [~~,-if-any,-either-a-copy-of-the-order-of-the-court-authorizing-such possession-or-a-notice-thereof~~]. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail. If it appears by affidavit to the satisfaction of the court that a person upon whom a copy of the order authorizing immediate possession [or-notice] is [mailed-it] required to be personally served under this section resides out of the State, or has departed from the State or cannot after due diligence be found within the State, the court may order that in lieu of such personal service the plaintiff send a copy of the order [shall-be-sent] by registered or certified mail [and, if-sent-to-the-owners,-it-shall-be] addressed to [them] such person at [their] his last known address. A single service upon or mailing to those at the same address shall be sufficient. [~~The-latest-secured-assessment-roll in-the-county-where-the-property-is-located-may-be-used-to-ascertain-the-names and-addresses-of-the-owners-of-the-property.~~] The court may, for good cause shown by affidavit of the plaintiff, shorten the time herein specified to a period of not less than three days.

(4) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceedings, alter the amount that the plaintiff is required to deposit pursuant to such order if the court determines that the probable just compensation which will be made for the taking of the property and any damage incident thereto is different from the amount set forth in such order.

(5) At any time after the court has made an order authorizing immediate

possession and before the plaintiff has taken possession pursuant to such order, the court, upon motion of the owner of the property or of an occupant of the property, may:

(a) Stay the order upon a showing that the hardship to the moving party of having immediate possession taken clearly outweighs the hardship of the stay to the plaintiff.

(b) Vacate the order if the court determines that the plaintiff is not entitled to take the property by eminent domain or that the plaintiff is not authorized by Section 1243.4 to take immediate possession of the property.

(6) The plaintiff may appeal from an order made pursuant to subdivision (5)(a) of this section staying the order authorizing immediate possession. An appeal may be taken from an order made under the provisions of subdivision (5)(b) of this section granting or denying a motion to vacate an order authorizing immediate possession. The appeal does not stay the order from which the appeal is taken or the order authorizing immediate possession; but the trial or appellate court may, in its discretion, stay the order authorizing immediate possession pending review on appeal or for such other period or periods as to it may appear appropriate.

(7) Failure of a party to make a motion to stay or vacate an order authorizing immediate possession is not an abandonment of any defense to the action or proceeding.

(8) The amount required to be deposited by the plaintiff and the amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

(9) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by taking possession of the property pursuant to this section.

SEC. 3. Section 1254.5 of the Code of Civil Procedure is renumbered and amended to read:

[1254.5.] 1243.6. When money is [paid-into-court] required to be deposited as provided by Section [14-of-Article-I-of-the-Constitution] 1243.5, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.

SEC. 4. Section 1254.7 of the Code of Civil Procedure is renumbered and amended to read:

[1254.7.] 1243.7. (1) At any time after money has been deposited as [security-as] provided in Section [14-of-Article-I-of-the-Constitution] 1243.5, [for-the-condemnation-of-any-property-or-interest-in-property-for state-highway-purposes,-upon-application,-in-the-manner-hereinafter-provided, of] the party whose property or interest in property is being taken [;] may apply to the court, in the manner hereinafter provided, for the withdrawal of all or any portion of the amount deposited for his respective property or property interest. The court [may] , upon such application, shall order from the money deposited in connection with such property or property interest [an-amount-not-exceeding-75-per-cent-of] the amount [originally deposited-for-the-respective-property-or-interest] applied for which the

applicant is entitled to withdraw under the provisions of this section to be paid to such [party] applicant.

(2) If the amount sought to be withdrawn exceeds the amount originally deposited for the respective property or property interest or 75 percent of the total amount deposited for the respective property or property interest, whichever is greater, the court may require the applicant, before withdrawing any of such excess, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the condemnation proceeding, together with legal interest from the date of its withdrawal.

(3) [Sach] The application shall be made by affidavit wherein the applicant shall set forth his interest in the property and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff and no withdrawal shall be made until at least [twenty(] 20 [)] days after such service of the application, or until the time for all objections has expired, whichever is later.

(4) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto on the ground that an undertaking should be filed as provided in subdivision (2) of this section or that the sureties upon such an undertaking are insufficient.

(5) Within [said-twenty-(20)-days] the 20-day period, the plaintiff may object to such withdrawal by filing an objection [thereof] thereto in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to

personally serve on such other persons a notice to such persons that they may appear within [~~ten~~] 10 [)] days after such service and object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in [~~its~~] such objection the names and last known addresses of other persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within [~~said-twenty-~~] the 20 [)] day period, said money shall not be withdrawn until the applicant causes such personal service to be made.

(6) If [~~such~~] the persons [~~se~~] served pursuant to subdivision (5) of this section appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom. [~~It to a total amount not exceeding 75 percent of the amount deposited.~~] No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served.

