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6/10/60

Memorandum No. 50(1960)

Subject: Study No. 36(L) - Condemnation (Taking Possession)

Attached to this memo is a draft recommendation and the proposed legislation relating to taking possession. The blue pages contain the draft recommendation. The gold pages contain the proposed constitutional amendment. The green pages contain the statute that is not dependent upon passage of the constitutional amendment. The yellow pages contain the statute that is dependent upon the passage of the constitutional amendment.

For the convenience of the Commission, inserted in front of the green pages are some white pages containing the language of Section 1243.5 as it appears in the green pages, but the strike-out and underscoring indicate language that has not been approved as yet by the Commission. This has been done because the first section of the statute is presented here as an amendment of the existing Section 1243.5. The staff's earlier recommendation was to repeal this section and enact a new Section 1244.5. However, as it has been decided that two statutes are to be presented, and the basic proposal merely modifies and clarifies existing procedures, it is now felt that it is more desirable to amend the existing Section 1243.5. This will indicate more clearly the deficiencies in the existing statute and perhaps enhance the chances that the bill will be enacted.

There is a revision of substance in the proposed constitutional amendment that has not been considered by the Commission as a policy matter. This is the deletion of "irrespective of any benefits from any improvements

proposed by such corporation." This provision was put in the Constitution in 1879. On its face it prohibits the setting off of benefits against any damages the condemnee is entitled to receive when (1) the condemner is a private corporation and (2) the condemnation is for a right of way or reservoir. It has been held that the provision precludes the setting off of benefits against severance damages when a railroad corporation condemns land, even though Code of Civil Procedure Section 1248 establishes the general rule that special benefits are offset against severance damages. (San Bernardino and Eastern Ry. v. Haven, 94 Cal. 489 (1892); Pacific Coast Ry. v. Porter, 74 Cal. 261 (1887).) But in Moran v. Ross (79 Cal. 549 (1889)) it was held that the benefits should be offset against severance damages if an unincorporated association is the condemner.

In Beveridge v. Lewis (137 Cal. 619 (1902)) the Los Angeles Traction Company sought to take advantage of the obvious discrimination in favor of unincorporated private condemners by having an individual obtain a franchise from Los Angeles County to construct and maintain an electric railway. After the necessary condemnations, it was planned to have the operation transferred to the corporation. Naturally an appeal was taken to the Supreme Court on the question of whether to offset benefits. In department, the Supreme Court held the pertinent phrase unconstitutional under the equal protection clause of the federal Constitution. In bank, however, the Supreme Court overturned the department's decision. It held that there was no discrimination in the case before it, for the general rule -- applicable to private and public condemners alike -- is that "general benefits" may not be offset against severance damages. The court said that the questioned phrase was intended to overrule an old

case holding that both special and general benefits are to be offset against severance damages. So far as special benefits are concerned, the court said "They are not involved here."

It has been subsequently held that general benefits are not offset even when public condemners are concerned. (People v. Thompson, 43 Cal.2d 13, 28 (1954).) It has also been held that Section 1248 refers only to special benefits, not general benefits, when it states that benefits are to be offset against severance damages. (Podesta v. Linden Irr. District, 141 Cal. App.2d 38 (1956).) It cannot be determined from the reports whether the early railroad cases cited above involved general benefits or special benefits.

In any event, if the provision does refer to special benefits, it is discriminatory and of dubious constitutionality, and if it does not, it is meaningless as it merely states the general rule which is applicable to all condemners alike. As it is of uncertain meaning and questionable validity, it has been deleted from this draft.

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 the question of determining when possession of or title to the condemned property should pass to the condemner. Related problems involve the determination of the time that the condemnee loses the right to place improvements on the property for which he may be compensated, the time the risk of loss of the improvements shifts to the condemner, the time interest on the award should commence and the time interest should abate, and the time from which taxes should be prorated.

In considering these problems, the Law Revision Commission has concluded that in many instances the existing law is unfair both to condemnees and the condemning agencies. In other instances, the law is uncertain, and in others, the law is merely difficult to find. 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, but only 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 immediate 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 the condemner must either personally serve or mail to the owners and occupants of the property a notice that possession is to be taken at least three days prior to the taking of possession. 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 made as required by the Constitution.

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

1. Order of immediate possession. After the issuance of summons, the condemner should be able to apply to the court, ex parte, for an order authorizing immediate possession; but 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.

