#36.80 10/21/71

Memorandum 71-79

Subject: Study 36.80 - Condemnation (Procedural Aspects Generally)

Summary

Attached is the second portion of the study by Norman E. Matteoni, the Commission's consultant on the procedural aspects of eminent domain law. This portion discusses discovery and pretrial and procedural aspects of trial. This memorandum does not undertake a detailed analysis of the study but, for the purpose of discussion at the meeting, outlines the policy issues presented in this portion of the study.

Discovery and Pretrial (study pages 89-97)

Discovery. The study outlines the special statutory procedure for exchange of valuation data (Code of Civil Procedure Sections 1272.01-1272.09) and the Los Angeles Pretrial and Discovery Rules. The study notes that the special statutory exchange provisions are optional whereas the Los Angeles discovery rules are mandatory. The study indicates that, although exchange of valuation data is desirable and should be encouraged, to make such discovery mandatory would engender considerable opposition from practitioners for tactical reasons. The study recommends, therefore, that the present optional exchange system be retained but that an exception be made for other counties like Los Angeles that may desire to expand their eminent domain discovery requirements. The staff believes that this is a meritorious suggestion.

In this connection, it should be noted that the discovery provisions will need to be redrafted eventually to conform to the Commission's future decisions relating to evidence and the substantive rules of compensation.

Also, the staff is concerned whether the exchange of valuation statute is working in actual practice. Is it being used at all? Is it being administered fairly by the courts? Do the courts, notwithstanding the statute, permit property owners to put in evidence not exchanged even though there is no real showing of "mistake, inadvertence, surprise, or excusable neglect"? Should the sanction be strengthened to require good faith exchanges? The Commission should consider the possibility of sending out a questionnaire to the approximately 600 persons on our mailing list to solicit information on the above questions and to obtain suggestions for "improvements" in the statute. Possibly, the Commission may want to involve the judges (Judicial Council and Conference of Judges) in this aspect of the study.

Pretrial. Under present Rules of Court governing pretrial proceedings, a pretrial conference is optional whereas, under the Los Angeles pretrial rules as outlined in the study, there is a mandatory system of dual pretrial conference. The study notes that there are often involved in eminent domain proceedings questions of law such as the larger parcel, comparable sales, and the like that affect the appraisal process and could well be settled before trial of valuation. Likewise, pretrial definition of specific issues and narrowing questions that must be presented at trial would be helpful. The study indicates that, although pretrial conferences are desirable and should be encouraged, to make them mandatory in all cases might impose undue burdens on the court systems of smaller counties. The study recommends, therefore, that those counties that are able to do so be encouraged to adopt more effective pretrial procedures.

The consultant does not recommend any statutory provisions concerning pretrial. Perhaps this is a matter to be covered by court rule and not one of concern in drafting an Eminent Domain Code.

If pretrial conferences are to be considered, the staff believes that a questionnaire should be used to solicit the views and suggestions of practitioners and judges before any changes in this area of the law are seriously considered.

Consolidation and Separation (study pages 98-102)

For a discussion of these problems and a staff draft of provisions designed to handle them, see Memorandum 71-78.

Time for Trial (study pages 103-106)

Section 1264 of the Code of Civil Procedure gives a trial preference to eminent domain proceedings over all other civil actions. The study notes that this trial preference is justifiable on the ground that the defendant is deprived of the right to use or utilize the property, for all practical purposes, while the proceeding is pending. The study suggests that this trial preference be continued.

The study indicates that the trial preference has been interpreted not to allow such an accelerated trial date as would preclude the defendant from adequately preparing his case and suggests that this interpretation be codified.

The study notes that one of the factors affecting choice of a trial date is the rule governing date of valuation. The fact that the date of valuation is the date of issuance of summons under Code of Civil Procedure Section 1249 acts as a prod for the plaintiff to move the case to trial early. The matter of date of valuation is one that the Commission will have occasion to consider in some detail at a later time.

Finally, the study indicates that, although there are no special rules for continuance of an eminent domain trial, the existing general provisions

are adequate and serviceable. The study recommends that no new rules are needed.

Functions of Court and Jury (study pages 107-108)

The study points out that the Constitution guarantees a jury trial on compensation unless waived. But for this guarantee, the court decides all questions in eminent domain trials. The study notes the current dissatisfaction with the jury system in eminent domain proceedings and recommends no expansion of jury function beyond the present one of determination of just compensation. It should be noted that the Commission has previously determined to retain the jury system for determination of just compensation.

Burden of Proof Regarding Just Compensation (study pages 109-125)

The study considers two distinct aspects of the burden of proof on just compensation--the burden of proof and the order of presentation of evidence.

Burden of proof. Traditionally, the burden of proof is upon the party making a claim. In California eminent domain law, the defendant has been required to make a claim of value and damages in his pleading, hence the defendant has had the burden of proof on value and damages.

The study points out that, under the Commission's tentative scheme, the defendant no longer pleads value and damages. No party does. This would indicate that there should be no burden of proof on this issue of just compensation.

This conclusion can be supported by several arguments. The eminent domain proceeding involves basically a determination of the value of a thing, on which all relevant evidence should have a bearing. To impose a burden of proof on value implies that one of the parties is correct and the other is incorrect, and that no in-between answer is possible. This implication is demonstrably fallacious. The study concludes that there should be no burden on the measure of value of the property taken. It should be noted that the new Oregon eminent domain statute enacted this year adopts a rule that, "Condemner and defendant may offer evidence of just compensation, but neither party shall have the burden of proof of just compensation."

The study goes on to point out that there may be issues related to compensation that the different parties are urging--for instance, the defendant's claim of damages to the remainder or the plaintiff's claim of benefits. In such a case, where it is clear which party is making the claim, the study suggests that the traditional rule that the burden of proof is on the claimant be retained.

The staff notes that, under the Commission's recently adopted before-and-after test for compensation, neither party will be making special allegations of damages or benefits but will simply introduce all relevant evidence on the value of the remainder. Thus, there would be no burden on these issues.

Order of presenting evidence. Traditionally, the party with the burden of proof is obligated to go forward with evidence. In California eminent domain law, because the defendant has borne the burden of proof on value and damages, he has gone forward with the evidence and, as a consequence, has been given the opportunity to open and close the argument.

The study points out that, should the Commission adopt the idea that there is no burden of proof on just compensation, it will be faced with the decision who is to present his evidence first and who will open and close arguments. The study lists several factors to be considered in making the decision who is to present evidence first:

(1) In most other civil actions, the plaintiff goes forward. To have a different rule in eminent domain is potentially confusing.

(2) In an eminent domain proceeding, the defendant is not at fault but it is the plaintiff that is the moving party, therefore the plaintiff should go forward.

(3) The plaintiff normally, in an eminent domain proceeding, has appraisal information available to it and is more experienced and capable in this area. This argument, tending towards a requirement that the plaintiff go first, is mitigated by the defendant's opportunity to discover the plaintiff's appraisal evidence.

(4) While the above considerations tend to a conclusion that the plaintiff should go forward, it must be pointed out that the plaintiff's offer is presumed fair and that it is actually the defendant that is seeking an amount of

compensation in excess of that offered by the plaintiff. Therefore, it should be the defendant's obligation to go first.