(7) If withdrawn, the receipt of any such money shall constitute a waiver by operation of law [~~to~~] of all defenses in favor of the person receiving such payment except with respect to the ascertainment of the value of the property or interest in the manner provided by law [~~and~~]

~~title to the property or interest as to which money is received pursuant to this section shall vest in the State as of the time of such payment].~~

Any amount so paid to any party shall be credited upon any judgment providing for payment ~~[and shall be considered payment upon the judgment as of the date the withdrawal is made so that no interest shall be payable upon the amount so withdrawn after the date of its withdrawal].~~

(8) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the condemnation proceeding shall be returned to the party who deposited it together with legal interest thereon from the date of its withdrawal, and the court in which the condemnation proceeding is pending shall enter judgment therefor against the defendant. If the defendant does not pay the judgment within 30 days after the judgment is entered, the court may, on motion, enter judgment against the sureties for such amount together with the interest that may be due thereon.

SEC. 5. Section 1249 of the Code of Civil Procedure is amended to read:

1249. Subject to Section 1249.1, for the purpose of assessing compensation and damages the right ~~[thereof]~~ thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section ~~[one thousand two hundred forty eight]~~ 1248; provided, that in any case in which the issue is not tried within one year after the

date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. [~~Nothing in this section contained shall be construed or held to affect pending litigation. -- If an order be made letting the plaintiff into possession, as provided in Section one thousand two hundred fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. -- No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.~~]

SEC. 6. Section 1249.1 is added to the Code of Civil Procedure, to read:

1249.1. All improvements pertaining to the realty that are on the property on the date of the service of summons and which affect its value shall be considered in the assessment of compensation, damages and special benefits unless they are removed or destroyed before either the title to the property or the possession thereof is taken by the plaintiff, whichever is earlier. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation, damages, or special benefits.

SEC. 7. Section 1253 of the Code of Civil Procedure is amended to read:

1253. (1) When payments have been made and the bond given, if the plaintiff elects to give one, as required by [~~the last two~~] Sections 1251 and 1252, the court [~~must~~] shall make a final order of condemnation, which [~~must~~] shall describe the property condemned, the estate or interest acquired

therein and the purposes of such condemnation. A certified copy of the order ~~[must]~~ shall thereupon be filed in the office of the recorder of the county in which the property is located. ~~[, and thereupon]~~

(2) The title to the property described ~~[therein]~~ in the final order of condemnation ~~[shall]~~ vests in the plaintiff for the purposes described therein ~~[specified]~~ upon the date that a certified copy of the final order of condemnation is filed in the office of the recorder of the county.

SEC. 8. Section 1254 of the Code of Civil Procedure is amended to read:

1254. (1) In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment ~~[to the Supreme Court, whenever the plaintiff shall have paid]~~ and after payment into court ~~[,]~~ for the defendant ~~of~~ ~~[,]~~ the full amount of the judgment ~~[,]~~ and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, [as well as all damages that may be sustained by the defendant, if, for any cause the property shall not be finally taken for public use,] apply ex parte for an order authorizing it to take possession of and to use the property sought to be condemned.

(2) If in the judgment the court determined that the plaintiff is entitled to acquire the property by eminent domain, and if the court determines that the plaintiff has made the deposit as required in subdivision (1)

of this section, the [superior] court [~~in-which-the-proceeding-was-tried~~
~~may,-upon-notice-of-not-less-than-ten-days~~] shall, by order, authorize the
plaintiff [~~,-if-already-in-possession,-to-continue-therein,-and-if-not,~~
~~then~~] to take possession of and use the property during the pendency of and
until the final conclusion of the litigation, and [~~may~~] shall, if necessary,
stay all actions and proceedings against the plaintiff on account thereof.

(3) At least 10 days prior to the time possession is taken, the
plaintiff shall serve upon the defendants or their attorneys, either
personally or by mail, a copy of the order of the court authorizing it to
take possession of the property. A single service upon or mailing to those
at the same address is sufficient.

(4) At any time after the court has made an order authorizing the
plaintiff to take possession pursuant to this section, the court may, upon
motion of any party to the eminent domain proceedings, alter the amount
that the plaintiff is required to deposit pursuant to such order.

(5) The plaintiff shall not be held to have abandoned or waived the
right to appeal from the judgment by depositing the amount of the judgment
and such further sum as may be required by the court and taking possession
of the property pursuant to this section.

(6) The defendant, who is entitled to the money paid into court for
him upon any judgment, shall be entitled to demand and receive the [same]
full amount of the judgment at any time thereafter upon obtaining an order
therefor from the court. [~~It-shall-be-the-duty-of~~] The court, or a judge
thereof, upon application [~~being-made~~] by such defendant, [~~to~~] shall order
and direct that the money so paid into court for him be delivered to him
upon his filing a satisfaction of the judgment, or upon his filing a receipt

therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial [~~shall be~~] is granted. A payment to the defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. [~~In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate.~~]

(7) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the condemnation proceeding shall be returned to the party who deposited it without interest, and the court in which the condemnation proceeding is pending shall enter judgment therefor against such party.