Although there are now no statutes specifying that the procedure recommended is to be followed in immediate possession cases, 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.

2. Notice of order to owners and occupants. The condemner should not be able to take possession of the property unless, at least 20 days prior to the date possession is to be taken, the owners and the occupants of the property are notified. Notice should be given by personal service of a copy of the order authorizing immediate possession. If personal service cannot be made, the court should authorize the plaintiff to give notice by mailing a copy of the order to the last known address of the person to be served. The order itself should contain a description of the property being taken, the interest being taken, the amount of money that must be deposited by the condemner, the date the condemner is authorized to take possession under the order and the purpose of the condemnation.

At the present time, the owners of the property being taken, and the occupants, too, must be notified that possession is to be taken. But the condemner is permitted to give this notice only 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, a property owner may be deprived of his property with no actual notice at all. 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 guarantee a property owner that reasonable efforts will be made to notify him that his property is to be taken in sufficient time to enable him to prepare to vacate the property. Moreover, present law does not specify what is to be contained in the order authorizing immediate possession, and it is not necessary to send a copy of the order to the owner -- a notice of the order may be sent instead. Thus, even if an owner receives the notice required, it may not inform him of the facts he is entitled to know.

The Commission's recommendation will assure an owner that he will have notice of the taking in sufficient time to prepare to vacate the property or to seek relief against the taking.

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 the immediate possession order. There is no similar provision in existing law granting a condemnee this right. The enactment of such a provision will permit the court to relieve the occupant of the condemned property from unnecessary hardship.

4. Amount of deposit. The condemner should be required to deposit, prior to taking immediate possession, the amount that the court determines

will probably be the just compensation the condemnee will be entitled to receive for his property. The condemnee should be able to move that the court alter the amount required to be deposited.

These provisions are in the Constitution at the present time, but they should be placed in the statute dealing with immediate possession so that a person may be able to discover all of his rights in the eminent domain provisions of the Code of Civil Procedure.

5. Withdrawal of deposit. The condemnee should be entitled to withdraw from the court the entire deposit that has been made by the condemner. Although existing law gives the condemnee the right to challenge the amount deposited by the condemner, the right is a hollow one for, 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 75 per cent of the deposit. 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 no money available from the condemnation. Even in highway taking cases the situation is not improved greatly, for much of the money goes to lienholders and not to the property owner. As only 75 per cent of the deposit is available, there is often no money available for the use of the property owner after his obligations to lienholders are discharged. Permitting the property owner to withdraw all of the deposit will make the money for the taking available to him at the time that he needs it most.

6. Vacating the order of immediate possession. The owner or the occupant of the property to be taken should have the right to contest

the condemner's right to take the property by eminent domain or the condemner's right to obtain immediate possession of the property prior to the time possession is taken. If the court, upon motion, decides that the condemner is not entitled to condemn the property or to take immediate possession, the court should vacate the order authorizing possession. An order vacating or refusing to vacate an order of immediate possession should be appealable, but an appeal should not automatically stay proceedings under the order of immediate possession. However, both the trial and appellate courts should have the right to stay proceedings until the appeal is decided.

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. Of course, the right of the condemner to take the property by eminent domain is not often successfully challenged; however, the question is raised from time to time, and sometimes successfully. Legally, the condemnee has the right to raise the question of 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 the question -- for example, the question of the necessity for the taking of property outside the territorial limits of the condemning agency for reservoir purposes -- may be a meaningless right if, when the right is finally established, 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 revisions recommended will enable the courts to resolve these questions before the condemnee has been irreparably damaged.

#### Possession Pending Appeal

The problem of possession pending appeal is similar to that of possession prior to judgment. Under existing law, the condemner is permitted to take possession of the property to be condemned after entry of judgment even though an appeal is pending from the judgment. However, it has been held that the condemner waives his right of appeal by taking possession of the property. This rule often places the condemner on the horns of a dilemma: for 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 abandoned if rising costs exceed the amount available for the construction of the improvement.

The Law Revision 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 the payment of the deposit to the condemnee. There is no provision for the passage of title upon payment of the deposit to the condemnee when possession is taken after judgment but pending appeal under Section 1254. The rules relating to passage of title should be made uniform. Moreover, if possession is taken prior to the final order of condemnation, title should pass when the condemner is authorized by the order of possession to take the property. For practical purposes, the date possession is taken is the date that the condemnee loses virtually all vestiges of title. From that date he does not have the right to use the property, and he is not liable for any taxes or assessments that become a lien on the property after that date. Under Section 4986 of the Revenue and Taxation Code, taxes that are a lien upon the property are prorated from the date possession is taken. Thus, as all of the incidents of title are lost on the date that possession is taken, title should pass at the same time.