On the basis of these arguments, the study concludes that the defendant should go forward with the evidence and should be given the opportunity to open and close the argument.

It should be noted that, in the Oregon provision, the condemnor is obligated to go first in the presentation of evidence, but the condemnee has the option of proceeding first if he exercises the option at least 7 days prior to the date set for trial. The Oregon provision reads:

> (1) Evidence shall be received and the trial conducted in the order and manner prescribed by ORS chapter 17, except that the defendant shall have the option of proceeding first or last in the presentation of evidence, if notice of such election is filed with the court and served on the condemner at least seven days prior to the date set for trial. If no notice of election is filed, the condemner shall proceed first in the presentation of evidence. Unless the case is submitted by both sides to the jury without argument, the party who presents evidence first shall also open and close the argument to the jury.
>
> (2) Condemner and defendant may offer evidence of just compensation, but neither party shall have the burden of proof of just compensation.

The Condemnation Witness (study pages 126-134)

The study discusses three facets of the use of expert witnesses--limitations on their selection and number, compensation of court-appointed experts, and exclusion of experts from the courtroom while others are testifying.

Limitations on selection and number of experts. The Commission has previously rejected the notion that a special provision be adopted that limits the number of appraisal experts parties may produce and that provides for court selection of appraisers. The Commission noted that, under generally applicable principles, the court has adequate authority to limit repetitive testimony and to appoint its own experts.

The study notes that SB 615 as presently amended in the Legislature would also largely duplicate existing law. It points out that SB 615 contains a new provision that requires the plaintiff to call as a witness an expert it regularly employs and pays to appraise and testify. The study makes no suggestions regarding the advisability of such a provision. The Commission may wish to act upon it at this time or wait to see if the provision is enacted.

Compensation of court-appointed experts. The study notes the existence of Code of Civil Procedure Section 1266.2, which provides that, where the court appoints an expert in an eminent domain proceeding, the witness fee is the reasonable and usual fee for the type of work done. The study indicates that this would be the applicable rule absent Section 1266.2 and that Section 1266.2 is evidently a provision designed to service quasi-judicial types of eminent domain proceedings which the Commission has tentatively determined not to perpetuate. The study suggests that Section 1266.2 may be safely repealed.

Exclusion from courtroom during testimony of others. The study indicates that courts generally have adequate authority to exclude witnesses from the courtroom while others are under examination and recommends that no special rules for eminent domain be adopted.

Verdict (study pages 135-137)

The study indicates that present law requires the jury verdict to indicate separately the value of the property taken, severance damages, and benefits. The case law in this area is sufficiently developed that further statutory intervention is unnecessary. The staff notes, however, that the Commission has tentatively adopted a before-and-after test of value, hence a new statute providing a dual indication in the verdict--value before taking and value after as affected by project--will have to be drafted.

Respectfully submitted,

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Legal Counsel

October 11, 1971

A STUDY OF CERTAIN PORTIONS OF CALIFORNIA'S GENERAL PROCEDURAL CONDEMNATION LAW*

SECOND PART

*This study was made for the California Law Revision Commission by Norman E. Matteoni, Deputy County Counsel, County of Santa Clara, San Jose, California. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. 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.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

FOREWORD

The following is the second part of a study regarding certain portions of California's eminent domain procedure law.

The first portion of the study, dated April 13, 1971, concerned the commencement of a condemnation action. This part considers discovery and pre-trial and procedural aspects of trial.

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Section 12: DISCOVERY AND PRE-TRIAL

A. [§12.1] Introduction

The opinions of expert appraisers and the data on which the opinions are based are discoverable in eminent domain proceedings. Ocean Side School Dist. v. Superior Court (1962) 58 C2d 180, 23 CR 375; People v. Donovan (1964) 231 CA2d 345, 41 CR 782; Mowry v. Superior Court (1962) 202 CA2d 229, 20 CR 698.

But, since the primary evidence to be produced in a condemnation trial is the opinion of expert witnesses, and since such opinions often are not determined until just before the trial date, conventional discovery procedures can be unrewarding. See Recommendation and Study Relating to Condemnation Law and Procedure, No. 4, Discovery in Eminent Domain Proceedings, 4 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, 707 (1963); CAL. LAW REVISION COMM'N ANNUAL REPORT, Appendix, Discovery in Eminent Domain Proceedings, 19-20 (1966).

The delay in gathering all the necessary valuation data is the work of three factors:

> First, the parties usually are unwilling to incur the expense of having the expert complete his appraisal until shortly before the actual trial, for they seek to avoid this expense until it is clear that the case cannot be settled. Second, an appraisal report completed a considerable time before the trial must be brought up to date just before the

> trial, and this involves additional expense. Third, an appraiser who completes his appraisal a considerable time before the trial may find that he has forgotten many of the details by the time of the trial and may need to devote a substantial amount of time to reviewing his appraisal just before trial in order to refresh his memory.
> Recommendation and Study Relating to Condemnation Law and Procedure, No. 4, Discovery in Eminent Domain Proceedings, 4 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, 708 (1963).

To this list should be added a fourth item, the direction of counsel to delay the conclusion of the appraisal process to avoid having a product available for discovery.

B. [§12.2] Statutory Exchange of Data

In 1967, the legislature adopted a special procedure to make discovery more effective in eminent domain proceedings. See CCP §§1272.01-1272.09. Section 1272.01 allows any party to a condemnation action to file, not later than fifty (50) days prior to the date set for trial, a demand for a list of witnesses and for an exchange of valuation data specified in CCP §§1272.02(a)-1272.02(e) or, in the alternative, for an exchange of appraisal reports, as provided in CCP §1272.02(f). Where there are more than two parties to the action, the party receiving such a demand may file a cross-demand upon other parties in the action. Code Civ. Proc. §1272.01(b).

Once a demand has been made under the statute, both the parties demanding and receiving the demand or

cross-demand must deposit with the clerk of the court at least twenty (20) days prior to the date set for trial and serve on each other their witness lists and statements of valuation data or appraisal reports.

Then, at the trial, CCP §1272.05 operates to limit a party's evidence to that disclosed by his response to the demands in the following manner:

> (1) An unlisted expert may not be called during the case in chief;
>
> (2) A valuation witness for whom a statement of valuation data has not been exchanged may not testify during the case in chief; and
>
> (3) A valuation witness for whom an incomplete statement of valuation data was exchanged may not testify to matters that were not included in the statement.

However, CCP §1272.06 the trial court has discretion to grant relief from the above sanctions "upon such terms as may be just" when the party has acted in good faith and when he

> (1) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such opinion or data; or
>
> (2) Failed to determine to call such witness or to discover or list such opinion or data through mistake, inadvertence, surprise, or excusable neglect.

Finally, CCP §1272.08 indicates that the statutory scheme for exchange is not intended to prevent the use of other discovery procedures nor is it an exclusive list of matters which are discoverable.