(8) The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceedings), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court

shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Sections 16430, 16431 and 16432, Government Code, or deposited in banks as provided in Chapter 4 of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations.

(9) For the purposes of this section, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

(10) Interest earned and other increment derived from investments or deposits made pursuant to this section, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund.

After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under this section, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

(11) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

SEC. 9. Section 1255a of the Code of Civil Procedure is amended to read:

1255a. (1) Subject to the provisions of this section, the plaintiff may abandon the proceedings at any time after the filing of the complaint and before the expiration of thirty days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceedings.

(2) The court may, upon motion made within 30 days after such abandonment, set aside the abandonment if it determines that the position of the moving party has been substantially changed as a result of the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(3) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion [express-or-implied], on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within [thirty-() 30 ()] days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the [said] action is dismissed forty days or more prior to the time set for the pre-trial [e#] conference in the [said] action or, if no pre-trial conference is set, the time set for the trial of the action.

(4) If the plaintiff has taken possession of the property sought to be condemned and it is determined that the plaintiff does not have the authority to take such property, or a portion thereof, by eminent domain, or if the plaintiff abandons the proceeding as to such property or a portion thereof, the court shall order the plaintiff to deliver possession of such property or such portion thereof to the parties entitled to the

possession thereof and shall make such provision as shall be just for the payment of damages arising out of the plaintiff's taking and use of the property, including damages for any loss or impairment of value the land and improvements may have suffered while the plaintiff was in possession of the property.

SEC. 10. Section 1255b of the Code of Civil Procedure is amended to read:

1255b. [~~If the plaintiff in a condemnation proceeding obtains an order from the court for possession of the property sought to be condemned prior to the trial of the action, then~~] (1) The compensation and damages awarded in a condemnation proceeding shall draw [~~lawful~~] legal interest from the [~~effective date of said order.~~] earliest of the following dates:

(a) The date of the entry of judgment.

(b) The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.

(2) The compensation and damages awarded in a condemnation proceeding shall cease to draw interest on the earliest of the following dates:

(a) As to any amount deposited pursuant to Section 1243.5, the date that such amount is withdrawn by the person entitled thereto.

(b) As to any amount deposited pursuant to Section 1254, the date of such deposit.

(c) As to any amount paid to the person entitled thereto, the date of such payment.

SEC. 11. (1) Except as provided in subdivision (2) of this section, this act applies to all actions or proceedings in eminent domain pending in the courts at the time this act takes effect in which no order authorizing the plaintiff to take possession of the property sought to be condemned prior to the final order of condemnation has been made prior to the effective date of this act.

(2) Sections 5 and 6 of this act do not apply to any action or proceeding pending in the courts at the time this act takes effect.

II

An act to amend Section 1248 of, and to add Section 1252.1 to, the Code of Civil Procedure, and to amend Section 5096 of the Revenue and Taxation Code, relating to taxes.

The people of the State of California do enact as follows:

SECTION 1. Section 1248 of the Code of Civil Procedure is amended to read:

1248. The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the

construction of the improvement proposed by the plaintiffs; and if the benefit shall be equal to the damages assessed under subdivision (2), the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property;

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences, along the line of such railroad, and the cost of cattle-guards, where fences may cross the line of such railroad; and such court, jury or referee shall also determine the necessity for and designate the number, place and manner of making such farm or private crossings as are reasonably necessary or proper to connect the parcels of land severed by the easement condemned, or for ingress to or egress from the lands remaining after the taking of the part thereof sought to be condemned, and shall ascertain and assess the cost of the construction and maintenance of such crossings;

6. If the removal, alteration or relocation of structures or improvements is sought, the cost of such removal, alteration or relocation and the

damages, if any, which will accrue by reason thereof;

7. As far as practicable, compensation must be assessed for each source of damages separately;

8. When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid; except that if such lien is for ad valorem taxes upon the property, the amount of such taxes for which, as between the plaintiff and the defendant, the plaintiff is liable under Section 1252.1 may not be deducted from the judgment.

SEC. 2. Section 1252.1 is added to the Code of Civil Procedure, to read:

1252.1 (1) As between the plaintiff and defendant, the plaintiff is liable for the payment of any ad valorem taxes upon the property sought to be condemned that (a) are allocable to that part of the fiscal year that begins on the date that the title to the property vests in the plaintiff or the plaintiff takes possession of the property, whichever is earlier, and (b) are not subject to cancellation under Chapter 4 (commencing with Section 4986) of Part 9 of Division 1 of the Revenue and Taxation Code or refund under Chapter 5 (commencing with Section 5096) of Part 9 of Division 1 of the Revenue and Taxation Code.