#### Compensation for Improvements

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. Although it may possibly be inferred from Section 1249, there is no explicit provision indicating that the condemnee is entitled to compensation for improvements that are on the property at the time of summons. The first sentence of Section 1249 is susceptible of 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. To clarify the right of the condemnee to be compensated, and to protect the condemner, it is recommended that legislation be enacted providing that the condemnee is entitled to compensation for the improvements on the property on the date of issuance of summons unless they are removed or destroyed prior to the date the condemner takes title to or possession of the property. Conversely, the condemner should not be required to pay for any improvements destroyed or removed prior to the date it acquires either title or possession.

#### Taxes

Although taxes are prorated from the date the condemner takes either title to or possession of the property, under present law the condemnee loses the benefit of this proration if he has already paid the taxes, for there is no provision for refund. To remedy this, 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 may have taken possession and constructed the contemplated improvement on it, the condemner may abandon the proceedings at any time until 30 days after final judgment. It is true that the condemner would have to 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 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.

Therefore, it is recommended that if the condemner chooses to take possession of the property prior to the final order of condemnation, it should not have the right to abandon the condemnation unless the condemnee consents to the abandonment. If the condemnation is abandoned, or if it is not completed for any other reason, statutory provision should be made for compensating the condemnee out of the deposit for the damage suffered from the loss of his property.

### 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. Although a condemnee has the right to withdraw up to 75 per cent of a deposit made by a condemner to acquire immediate possession, under the present language of Section 1254.7 of the Code of Civil Procedure, the condemnee may refuse to withdraw the deposit and force the condemner to pay interest on the full amount of the judgment from the date of taking 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 any deposit is withdrawn, interest ceases to accrue on the portion withdrawn on the date of its withdrawal.

The Commission recommends that the rules relating to interest be placed in a single section of the title on eminent domain so that they may be readily discoverable. The Commission also recommends the enactment of legislation providing that interest ceases to accrue upon payment of the award to the person entitled to it or, if funds are deposited in court, upon the date that the deposit is available for payment to the person entitled to it. Such a provision will relieve condemners from the payment of unnecessary interest.

#### Constitutional Revision

After studying the law relating to immediate possession, the Commission has concluded that the provisions of Section 14 of Article I of the State Constitution that grant the right of immediate possession are defective and should be revised. These provisions -- granting specified public agencies the right of immediate possession in right of way and reservoir cases -- reversed a constitutional policy of this State 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 Court<sup>o</sup>

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<sup>o</sup>137 Cal. 575 (1902).

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 concurrent right to be paid 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 moving to the new location.

Therefore, the Law Revision 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. Compensation of the owner prior to the taking. The present provisions of the Constitution which grant specified agencies the right to take immediate possession without compensating the owner should be deleted. The owner should be guaranteed the right to be compensated as soon as his land is taken for public use, subject only to such delay as is necessary to determine adverse claims to the compensation.

2. Authorization to the Legislature to determine the persons and purposes for which immediate possession may be taken. The present

constitutional provisions authorizing immediate possession freeze into the Constitution the agencies and purposes for which the right to immediate possession may be exercised. Moreover, as these agencies are granted this right by the Constitution, there must always be some doubt as to the power of the Legislature to enact legislation limiting or regulating the exercise of the power.

The right of immediate possession is of great value to the public, for it permits the immediate construction of needed public projects. But the Legislature should have the power to decide 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.

The Legislature should have the power to fully regulate the procedure under which immediate possession is taken, subject only to the right of the property owner to be compensated as soon as his property is taken unless there is a dispute over the value of different interests in the property. 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. Deletion of reference to benefits. 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 corporations 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. The phrase is discriminatory in that it is not applicable to unincorporated condemners and may be unconstitutional under the equal protection clause of the federal Constitution. The phrase is uncertain in meaning, for some courts have indicated that it merely states a rule that is applicable to all condemners that "general" benefits may not be set off, while others have held that it refers to "special" benefits which all other condemners are permitted to set off.

As the phrase is of uncertain meaning, is discriminatory and is of dubious constitutionality, it should be deleted from the Constitution.