This legislation was adopted at the recommendation of the California Law Revision Commission and was intended to follow the policy enunciated in Swartzman v. Superior Court (1964) 231 CA2d 195, 41 CR 721:

> The rules of discovery contemplate two-way disclosure and do not envision that one party may sit back in idleness and savor the fruits which his adversary has cultivated and harvested in diligence and industry. Mutual exchange of data provides some protection against attempted one-way disclosure; the parties seeking discovery must be ready and willing to make an equitable exchange.

C. [§12.3] Los Angeles Pre-trial and Discovery Rules

Prior to the enactment of the above-mentioned statutory scheme, the County of Los Angeles was operating under its own court rules regarding the exchange of valuation data in eminent domain cases. Code of Civil Procedure §1272.07 recognizes the Los Angeles procedure by providing that the statutory exchange of valuation data "does not apply in any eminent domain proceeding in any county having a population in excess of 4,000,000 in which a pre-trial conference is held."

The Los Angeles system is in fact more extensive than

the statutory exchange of data and is tied into special rules for pre-trial which reinforce the mutual exchange of valuation data. See Eminent Domain Policy Memorandum, Local Rules of Superior Court, County of Los Angeles (January 1, 1969).

In eminent domain cases before the Los Angeles Superior Court, two pre-trial conferences are scheduled. The first is set within 60 days of the at issue memorandum. For that conference, a joint written statement must be prepared containing among other items: the nature and extent of the ownership of the several interests to be taken, the purpose of the acquisition and a description of the proposed public work, both the condemnor's and condemnee's estimated valuations, whether severance damages and/or benefits are claimed, and whether there are any other issues to be determined other than the issue of value. This conference also determines the trial date and the date for the final pre-trial conference which is usually set within 30 days of the trial date. The first pre-trial conference can be waived by a request of the parties together with the filing of the joint pre-trial statement and a stipulation for exchange of valuation data filed not less than ten (10) days before the date set for the conference.

Prior to the final pre-trial conference, each party

to the action must submit in camera to the court such appraisal reports and other information and data as may be ordered by the court. This material is not filed but must be reviewed by the court; at the time of the final pre-trial conference the valuation data will be ordered exchanged, if the court determines the data or reports are comparable and it appears proper to do so. Any information in addition to that exchanged which the party subsequently discovers and desires to use in the trial of the action must be immediately provided to the other party and a showing of good cause made to the pre-trial court or trial court before the party can be permitted to use such information.

The final pre-trial conference shall state all matters which the parties agree upon, list the proposed experts as submitted by the parties, state the factual and legal contentions regarding issues in dispute, and provide a concise statement of every ruling and order of the court on any matter which has been determined or will aid the court in the disposition of the case.

Besides joining the exchange of appraisal data with an extensive pre-trial procedure, the Los Angeles system differs from the specialized form of interrogatory set forth in CCP §§1272.01-1272.09 in two significant ways:

1. The Los Angeles order for exchange is made in every case, while under the statutory scheme, one of the parties must initiate the procedure.

2. Under the Los Angeles discovery and pre-trial procedure, the appraisal material is only exchanged if the court determines the reports and data to be comparable. Under the statutory exchange of data, the valuation statement or reports are always exchanged. The latter system places the burden upon the slighted party to pursue further discovery in cases where the exchange is unequal.

Another difference, not as significant, is that the Los Angeles exchange is exactly simultaneous because it is processed through the pre-trial court, but the exchange under CCP §§1272.01-1272.09 can only be simultaneous if the parties deposit the data with the court and serve the opposing party on the twentieth day prior to the date set for trial. Generally, however, both procedures accomplish the same end.

D. [§12.4] Recommendations

The advantages of the Los Angeles system are its use of a thorough pre-trial procedure and the requirement that the data be judged comparable by the court before ordered exchanged. It is recognized, however, that not all counties have the volume of eminent domain cases to justify nor the

judge-power to conduct such pre-trial proceedings. Nonetheless, it would be advisable to modify CCP §1272.07 to allow those counties desiring to do so to adopt a discovery and pre-trial procedure similar to the Los Angeles system which would be a substitute for the statutory exchange of valuation data. That section as presently worded can only apply to Los Angeles County.

It is not recommended that a statutory exchange of data be made compulsory. For various reasons, attorneys practicing in the field of eminent domain do not wish to invoke discovery. Some believe that all the necessary valuation facts for the appraisal of a given piece of property are readily ascertainable through competent appraisers, and that settlement or other discussions between counsel are sufficient to sketch out the other side's case. The condemnor has the added advantage of being able to see the condemnee's case in its entirety before having to put on its own case, because the burden of proof is upon the defendant. (See §16.3.) On the other hand, the condemnee, knowing that it must assume an offensive position, may wish to keep some of its appraisal data drawn in until the time of trial, particularly where preliminary discussions have indicated that the condemning agency is not receptive to its contentions. By initiating discovery, the defendant invites retaliation

by the plaintiff.

What is recommended is that those counties which are able to do so be encouraged to adopt more effective pre-trial procedures to specifically define the issues and provide a means of narrowing the questions that must be presented at the trial of an eminent domain case. There are several questions of law that can arise which affect the appraisal process. A meaningful pre-trial conference can isolate these questions and provide for their determination prior to the actual trial on the question of value.

Section 13: CONSOLIDATION AND SEPARATION

A. [§13.1] Introduction

The plaintiff has the initial opportunity to prosecute, either jointly or separately, condemnation actions which are within the same county and required for the same public use, but the real discretion to consolidate or separate lies in the court, guided by the convenience of the parties. Code Civ. Proc. §1244(5). The exercise of this discretion will not be reviewed on appeal in the absence of abuse. San Luis Obispo v. Simas (1905) 1 CA 175, 182, 81 P 972; El Monte School Dist. v. Wilkins (1960) 177 CA2d 47, 52, 1 CR 715.

Section 1244(5) was discussed in the first portion of this study at §7.2 regarding multi-parcel complaints. The purpose of this section is simply to review the power of the court to sever one action from another or consolidate two or more actions.

B. [§13.2] General Procedure for Consolidation

Outside of the eminent domain procedure, there are three general procedural statutes which affect consolidation and separation of actions. The first two concern joinder of parties and causes of action, and the third specifically refers to the court's authority to sever and consolidate actions:

1. Code of Civil Procedure §382 states that parties to an action who are united in interest must be joined as plaintiffs or defendants; but if one who should be a plaintiff will not give his consent, he may be joined as a defendant. And "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

2. Code of Civil Procedure §427 provides for a joinder of causes of action in the same complaint where they all arise out of the same transaction.

3. Code of Civil Procedure §1048 grants discretion to the court to sever and consolidate actions, "whenever it can be done without prejudice to a substantial right."

C. [§13.3] Scope of CCP §1244(5)

All actions involving properties condemned in furtherance of a specified public project may be consolidated; there is no requirement of contiguity or of unity of ownership. Sacramento v. Glann (1910) 14 CA 780, 113 P 360.