(2) If the defendant pays any taxes for which, as between the plaintiff and defendant, the plaintiff is liable under subdivision (1) of this section,

the plaintiff shall pay to the defendant a sum equal to the amount of such taxes for which the plaintiff is liable.

(3) If the title to the property vests in the plaintiff or if the plaintiff takes possession of the property prior to judgment, the amount the defendant is entitled to be paid under subdivision (2) of this section shall be claimed at the time and in the manner provided for claiming costs. If title to the property does not vest in the plaintiff and if the plaintiff does not take possession thereof prior to judgment, the amount the defendant is entitled to be paid under subdivision (2) of this section shall be claimed within 30 days after the title vests in the plaintiff or within 30 days after payment of such taxes, whichever is later, and shall be claimed in the manner provided for claiming costs.

SEC. 3. Section 5096 of the Revenue and Taxation Code is amended to read:

5096. (1) On order of the board of supervisors, any taxes paid before or after delinquency shall be refunded if they were:

- (a) Paid more than once.
- (b) Erroneously or illegally collected.
- (c) Paid on an assessment in excess of the cash value of the property by reason of the assessor's clerical error.
- (d) Paid on an assessment of improvements when the improvements did not exist on the lien date.

(2) On order of the board of supervisors, any taxes paid before or after delinquency shall be refunded if they are properly allocable to that

part of the fiscal year which began on the date the property was acquired
(a) by the United States of America, if such property upon such acquisition
became exempt from taxation under the laws of the United States, or (b) by
the State or by any county, city, school district or other public agency,
and because of such public acquisition became not subject to sale for
delinquent taxes.

SEC. 4. This Act takes effect on July 1, 1962.

III

A resolution to propose to the people of the State of California an amendment to the Constitution of the State by amending Section 14 of Article I thereof relating to eminent domain.

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 1961 Regular Session commencing on the 2nd day of January, 1961, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the State be amended by amending Section 14 of Article I thereof, to read:

SEC. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. [~~y-and-no-right-of-way-or-lands-to-be-used-for-reservoir purposes-shall-be-appropriated-to-the-use-of-any-corporation,-except-a municipal-corporation-or-a-county-or-the-State-or-metropolitan-water-district, municipal-utility-district,-municipal-water-district,-drainage,-irrigation, levee,-reclamation-or-water-conservation-district,-or-similar-public corporation-until-full-compensation-therefor-be-first-made-in-money-or ascertained-and-paid-into-court-for-the-owner,-irrespective-of-any-benefits from-any-improvement-proposed-by-such-corporation,-which~~] Except as provided in Section 23a of Article XII of this Constitution, such just compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.

However, the Legislature may, by statute, authorize the plaintiff in a proceeding in eminent domain to take immediate possession of and title to the property sought to be condemned, whether the fee thereof or a lesser estate, interest or easement be sought; provided that any such statute shall require (a) that the plaintiff first deposit such amount of money as the court determines to be the probable just compensation to be made for the taking and any damage incident thereto, including any damages that may be sustained by the defendant if the property is not finally taken for public use, and (b) that the money deposited shall be paid promptly to the person entitled thereto in accordance with such procedure as the Legislature may prescribe. Subject to the limitations contained in this section, the Legislature may by statute prescribe the manner in which, the time at which, the purposes for which, and the persons or entities by which, immediate possession of property sought to be condemned may be taken.

Unless the Legislature otherwise provides in accordance with this section, [~~;-provided,-that~~] in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may

take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.

The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.

10/7/60

(36)

IV

An act to amend Section 1243.4 of the Code of Civil Procedure as proposed to be added by Senate Bill No. relating to eminent domain.

The people of the State of California do enact as follows:

SECTION 1. Section 1243.4 of the Code of Civil Procedure as proposed by Senate Bill No. is amended to read:

1243.4. In any proceeding in eminent domain [~~brought-by-the-State, or-a-county,-or-a-municipal-corporation,-or-metropolitan-water-district, municipal-utility-district,-municipal-water-district,-drainage,-irrigation, levee,-reclamation-or-water-conservation-district,-or-similar-public corporation~~], the plaintiff may take immediate possession [and-use] of [~~any-right-of-way-or-lands-to-be-used-for-reservoir-purposes,-required-for-a-public-use-whether-the-fee-thereof-or-an-easement-therefor-be sought,~~] the property sought to be condemned in the manner and subject to the conditions prescribed by law.

SEC. 2. This act shall become effective only if Senate Constitutional Amendment No. is approved by the vote of the people at the next general election, and in such case, this act shall become effective on January 1, 1963.