#### Supplementary Legislation

If 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 Commission recommends that legislation be enacted extending the right of immediate possession to all condemners. The right of the condemner to take the property is rarely disputed. But despite the fact that the only question for judicial decision in most 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 issue in the case of the 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 or must be drastically curtailed in scope.

At the same time that the right of immediate possession is extended, the implementing statute should also be amended to permit the court to determine whether there is any necessity for the condemner to obtain possession prior to judgment. The condemnee, within the period prior to the time possession is taken, should be able to raise this question and obtain a determination of the court.

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

## I

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] person whose property is taken or damaged. [~~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.

~~[, provided, that]~~ However, the Legislature may, by statute, authorize the plaintiff in [any] a 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] to take immediate possession of and [use of any right-of-way or lands to be used for reservoir purposes, required for a public use] title to the property sought to be condemned, whether the fee thereof or [an] a lesser estate, interest or 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] after first giving such notice as may be required by law and depositing such amount of money as the court determines to be the probable just compensation to be made for [such] the taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property [as seen as the same can be ascertained according to law]. The court may, upon motion of any party to [said] the eminent domain proceedings, after such notice to the other parties as [the court] may be prescribed by law, alter the amount [of such security so] required to be deposited in such proceedings. The money deposited shall be paid to the person entitled thereto, in accordance with such procedure and upon such conditions as the Legislature may by statute prescribe, as soon as the court determines that there are no adverse claims

to the deposit. The Legislature may, by statute not inconsistent with this section, prescribe the manner in which, the time at which, the purposes for which, and the persons or entities for which, immediate possession of property sought to be condemned may be taken. 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.

II-A

1243.5. (1) In any case in which the plaintiff is entitled pursuant to Section 14 of Article I of the Constitution of this State to take immediate possession of the property sought to be condemned [---]

[~~(1)~~] 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 authorizing it to take immediate possession of and to use the property [~~or interest therein~~] sought to be condemned.

(2) If the court determines that the plaintiff is entitled to obtain the property by eminent domain and that the plaintiff is entitled pursuant to Section 14 of Article I of the Constitution to obtain immediate possession of the property sought to be condemned, the court shall, by order, authorize the plaintiff to take possession of and to use the property [~~or interest therein~~] sought to be condemned after the plaintiff deposits, in [~~court~~] accordance with Section 1254.5, the amount the court determines to be the probable just compensation [~~the owner of the property will be entitled to receive~~] to be made for the taking [~~of the property~~] and any damage incident thereto. The order authorizing immediate possession shall:

(a) Describe the property [---] and the estate or interest sought to be acquired in the property.

(b) Describe the purposes of the condemnation. [~~and~~]

(c) State the amount that the plaintiff is required to deposit [~~in court~~] pursuant to the order. [~~and shall~~]

(d) State [~~that~~] the date upon which the plaintiff is [~~not~~] authorized by the order to take possession of the property. [~~until 20 days after a copy of the order is filed in the office of the recorder of the county in~~]

~~which the property is located and served as provided in subdivision (3).~~

(3) ~~[The plaintiff shall,]~~ At least 20 days prior to the ~~[time]~~ date upon which the plaintiff is authorized to take possession ~~[is taken]~~ of the property under the order authorizing immediate possession, the plaintiff shall file a copy of the order in the office of the recorder of the county in which the property is located and shall personally serve a copy of the order on the record owner or owners of the property or any interest therein and on the person or persons, if any, in possession of the property. ~~[, if any, a copy of the order authorizing such possession.]~~ If it appears by affidavit to the satisfaction of the court that a person upon whom ~~[service]~~ a copy of the order authorizing immediate possession is required to be 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, at least 20 days prior to the date upon which the plaintiff is authorized to take possession of the property under the order, a copy of the order ~~[shall be sent]~~ by registered or certified mail addressed to such person at his last known address. Unless the plaintiff has complied with this subdivision, the plaintiff shall not take possession of the property.

(4) At any time after the court has made an order authorizing ~~[the plaintiff to take]~~ immediate possession ~~[of the property sought to be condemned prior to the entry of judgment]~~, the court may, upon motion of any party to the eminent domain proceedings, alter the amount that the plaintiff is required to deposit ~~[in court]~~ pursuant to such order if the court determines that the probable just compensation ~~[the owner of the property will be entitled to receive]~~ to be made for the taking 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 [the plaintiff-to-take] immediate possession [of-the-property-sought-to-be condemned-prior-to-entry-of-judgment] and before the plaintiff has taken possession pursuant to such order, the court, upon motion of the owner of the property or an interest therein or of an occupant of the property, may:

(a) Stay the [effective-date] effect of the order for good cause shown.