Code of Civil Procedure §1244(5), as a specific statutory provision dealing with condemnation actions, takes precedence over general statutes relating to consolidation

and separation, such as CCP §§382, 427 and 1048, insofar as inconsistencies exist. Id. at 789. But the resolution of possible conflicts is broadly viewed by the court. For example, in Los Angeles v. Klinker (1933) 219 C 198, 25 P2d 826, the trial court had consolidated takings which were for different public uses but were from the same ownership of the property. Part of defendant's land was being acquired in fee for public buildings and grounds and the remainder as an easement for street purposes. Section 1244(5) allows consolidation only where the actions are within the same county and for the same public project. Nonetheless, the supreme court ruled that CCP §1048, the general procedure statute for consolidation and separation of civil actions, did not do violence to CCP §1244(5). "By consolidation [the] market value could be ascertained as a whole, thereby merging into the value of the entire property tedious questions relating to severance damage." Id. at 211.

D. [§13.4] Recommendations

But for the right granted to the plaintiff to file multi-parcel complaints, it would not be necessary to specially provide for the court's discretion to consolidate or separate actions. The authority bestowed by CCP §1048 is otherwise sufficient.

At its meeting on June 12, 1971, the Law Revision Commission tentatively determined that "a condemnor should be able to join up to ten ownerships in a single complaint, with provision that the ownerships be tried separately unless they are held in common or unless the court grants a motion to consolidate." See Minutes, CAL. LAW REVISION COMM'N, 10-11 (June 11 and 12, 1971). At the same time, it is questionable whether section 1244(5) should continue to require consolidation only where the actions are for the same public use.

Since this requirement does not recognize the Klinker rule, discussed in §13.3, one or more of the following alternatives should be considered in a revision of CCP §1244(5):

1. The language that the parcels condemned can be joined in the same proceeding where they are sought for the same project should be deleted, making it unnecessary to look to CCP §1048. But the requirement that the parcels be within the same county must be retained, because the joining or separation of parcels cannot be considered in the absence of venue to all parties. Oakland v. Darbee (1951) 102 CA2d 493, 502-505, 227 P2d 909; see discussion at §3.7 of the first part of this study.

2. The authority of the court to consolidate actions of the same condemning entity or different entities from

the same ownership for disparate uses should be separately stated.

3. The opportunity given to the plaintiff to file a multi-parcel complaint in certain situations should be distinguished from the court's power to sever or consolidate the parcels for the purpose of trial, by setting forth the latter in a separate section. This suggestion is actually making the existing discretion granted in CCP §1048 specifically applicable to condemnation proceedings; it is a statutory enactment of the Klinker rule.

Lastly, CCP §1048's limitation that the court's discretion be exercised so not to prejudice a substantial right is preferable to the less precise standard of CCP §1244(5) "to suit the convenience of the parties."

Section 14: TIME FOR TRIAL

A. [§14.1] Introduction

There are two eminent domain procedure statutes which affect the date of trial, one directly and the other collaterally. Code of Civil Procedure §1264 declares that condemnation trials are entitled to preferential setting. And section 1249 makes the date of issuance of summons the date of valuation, providing the action is tried within one year of the commencement of the action. The latter statute acts as a prod to the condemnor to move the case to an early trial date. But, in cases where the plaintiff seeks to invoke CCP §1264 shortly before the expiration of the one year from issuance of summons, the court must balance the preference granted against the right of the defendant to adequately prepare its case.

Section 1249 can also influence the parties' rights on a request for a continuance which is considered below. However, a review of this statute is not undertaken because it will be covered elsewhere by the Law Revision Staff.

B. [§14.2] Preferential Setting

Code of Civil Procedure §1264 gives preference to eminent domain actions over all other civil actions for

the purpose of trial, "to the end that all such actions shall be quickly heard and determined." Viewing such a mandate, Central Pac. Ry. Co. v. Superior Court (1931) 211 C 706, 714, 296 P 883, found "proceedings in eminent domain in the nature of summary proceedings."

Perhaps the best example of a court following the letter of 1264 is San Mateo v. Bartole (1960) 184 CA2d 422, 7 CR 569. The action was commenced on December 10, 1957, but the defendant was not served until July 15, 1958. An answer was filed on September 17, 1958. The condemnor waited until November 7, 1958, before seeking to bring the case to trial by a motion to advance. A pre-trial followed on November 24 and a trial regarding special defenses was set for December 4 and the valuation phase of the action was set for trial on December 8. Because the short notice did not provide adequate time to prepare, continuances were granted to the defendant for December 15, 1958, and January 5, 1959, but the valuation date of December 10, 1957, was preserved. Although the condemnor took no steps to move the case to trial until 33 days before the expiration of the one-year period, it received a prompt trial date under CCP §1264.

Incidentally, no memorandum to set was filed in Bartole and the case is cited as authority that none is necessary in Swartzman v. Superior Court (1964) 231 CA2d

195, 198-199, 41 CR 721. There, a motion to specially set under Rules of Court 209(a), concerning pre-trial conference settings, and 225, concerning advancing the trial date, were deemed appropriate means to accelerate eminent domain proceedings and bring them to trial expeditiously in accordance with the legislative requirement that these actions be given priority.

The court in Bottoms v. Superior Court (1927) 82 CA 764, 771-772, 256 P 422, which held that the rule of CCP §1054 regarding attorneys who are members of the legislature is applicable to condemnation actions, offered the following view of the scope of CCP §1264:

> That section merely provides that in all actions brought to enforce the right of eminent domain, the same shall, by any court in which they are instituted, be given preference over all other civil actions therein, in the matter of setting such actions for hearing or trial, and in hearing the same, "to the end that all such actions shall be quickly heard and determined." Of course, it is eminently proper that the legislature should require that actions in such cases, which involve the proposition of taking private property for a public use against the consent of the owner, should be brought to trial and determined with a greater degree of alacrity than is the case in the common run of civil actions, for the obvious reason that, so long as such actions are pending and undisposed of, the owner of the property sought thus to be condemned or taken from its owner is himself practically deprived of the right to use or utilize it. What section 1264 really means is, not that the defendant in such case shall be forced to such haste in the preparation of his defense as would preclude him from making full and proper preparation therefor, both as to his pleading and proof, or that he shall be deprived

> of the right to take any step in its preparation which under the law is common in its application to all actions or any proceeding in courts which call for the determination of an ultimate issue, but that, after issue has been joined therein, such action shall be brought to trial with such promptitude as will facilitate the earliest final disposition thereof consistent with a due regard to all the rights of all the parties thereto, and to that end it shall, in the matter of setting the same for trial and in the trial thereof, be given preference over any other civil action pending at the same time. (Emphasis added.)

The preferential treatment given to eminent domain trials should be preserved. The last clause of 1264, however, could be modified to say that such actions shall be quickly heard and determined, "consistent with a due regard to all the rights of the parties thereto."

C. [§14.3] Continuances

There are no special rules for continuance of an eminent domain trial. See People v. Busick (1968) 259 CA2d 744, 68 CR 532. Other than the question of preservation of the valuation date under CCP §1249, as mentioned above, the continuance of such a trial is treated the same as other civil matters. See People v. Hamud (1967) 254 CA2d 593, 595, 62 CR 266.

There is no need for a special rule in eminent domain. Concerns of preservation of the valuation date, cessation of the running of interest and the like can properly be addressed to the court under a standard motion for continuance under Rule of Court 224.

Section 15: FUNCTIONS OF THE COURT AND JURY

A. [§15.1] Constitutional Guarantee of Jury Trial

Article I, Section 14 of the California Constitution provides that "compensation shall be ascertained by a jury, unless a jury be waived . . ."

B. [§15.2] Function of Court

But for this guarantee, the court decides all questions in eminent domain trials. Vallejo etc. R. R. Co. v. Reed Orchard Co. (1915) 169 C 545, 555, 147 P 238. The court's sphere of decision includes the interests of claimants in the condemned land (Los Angeles v. Pomeroy (1899) 124 C 597, 608, 57 P 585), public use, necessity (Housing Authority v. Forbes (1942) 51 CA2d 1, 8, 124 P2d 194), and compensability of a given item.

C. [§15.3] Function of Jury

In making its determination as to appropriate compensation, a jury can call on its general experience, but cannot base a verdict on its own evaluation reached independent of the evidence. People v. Jones (1963) 218 CA2d 747, 32 CR 344.

Particularly in view of the recommendation of the Special Committee on Judicial Reforms, Los Angeles Superior Court, (1971) that jury trials be abolished in eminent

domain, it is not proposed that the jury be given a larger function in these trials.

Section 16: BURDEN OF PROOF REGARDING JUST COMPENSATION

A. [§16.1] Introduction

The question whether the condemnor or condemnee carries the burden of proof on the issue of compensation is well settled in California. The burden is upon the defendant. See Hill, Farrer & Burrill, A Study Relating to the Procedural Problems in Eminent Domain Cases (October 4, 1961), prepared for the California Law Revision Commission. Nonetheless, the rule should be re-examined because the foundation upon which it rests is proposed to be removed through California Law Revision Commission's Eminent Domain Comprehensive Statute §2400.

B. [§16.2] General Principles

In order to discuss the placement of the burden of proof in a particular type of proceeding, it is necessary to understand the term generally.

First, "burden of proof" is used in two senses: (1) the secondary meaning of having to go forward with the evidence (Evid. C. §110), and (2) the primary meaning of the burden of proving the issue being litigated (Evid. C. §115). See Witkin, CALIFORNIA EVIDENCE §192 (1969); and CALIFORNIA EVIDENCE MANUAL, Evidentiary Burdens and Presumptions §2.9 (CEB 1966).

Second, Evid. C. §550 states, "The burden of producing

evidence as to a particular fact is initially on the party with the burden of proof as to that fact." This burden will shift when the proponent has produced sufficient evidence that a determination in his favor would be required in the absence of contradictory evidence.

Third, "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Evid. C. §500.

C. California Rule

1. [§16.3] Generally

California and the majority of jurisdictions throughout the United States have placed these two evidentiary burdens upon the defendant in regard to the issue of just compensation in an eminent domain action. The defendant must go forward with the evidence, San Francisco v. Tillman Estate Co. (1928) 205 C 651, 653, 272 P 585, and prove its claim of value for the land taken and any severance damage to the remaining property, Monterey v. Cushing (1890) 83 C 507, 510, 23 P 700. See also Santa Cruz v. Younger (1963) 223 CA2d 818, 822, 36 CR 253.

2. [§16.4] Specifically

Since 1872, when the eminent domain procedure

statute was first enacted, the plaintiff has not been required to allege value in its complaint (CCP §1244), while the defendant must allege value and damages claimed in its answer (CCP §1246).

The basic rule in this state is that "whatever facts a party must affirmatively plead he also has the burden of proving." Witkin, CALIFORNIA EVIDENCE §196 (1969). Thus, Monterey v. Cushing (1890) 83 C 507, 510, 23 P 700, reasoned: "Section 1244 of the Code of Civil Procedure provides what the complaint shall contain, and it does not mention value or damage. And if the plaintiff is not required to allege value or damage, he is not required to prove it." See also Cal. S.R.R. Co. v. S.P.R.R. Co. (1885) 67 C 59, 64, 7 P 123.

Likewise, the burden of producing evidence was also placed upon the defendant. In San Francisco v. Tillman Estate Co. (1928) 205 C 651, 653, 272 P 585, the supreme court affirmed the trial court's grant of a motion for new trial on the ground that it had improperly reversed the burden of going forward. In that case, the plaintiff had put on its prima facie case to establish public use and necessity, and then rested without offering any evidence on the question of value. The defendant also rested, arguing to the court that it was not bound to proceed. Plaintiff then volunteered to put on valuation testimony

which it labeled "rebuttal" only. (Apparently plaintiff wanted some evidence before the jury to support a verdict on its figure.) The court reserved judgment on the question whether defendant had submitted its case. But, when plaintiff rested, defendant called its witnesses who were allowed, over objection, to offer defendant's entire testimony on value. Upon motion for a new trial, the court correctly acknowledged it had been maneuvered into misplacing the burden of going forward.

Despite the well settled placement of the burden of proof and going forward, some California cases indicated that the condemnor had the right to open and close the argument. Mendocino County v. Peters (1905) 2 CA 24, 29, 82 P 1122, relied upon CCP §607, a general procedural statute regarding the conduct of a trial, to declare that the defendant had no right to open and close argument. And, East Bay Muni. Util. Dist. v. Kieffer (1929) 99 CA 240, 254, 278 P 476, ruled that the right to open and close rests in the discretion of the trial court.

In 1951, CCP §1256.1 was enacted to provide clearly that the "defendant shall open and conclude argument" in an eminent domain case. This section is now cited as authority for placement of the burden of producing evidence upon the condemnee.

D. [§16.5] Reason for Re-examination

The specific reason for re-examination is provided by Eminent Domain Comprehensive Statute §2400. By that section, the California Law Revision Commission proposes that an answer constitute a simple response to the complaint in eminent domain, stating only (1) the caption of the action, (2) a description of the property in which the condemnee claims an interest and the interest claimed, and (3) the name and address of the condemnee or person designated for service of notice of all proceedings affecting the property. The purpose of this section is to make the answer similar to the notice of appearance provided in federal condemnation proceedings. See Rule 71A(e) of the Federal Rules of Civil Procedure. Parenthetically, the Law Revision Commission has tentatively decided to retain the basic scheme of CCP §1244, specifically not requiring any allegation of value. See Minutes, CAL. LAW REVISION COMM'N, 9-10 (June 11 and 12, 1971).

Since under California's case law the obligation of affirmatively pleading the issue has been the historical test for the imposition of the burden of proof, the removal of this requirement from the answer in a condemnation case re-opens the question. Other reasons for re-examination are possible inequities caused by the confusion to the uninformed and the reversal of the usual

roles of plaintiff and defendant.

E. Re-examination of Burden of Proving the Issue of Compensation

1. [§16.6] Three Alternatives Regarding Burden of Proof

There are three alternatives regarding the burden of proof on the question of value.

First, the burden can be placed upon the condemnor, as the moving party. Since the property owner does not bear any fault in the proceeding, the condemnor should justify both the right to take and the compensation to be paid.

Second, neither party has the burden of proof. The reasons for this position are that the proceeding is in rem and the evidence of all witnesses bears upon the issue of value.