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

At any time before the plaintiff has taken possession pursuant to the order authorizing immediate possession the court may, without notice, stay the effect of the order authorizing immediate possession to permit the court to decide a motion for an order under this subdivision.

(6) An appeal may be taken from an order granting or denying a motion to vacate an order authorizing immediate possession. The appeal does not stay the effect of the order from which the appeal is taken or the order authorizing immediate possession; but the trial court may, in its discretion, stay the effect of the order authorizing immediate possession pending review on appeal or for such other period or periods as to it may appear appropriate. The appellate court may issue a writ of supersedeas, injunction or other appropriate writ or order in such proceedings as may be proper in aid of its jurisdiction.

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

## II

An act to amend Sections 1243.5, 1249, 1253, 1254, 1254.5, 1254.7, 1255a and 1255b of the Code of Civil Procedure, and to add Sections 1249.1 and 1252.1 to the Code of Civil Procedure, all relating to eminent domain.

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

SECTION 1. Section 1243.5 of the Code of Civil Procedure is amended to read:

1243.5. ~~[(a)]~~ (1) In any case in 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]~~ plaintiff is entitled [,] pursuant to Section 14 of Article I of the Constitution of this State [,] 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 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 obtain the property by eminent domain and that the plaintiff is entitled pursuant to Section 14 of Article I of the Constitution to obtain immediate possession of the property sought to be condemned, the court shall, by order, authorize the plaintiff to take possession of and to use the property sought to be condemned after the plaintiff deposits, in accordance with Section 1254.5,

the amount the court determines to be the probable just compensation to be made for the taking and any damage incident thereto. The order authorizing immediate possession shall:

(a) Describe the property and the estate or interest sought to be acquired in the property.

(b) Describe the purposes of the condemnation.

(c) State the amount that the plaintiff is required to deposit pursuant to the order.

(d) State the date upon which the plaintiff is authorized by the order 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~~] date upon which the plaintiff is authorized to take possession [~~is taken~~] of the property under the order authorizing immediate possession, the plaintiff shall file a copy of the order in the office of the recorder of the county in which the property is located and shall personally serve a copy of the order on [~~or mail to~~] the record owner or owners of the property or any interest therein [~~, 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~~]. 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 to~~] required to be 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, at least 20 days prior to the date upon which the plaintiff is authorized to take

possession of the property under the order, 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 these 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.]

(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 to  
be made for the taking 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 an interest  
therein or of an occupant of the property, may:

(a) Stay the effect of the order for good cause shown.

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

At any time before the plaintiff has taken possession pursuant to the  
order authorizing immediate possession the court may, without notice, stay  
the effect of the order authorizing immediate possession to permit the court  
to decide a motion for an order under this subdivision.

(6) An appeal may be taken from an order granting or denying a motion  
to vacate an order authorizing immediate possession. The appeal does not

stay the effect of the order from which the appeal is taken or the order authorizing immediate possession; but the trial court may, in its discretion, stay the effect of the order authorizing immediate possession pending review on appeal or for such other period or periods as to it may appear appropriate. The appellate court may issue a writ of supersedeas, injunction or other appropriate writ or order in such proceedings as may be proper in aid of its jurisdiction.

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

SEC. 2. 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 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-1254,-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. 3. Section 1249.1 is added to the Code of Civil Procedure, to read:

1249.1. No improvements put upon the property subsequent to the date of the service of summons, and no improvements that have been removed or destroyed either prior to the trial or prior to the date the title to the property or the possession thereof is taken by the plaintiff, whichever is earlier, shall be included in the assessment of compensation or damages. All improvements pertaining to the realty that are on the property on the date of the service of summons may be considered in the assessment of compensation and damages unless they are removed or destroyed either before the title to the property or the possession thereof is taken by the plaintiff or before the trial, whichever is earlier.

SEC. 4. Section 1252.1 is added to the Code of Civil Procedure, to read:

1252.1. (1) If the defendant has paid any ad valorem taxes, or any ad valorem special assessments levied and collected as taxes, upon the property sought to be condemned for the fiscal year in which the title to the property vests in the plaintiff, the plaintiff shall pay to the defendant a sum equal to the amount of such taxes and assessments that are allocable to that part of the fiscal year that begins on the date that the title to

the property vests in the plaintiff.