Third, the burden is upon the defendant. "When the taking agency is a governmental subdivision, it is presumed to have made a fair offer, and, accordingly, the landowner has the burden of proof that just compensation requires a sum greater than the amount conceded by the government." State Highway Comm. v. Nelson (1960) 222 Or. 458, 353 P2d 616, 617. This placement of the burden constitutes the majority view in the United States. 5 NICHOLS ON EMINENT DOMAIN §18.5 (3d rev. ed. 1969).

2. [§16.7] Practical Application of Burden of Proof

Before deciding what should be the California rule, it is necessary to consider the practical application of the burden of proof in an eminent domain proceeding. Fundamentally, it imposes "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact . . ." Evid. C. §115.

California Jury Instructions, Civil (5th Ed. 1969) at BAJI 11.98, provides this direction for the jury:

> In this action the defendant[s] has [have] the burden of proving, by a preponderance of the evidence, the market value of the property to be acquired [and the severance damage, if any, to defendant's remaining property].
>
> [The plaintiff has the burden of proving, by a preponderance of the evidence, the special benefits, if any, accruing to defendant's remaining property.]
>
> By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an

issue preponderates, then your finding upon that issue must be against the party who had the burden of proving it.

3. [§16.8] Criticisms

The last sentence of the instruction has been criticized by condemnee attorneys because it suggests to jurors that the property owner must prove the full amount of his contention of value, and if he does not do so, then their verdict should be based upon the condemnor's opinion of value. The announcement of the placement of the burden sometimes infers to jurors that the condemnor's witnesses are to be believed over those of the defendant.

Richard Huxtable in CALIFORNIA CONDEMNATION PRACTICE §12.64 (CEB 1960) offers an instruction which seeks to avoid this interpretation. Among other modifications, the last sentence of the final paragraph of BAJI 11.98, regarding the possibility that "the evidence is evenly balanced," is deleted and the following language is given: "It is obvious that the property being taken has some value and that the dispute is only over the extent or magnitude of such value. You are, therefore, directed to return a verdict in such [amount] as you, in your own deliberations, establish to be the just compensation to which the defendant is entitled . . ."

Another criticism hits at the implication in the defendant's carrying of the burden that the condemnor has accurately estimated value. Although the public agency is under a constitutional mandate to pay just compensation, the results are not always present in fact. It has been urged that once the defendant has gone forward, introducing evidence on the question of value, the burden of proof disappears.

Technically, the latter proposition mixes burden of proof with the burden of going forward, or at least fails to distinguish the two burdens. As explained in Witkin, CALIFORNIA EVIDENCE §192 (1966), "The practical effect of the distinction is that (1) the burden of going forward or initially producing evidence calls the judge's powers into play, e.g., in ruling on a motion for nonsuit, while (2) the burden of proof in the fundamental sense operates when the case finally reaches the jury." Thus, the position actually put forth is that there be no burden of proof, only the burden of producing evidence.

The proposition has merit, if you accept the criticism of the last sentence of BAJI 11.98. For example, in a case where there is but one opinion of value each from the condemnee and condemnor, the jury is not bound to select either the low or high figure. It may place the fair market value wherever it chooses within the range

based upon all the evidence presented. (See §18.2 regarding jury verdicts for a fuller discussion of the range of values test.)

Further, whether nominal or greater, the property being condemned has some value. The condemnation action itself concedes the taking is of value. "The apparent fact that there is no market value of land [or a property right], in a strict sense, does not entitle plaintiff to take lands without paying just compensation." People v. Jones (1924) 67 CA2d 531, 537, 155 P2d 71.

4. [§16.9] Difficulties in Complete Removal of Burden

While there may be reason to remove the burden of proof on the issue of value, it is not appropriate to displace the burden in all phases of an eminent domain trial. There are certain facts in such proceedings which are essential to the claims or defenses of the parties, the tests of Evid. C. §500 for imposition of the burden.

While it can be said that the condemnation action itself admits that compensation be paid for the property interest being acquired, the action does not admit the existence of severance damages. It is not uncommon to find the property owner claiming substantiated severance damage, while the condemning agency denies the existence of any. In the same regard, a claim of severance damages

does not admit that special benefits also attach. The existence of these facts should remain with the proponents, although once established the amounts can be ascertained from all the evidence presented on the issue.

It has been previously recommended to the California Law Revision Commission that there be specific statutory provision placing the burden of proving special benefits upon the condemnor. See Hill, Farrer & Burrill, A Study Relating to the Procedural Problems in Eminent Domain Cases 12-13 (October 4, 1961). It should be noted Evid. C. §500's essential to the defense test would apply to the condemnor's assertion of special benefits.

The burden of proof as to a higher use for the property should also rest upon the proponent. See People v. Loop (1954) 127 CA2d 786, 801, 274 P2d 885. This is an element to be considered in the valuation process and oftentimes produces the spread of difference in opinion of fair market value between the parties. Most often it is the defendant who asserts a higher use for the property, but the condemnor may urge it to seek imposition of the detriments that attach to a change of zoning. For example, in People v. Investors Diversified Services (1968) 262 CA2d 367, 68 CR 663, the condemnor was allowed to introduce evidence that the beneficial effect of a probable zoning change would require dedication of a strip of the property

for city street purposes which lie within the take for highway purposes.

Another element in the valuation process is the probability of assemblage or plottage, by which subject property can be joined with adjacent lands to create a larger parcel better suited to a higher and better use. Again, the proponent would have the burden of proving the probability of assemblage.

5. [§16.10] Reversal of Burden

Reasons of policy and convenience can indicate placement of the burden without regard to the requirement of pleading. One of the factors for reversal of the burden is greater availability of evidence. See Witkin, CALIFORNIA EVIDENCE §198 (1969). In this regard, it has been contended that the condemning agency with its in-house staff and ability to buy appraisal investigation has greater availability of evidence. This may be particularly true in the case of acquisition of smaller parcels, lower income residences and acquisition from those not knowledgeable in real property.

Having the advantage by scope of investigation, it is argued the condemnor should go forward with its evidence first. Further, some agencies abuse their position of strength by failing or refusing to fully

discuss the basis of their appraisal with the property owner.

Nonetheless, in theory, the condemnee is able to reach, through the discovery process, the opinion of value and basis therefor held by the condemnor.

6. [§16.11] Other Reasons for Placement of Burden of Proof Upon Defendant

There are reasons, other than California's requirement of pleading, given for the imposition of the burden of proof upon the property owner.