(2) If the title to the property vests in the plaintiff prior to judgment, the amount claimed by the defendant under 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 prior to judgment, the amount claimed by the defendant under this section shall be claimed within 30 days after the title vests in the plaintiff and shall be claimed in the manner provided for claiming costs.

SEC. 5. 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 and the purposes of such condemnation. A 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) Subject to subdivision (3) of this section, 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 the final order of condemnation is filed in the office of the recorder of the county.

(3) The title to the property described in an order authorizing the plaintiff to take possession of the property under Section 1243.5 or 1254 vests in the plaintiff for the purposes described therein upon the date

that the plaintiff is authorized to enter into possession of the property pursuant to such order, whether possession is actually taken on that date or subsequently.

SEC. 6. Section 1254 of the Code of Civil Procedure is amended to read:

1254. 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 into court, for the defendant, 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, the superior court in which the proceeding was tried may, upon notice of not less than 10 days, 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, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The order shall describe the property, the estate or interest acquired therein and the purposes of the condemnation.

In an action for condemnation of property for the use of a school district, an order so authorizing possession or continuation of possession by such school district is not appealable. 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. 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 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 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 granted. A payment to a 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. 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.

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.

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. 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. 7. Section 1254.5 of the Code of Civil Procedure is amended to read:

1254.5. 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. 8. Section 1254.7 of the Code of Civil Procedure is amended to read:

1254.7. At any time after money has been deposited as [security-as] provided in Section [~~14 of Article 1 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, the court may order from the money deposited in connection with such property or interest an amount not exceeding the amount which the court finds such party is entitled to receive [~~75 percent of the amount originally deposited~~] for [~~the~~] his respective property or interest to be paid to such party. Such 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. Within [~~saïd twenty-(20)-days~~] the 20-day period, the plaintiff may object to such withdrawal by filing an objection [~~thereef~~] 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 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. If such persons so served 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  . [~~y-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. 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 [~~y-~~ ~~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~~]. 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,

and the court in which the condemnation proceeding is pending shall enter judgment therefor against the defendant.

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

1255a. (1) Unless the title to the property sought to be condemned has vested in the plaintiff, 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) If the title to the property sought to be condemned has vested in the plaintiff, the plaintiff may not abandon the proceedings except with the consent of all parties to the proceeding whose interests would be affected by such abandonment.

(3) Upon such abandonment, 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 [ef] 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 title to the property sought to be condemned has vested in the plaintiff and it is determined that the plaintiff does not have the authority to take such property or any portion thereof by eminent domain, or if, with the consent of all parties to the proceeding whose interests are affected, the plaintiff abandons the proceedings as to any such property, the trial court shall enter an order revesting the title to such property in the parties entitled thereto. The order shall require the plaintiff to deliver possession of such property 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, and also for costs, expenses and attorney's fees as provided in subdivision (3) of this section. The court shall order the clerk of the court to pay such sums to the parties entitled thereto out of the money deposited by the plaintiff in accordance with Section 1243.5 or Section 1254 of this code.

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 title to the property sought to be condemned

vests in the plaintiff.

(c) 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 may be withdrawn by the person entitled thereto or the date of entry of judgment, whichever is earlier.

(b) As to any amounts 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 2 and 3 of this act do not apply to any action or proceeding pending in the courts at the time this act takes effect.

III

An act to amend Section 1243.5 of the Code of Civil Procedure  
relating to eminent domain.

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

SECTION 1. Section 1243.5 of the Code of Civil Procedure is amended to read:

1243.5 (1) In any [ease] proceeding in [~~which the plaintiff is entitled pursuant to Section 14 of Article I of the Constitution of this State to take immediate possession of the property sought to be condemned~~] eminent domain, 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 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 obtain the property by eminent domain and that it is necessary for the plaintiff [~~is entitled pursuant to Section 14 of Article I of the Constitution~~] to obtain immediate possession of the property sought to be condemned, the court shall, by order, authorize the plaintiff to take possession of and to use the property sought to be condemned after the plaintiff deposits, in accordance with Section 1254.5, the amount the court determines to be the probable just compensation to be made for the taking and any damage incident thereto.

The order authorizing immediate possession shall:

(a) Describe the property and the estate or interest sought to be acquired in the property.

(b) Describe the purposes of the condemnation.

(c) State the amount that the plaintiff is required to deposit pursuant to the order.

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

(3) At least 20 days prior to the date upon which the plaintiff is authorized to take possession of the property under the order authorizing immediate possession, the plaintiff shall file a copy of the order in the office of the recorder of the county in which the property is located and shall personally serve a copy of the order on the record owner or owners of the property or any interest therein and on the person or persons, if any, in possession of the property. If it appears by affidavit to the satisfaction of the court that a person upon whom a copy of the order authorizing immediate possession is required to be 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, at least 20 days prior to the date upon which the plaintiff is authorized to take possession of the property under the order, a copy of the order by registered or certified mail addressed to such person at his

last known address. Unless the plaintiff has complied with this subdivision, the plaintiff shall not take possession of the property.

(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 to be made for the taking 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 an interest therein or of an occupant of the property, may:

(a) Stay the effect of the order for good cause shown.

(b) Vacate the order if the court determines that the plaintiff is not entitled to acquire the property by eminent domain or that [~~the plaintiff is not entitled to obtain immediate possession of the property~~] there is no necessity for the taking of possession by the plaintiff prior to judgment.

At any time before the plaintiff has taken possession pursuant to the order authorizing immediate possession the court may, without notice, stay the effect of the order authorizing immediate possession to permit the court to decide a motion for an order under this subdivision.

(6) An appeal may be taken from an order granting or denying a motion to vacate an order authorizing immediate possession. The appeal does not stay the effect of the order from which the appeal is taken or the order authorizing immediate possession; but the trial court may, in its discretion, stay the effect of the order authorizing immediate possession pending review on appeal or for such other period or periods as to it may appear appropriate. The appellate court may issue a writ of supersedeas, injunction or other appropriate writ or order in such proceedings as may be proper in aid of its jurisdiction.

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

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.

## 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 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 the condemner must either personally serve or mail to the owners and occupants of the property a notice that possession is to be taken at least three days prior to the taking of possession. 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 made as required by the Constitution.

The Law Revision 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. After the issuance of summons, the condemner should be able to apply to the court, ex parte, for an order authorizing immediate possession; but 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.

Although there are now no statutes specifying that the procedure recommended is to be followed in immediate possession cases, 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. The statutes, however, should indicate that the order is not to be routinely granted, but is to be issued only if the court determines that the plaintiff is entitled to the order.

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 only 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 with no actual notice at all. 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 guarantee that reasonable efforts will be made to notify an owner or occupant that the property is to be taken 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 owners and the occupants of the property are notified thereof at least 20 days prior to the date

possession is to be taken. 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.

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 the immediate possession order to prevent unnecessary hardship. There is no similar provision in existing law granting a condemnee this right.

4. Amount of deposit. Statutes should be enacted requiring the condemner to deposit, prior to taking immediate possession, the amount that the court determines will probably be the just compensation the condemnee will be entitled to receive for his property and permitting the condemnee to move the court to alter the amount required to be deposited.

These statutes will codify the substance of provisions that are now in the Constitution.

5. Withdrawal of deposit. Although existing law gives the condemnee the right to challenge the amount deposited by the condemner, the right is a hollow one for, 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. 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 no money available from the condemnation. Even in highway taking cases the situation is not improved greatly, for with only 75 per cent of the deposit available, there is often no money available for the use of

the property owner after his obligations to lienholders are discharged. The Commission recommends that the condemnee be authorized to withdraw from the court the entire deposit that has been made by the condemner. Permitting him to do so will make the money for the taking available to him at the time that he needs it most.

6. 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 of 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 should have 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, but an appeal should not automatically stay proceedings under the order of immediate possession. However, both the trial and appellate courts should have the right to stay proceedings until the appeal is decided.

### Possession Pending Appeal

The problem of possession pending appeal is similar to that of possession prior to judgment. Under existing law, the 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 abandoned if rising costs exceed the amount available for the construction of the improvement.

The Law Revision 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 the payment of the deposit to the condemnee. There is no specific provision for the passage of title upon payment of the deposit to the condemnee 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. If possession is taken prior to the final order of condemnation, title should pass when the condemner is authorized by the order of possession to take the property. This is because, for practical purposes, the date possession is taken is the date that the condemnee loses virtually all vestiges of title. From that date he does not have the right to use the property and he is not liable for any taxes or assessments that become a lien on the property after that date. Under Section 4986 of the Revenue and Taxation Code, taxes that are a lien upon the property are prorated from the date possession is taken. Thus, as all of the incidents of title are lost on the date that possession is taken, title should pass at the same time.