A New York court, in Village of Penn Yan Urban Renewal Agency v. Penn Yan Realty Corp. (1968) 294 NYS2d 66, 68, said:

> In any event, it is clear no adversary proceeding arises (as to fair market value or damages) until the landowner is of the opinion that the condemnor's offer is something less than "just compensation." The Condemnation Law . . . mandates that the condemnor state in its petition, "the value of the property to be condemned" (i.e., its estimate of the just compensation to be paid to the owners of the appropriated property), the fact that the plaintiff (condemnor) "has been unable to agree with the owner of its property for its purchase, and the reason of such inability," and a prayer that commissioners of appraisal "be appointed to ascertain the compensation to be made, to the owners of the property so taken."
>
> Nothing remains for the plaintiff-condemnor to do.
>
> So, in the instant case, the defendant-

> landowners admitted the allegation of the condemnor's petition, except as to the amount of damages. From a logical viewpoint, the condemnor has made an offer and each of the landowners has rejected it and alleged a greater sum than that deemed fair by the condemnor. The condemnor must now defend against the claim of damages over and above the offer made. If the burden of proof were to be cast upon the condemnor, then its evidence would necessarily, or at least in great part, consist of an attempt to defend against a claim over the amount of its offer, of which the precise facts, nature and theory have not yet been made known to the condemnor. Under such circumstances to require the condemnor to first go forward with the proof puts the cart before the horse. It is less than logical to require the condemnor to either proceed or defend itself blindly.

But the simplest argument for the majority position on burden of proof is: "Such rule conforms to the reality of the situation (that the landowner is claiming redress of damages for the deprivation of use and title) . . ." Loeb v. Board of Regents (1965) 29 Wis.2d 159, 165, 138 N.W.2d 227, 230.

It is of further interest to note that, although the federal government has dispensed with answers in favor of a notice of appearance in condemnation proceedings, it maintains the burden of proof upon the defendant. United States v. Chase (2d Cir. 1958) 260 F2d 405.

F. [§16.12] Re-examination of Burden of Going Forward

As mentioned above, the burden of producing evidence is directly related to the burden of proving the issue

being litigated. Thus, the decision of where to place the burden of proof should determine the secondary burden as well.

Adopting the position that there should be no burden of proof on the issue of value would frustrate the application of this rule. In such a case, which party should go forward? The answer must be given on the basis of policy. The reasons discussed in Village of Penn Yan Urban Renewal Agency v. Penn Yan Realty Corp. (1968) 294 NYS2d 66, 68 (see §16.11), are sufficiently compelling to place this burden with the party seeking greater compensation, the condemnee.

G. [§16.13] Recommendations

The proposition that neither party bear the burden of proof on the question of value has appeal. But, it is complicated if one also takes the position that the burden of proof should rest on the proponent of the claim of severance damage and special benefits as discussed in §16.9. A statute setting forth the above should clearly state:

(1) The defendant has the burden of producing evidence on the issues of value and damages;

(2) Neither party has the burden of proving value;

(3) The defendant has the burden of proving severance damages;

(4) The plaintiff has the burden of proving special benefits; and

(5) The defendant has the right to open and close the argument.

Yet, there are other essential facts, e.g., highest and best use, which may be both the basis of a claim for or defense to higher value. For this reason, it may be best to state any statute adopting the above in a general manner: "The defendant shall open and close the case; and the burden of proof on all issues, other than value, fall on the proponent of the claim or defense." Comment should then follow to explain that neither condemnor nor condemnee carries the burden of proof on the question of value.

On the other hand, Levey, CONDEMNATION IN U.S.A. §4802, p. 473 (1969) makes this point: "The question of burden of proof in condemnation cases is the same as in other civil cases. Whatever either party must establish casts a burden of proof of that issue on such party." This simpler view suggests the evidentiary burdens of eminent domain remain within the general framework of the Evid. C. §§500 and 550. Thus, the present California rule would be maintained, and CCP §1256.1 could be

modified to indicate directly that the burden of proof is upon the defendant. Any difficulty in interpreting the rule, then, must be clarified by revision of the BAJI instruction, as suggested by Richard Huxtable, specifically informing the jury of the application of the burden of proof to a condemnation case and its right to independently fix compensation for the taking on the basis of all the evidence presented.

The difficulty with the simpler approach is that it shifts responsibility for a correction of the law that properly should be made in a revision of the eminent domain laws.

Section 17: THE CONDEMNATION WITNESS

A. [§17.1] Court Appointed Experts

1. Introduction

Usually the condemnor and condemnee hire and call their own expert witnesses on the question of value. But the court has the power to appoint experts. See generally Evid. C. §730 (formerly CCP §1871) and specifically CCP §1266.2.

The Report and Recommendations of the Special Committee on Judicial Reform, Los Angeles Superior Court, (1971) calls attention to the appointment of experts in a condemnation trial as an alternative to abolishing jury trials for such proceedings. Recommendation No. 22 urges that "expert appraisal testimony in eminent domain be limited to two appraisers appointed by the court, with the provision for appointment of a third appraiser if a divergence exists in the two appraisers greater than ten percent."

2. [§17.2] SB 615

Senator Song in the 1971 legislative session introduced legislation to effect the proposal of the Los Angeles Superior Court Special Committee, with the further requirement that the fees of court appointed experts be paid by the condemnor. SB 615. But subsequent

amendments have moved the initial legislation from its intended direction.

The first amendment to the bill provided that each side is entitled to one expert appraiser rather than have the court appoint in the first instance; but if those two appraisers testify to appraisals differing by more than ten per cent, the court may appoint an expert. At that time, the provision that the plaintiff bear the cost of the appointed expert was retained.

The bill was amended a second time to allow each side two appraisers and an opportunity to show cause why additional appraisers should be allowed. But if a court appoints an expert under Evid. C. §730, the fee shall be paid by the plaintiff in those cases where the lowest appraisal of the defendant and the highest appraisal of the plaintiff differ by more than ten per cent. Moreover, "If one or more experts are regularly employed and paid as such by the plaintiff, at least one of the experts who testifies for the plaintiff shall be such an employee."

The third amendment to SB 615 struck the language regarding the plaintiff's obligation to pay the court appointed expert. The bill at all times has specifically declared that it was not to be construed as limiting the number of witnesses, other than appraisal experts. Thus, neither the owner nor foundational experts are counted

within the limitation of two appraisal experts as qualified to testify under Evid. C. §813(a)(1).

3. [§17.3] Present Statutes

Currently, both the Evidence Code and Code of Civil Procedure have statutes which apply to the court appointment of an appraiser in a condemnation action and there is some question whether they say the same thing.

First, Evid. C. §730, applicable to any case where expert testimony is required, states:

> [T]he court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which such expert evidence is or may be required.

(Prior to 1967, substantially the same language was contained in CCP §1871, which was repealed on the effective date of the Evidence Code. Cal. Stats. 1965, ch. 299, §59.) The Evidence Code also provides that the compensation for the expert shall first be apportioned and charged to the several parties and thereafter be taxed as other costs. Evid. C. §731. Moreover, such an appointed expert "may be called and examined by the court or by any party to the action. When such witness is called and examined by the court," the parties have the right to cross-examine and "to object to the questions asked and the evidence

adduced." Evid. C. §732.

Second, the eminent domain procedural law provides in CCP §1266.2:

> In any action or proceeding for the purpose of condemning property where the court may appoint appraisers, referees, commissioners, or other persons for the purpose of determining the value of such property and fixing the compensation thereof, and may fix their fees or compensation, the court may set such fees or compensation in an amount as determined by the court to be reasonable, but such fees shall not exceed similar fees for similar services in the community where such services are rendered.

Prior to 1968, this section fixed the compensation at not more than $50.00 per day. See Cal. Stats. 1968, ch. 450, §4.