#### Compensation for Improvements

There are two ambiguities, if not defects, in the present law relating to compensation for improvements on condemned property. 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 the time of summons. Second, the first sentence of Section 1249 is susceptible of 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 issuance of summons unless they are removed or destroyed prior to the date the condemner takes title to or possession of the property.

### Taxes

Taxes are prorated from the date the condemner takes either title to or 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, for there is no provision for refund by the taxing authority or reimbursement by the condemner. To remedy this, the Commission recommends that the condemner 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. A condemnee should also be entitled to a proration of taxes even though the condemner is not a public agency.

### 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 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 condemner takes possession of the property prior to the final order of condemnation, it should not have the right to abandon the condemnation unless the condemnee consents to the abandonment. If the condemnation is abandoned, or if it is not completed for any other reason, statutory provision should be made for compensating the condemnee out of the deposit for the damage suffered from the loss of his property.

#### 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. Although a condemnee has the right to withdraw up to 75 per cent of a deposit made by a condemner to acquire immediate possession in highway acquisition cases, the condemnee may refuse to withdraw the deposit and force the condemner to pay interest on the full amount of the judgment from the date of taking 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 any deposit is withdrawn, interest ceases to accrue on the portion withdrawn on the date of its withdrawal.

The Commission recommends the enactment of legislation providing

that interest ceases to accrue upon payment of the award to the person entitled to it or, if funds are deposited in court, upon the date that the deposit is available for payment to the person entitled to it.

#### Constitutional Revision

After studying the law relating to immediate possession, the Commission has concluded that the provisions of Section 14 of Article I of the State Constitution that grant the right of immediate possession are too narrow in scope and defective in some details. These provisions grant the right of immediate possession only to specified public agencies in right of way and reservoir cases. They do not guarantee the property owner that he will actually receive compensation at the time his property is taken.

When they were adopted they reversed a 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 Court<sup>o</sup> 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

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<sup>o</sup> 137 Cal. 575 (1902).

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 concurrent right to be paid 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 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 decide 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 Law Revision 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 present provisions of the Constitution which grant specified agencies the right to take immediate possession without concurrently compensating the owner should be repealed. The owner should be guaranteed the right to be compensated as soon as his land is taken for public use, subject only to such delay as is necessary to determine adverse claims to

the compensation.

2. The Legislature should have the power to determine what agencies should have the right to take immediate possession and the procedure to be followed in such cases, subject only to a constitutional right of the property owner to be compensated as soon as his property is taken unless there is a dispute over the value of different interests in the property. 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 corporations 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. The phrase is discriminatory in that it is not applicable to unincorporated condemners and may be unconstitutional under the equal protection clause of the federal Constitution. The phrase is uncertain in meaning, for some courts have indicated that it merely states a rule that is applicable to all condemners that "general" benefits may not be set off, while others have held that it refers to "special" benefits which all other condemners are permitted to set off.

#### Supplementary Legislation

If 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 Commission recommends that legislation be enacted extending the right of immediate possession to all condemners.

The right of the condemner to take the property is rarely disputed. But despite the fact that the only question for judicial decision in most 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 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.

At the same time that the right of immediate possession is extended, the implementing statute should also be amended to permit the court to determine whether there is any necessity for the condemner to obtain possession prior to judgment. The condemnee, within the period prior to the time possession is taken, should be able to raise this question and obtain a determination of the court.

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

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SEC. 3. 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 may be considered in the assessment of compensation and damages unless they are removed or destroyed either before the title to the property or the possession thereof is taken by the plaintiff or before the trial, 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 or damages.

SEC. 4. 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, or any ad valorem special assessments levied and collected as taxes, upon the property sought to be condemned that are allocable to that part of the fiscal year that begins on the date that the title to the property vests in the plaintiff, and the defendant is liable for the payment of any of such taxes and assessments that are allocable to the remainder of the fiscal year.

(2) If the defendant pays any taxes or assessments 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 and assessments for which the plaintiff is liable.

(3) If the title to the property vests in the plaintiff 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 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 or assessments, whichever is later, and shall be claimed in the manner provided for claiming costs.

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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 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 indebtedness is for taxes or assessments upon the

property, the amount of such taxes or assessments for which, as between the  
plaintiff and the defendant, the plaintiff is liable under Section 1252.1  
may not be deducted from the judgment.