Both because the latter section was thought to apply to expert appraisal witnesses and restricted compensation to a maximum of $50.00 per day, a question arose in the appeal of an eminent domain action where the trial court fixed compensation for a court appointed expert witness at $150.00 per day. Burbank v. Nordahl (1962) 199 CA2d 311, 18 CR 710.

There, the appellate court accepted the trial court's determination that it had made the appointment under CCP §1871 (now Evid. C. §730) rather than CCP §1266.2, and declared that the latter did not use the term "appraisers" in the sense of an expert witness.

The contention of the plaintiff that section 1266.2 places a limit upon the amount of compensation payable to a court-appointed expert witness in an eminent domain proceeding, who has the qualifications of an appraiser, is without merit. That section refers to a type of service rendered rather than to the qualifications of the person performing them; applies to "appraisers, referees, commissioners, or other persons"; and is concerned with services rendered "for the purpose of determining the value" and "fixing the compensation" of the property being condemned. (Italics ours.) Thus, the statute expressly restricts its application to a designated service and, in addition, under the maxim of noscitur a sociis (Fox v. Hale & Norcross S.M. Co., 108 Cal. 369, 426 [41 P. 308]), its application to the services of an appraiser is limited to those in the designated area which are of the character performed by referees or commissioners. These are not the type of services rendered by an appraiser who qualifies himself as a witness as to the value of the particular property by making an investigation into such value, and

> who thereafter testifies with respect to his findings and his opinion in the premises. Such an appraiser does not determine the value of property in the same sense as a referee or commissioner would make such determination, nor does he fix the compensation thereof.
>
> The authority of a court to appoint an expert pursuant to section 1871 extends to condemnation cases (Metropolitan Water Dist. v. Adams, 23 Cal.2d 770, 772-774 [147 P.2d 6]); that section also confers an unqualified authority to fix the compensation payable to a witness appointed thereunder; and there is nothing in the provisions of section 1266.2 which purports to limit that authority. The latter section makes no reference to the services of a witness . . .
>
> Id. at 328-329.

What CCP §1266.2 envisions is a quasi-judicial system, as discussed in §3.1 of the first part of this study, where, upon the commencement of condemnation proceedings, the court appoints special appraisers or viewers to make the award of compensation. Such a system is available in California in the Street Opening Act of 1903. Streets & Highways Code §4200 says that in condemnation proceedings

under the Act, where neither a trial by jury or by the court without a jury is demanded by any party to the action, "such a trial shall be waived, and the court shall appoint three disinterested persons as referees, to ascertain the compensation and damages . . ." See City of Los Angeles v. Allen (1934) 1 C2d 572, 36 P2d 611.

4. [§17.4] Recommendations

The rules for court appointed experts, unless modified by SB 615 which would add section 1267 to the Code of Civil Procedure, are sufficiently set forth in the Evidence Code. Even though there are limited instances when a quasi-judicial system may apply in California, it would be preferable to repeal CCP §1266.2. The purpose of 1968 amendment to the section, substituting reasonable fees for the not more than $50.00 per day standard, could have been accomplished by striking the section completely. As originally enacted, it did not empower the court to appoint appraisers, referees or commissioners but merely fixed their fee in cases where the court was authorized to appoint such persons to determine value, as in the Street Opening Act of 1903. Without any limitation, the only standard by which the court could award fees would be that of reasonableness.

More difficult is a recommendation regarding SB 615.

Already it has been amended to avoid the harshness of not allowing the respective parties the opportunity of calling appraisal witnesses whom they are satisfied represent their respective views on value. And, instead of making it mandatory that the court appoint a third appraiser, if those of each party differ by more than 10 per cent, the proposed new law is now silent. Thus, the court's power to appoint appraisal witnesses remains solely in Evid. C. §730. It has already been held under CCP §1871 (now Evid. C. §730) that neither party has the right to require the judge to exercise his discretion to appoint an expert. Laguna Salado etc. Dist. v. Pacific Development Co. (1953) 119 CA2d 470, 473-474, 259 P2d 478.

As finally amended, the only item SB 615 adds to the law is that plaintiff must call as a witness an expert whom it regularly employs and pays to appraise and testify. A condemnor cannot use its in-house staff customarily assigned the task of appraising property for court purposes only when it finds it convenient. In other words, the staff appraiser cannot be held back when his opinion is greater than the independent fee appraiser called to testify.

Except for this, Evid. C. §730 says all that SB 615 seeks to provide.

B. [§17.5] Exclusion of Witnesses

The investigation of an expert called to testify should demonstrate independent thought and thoroughness. To reinforce this impression to the trier of fact, most condemnation lawyers instruct their appraisal witnesses to remain outside the courtroom until called to the stand and once excused to leave the courtroom.

Nevertheless, an appraisal or foundational expert may be seen within the courtroom during times other than his testimony. To prevent a waiting witness from scouting the other side's testimony or attorney's tact on cross-examination, a motion for exclusion can be made pursuant to Evid. C. §777(a). It is there provided "the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses." The rule does not apply to a defendant property owner nor to an officer or employee of a corporation or public agency which is a party to the action, where the person is designated by the attorney. Evid. C. §777(b) and (c).

The discretion given in Evid. C. §777 is sufficient to apply to the trial of a condemnation action.

Section 18: VERDICT

A. [§18.1] Form

Code of Civil Procedure §1248 requires that there be a separate assessment of the value of property taken, the damages to remaining land (severance), and benefits. The verdict should accordingly contain separate statements setting forth each of these items. See Butte County v. Boydston (1883) 64 C 110, 111-112, 29 P 511.

B. [§18.2] Basis of Award

It is not necessary that the same nine jurors agree to both the value of the property interest acquired and the amount of severance damages, as long as nine jurors do agree to each of these items. Los Angeles v. Frew (1956) 139 CA2d 859, 873, 294 P2d 1073.

A jury may not arbitrarily disregard expert valuation testimony. It is said that the verdict award must generally be within range between the high and low valuation opinions offered. But, the statement is an oversimplification. The cases actually hold that the jury cannot render a verdict higher or lower than "that shown by the testimony of the witnesses." The entire evidence from both sides must be considered, not just the lump-sum figures of the respective high and low testimony. Pleasant Hill v. First Baptist Church (1969) 1 CA3d

384, 409, 82 CR 1; Redevelopment Agency v. Modell (1960) 177 CA2d 321, 326-327, 2 CR 245; People v. McCullough (1950) 100 CA2d 101, 105, 233 P2d 37. By way of example, in Los Angeles etc. School Dist. v. Swenson (1964) 226 CA2d 574, 38 CR 214, the jury relied on comparable sales data to reach a verdict below any valuation opinion.

The same principle is valid in relation to severance damages. In Los Angeles County etc. Flood Control Dist. v. McNulty (1963) 59 C2d 333, 29 CR 13, a jury's severance damage verdict less than the lowest (condemnor's) opinion testimony was upheld, since this testimony was based upon certain contingencies the jury was free to accept or reject. More recently, People v. Jarvis (1969) 274 CA2d 217, 79 CR 175, held that a severance damage award may be higher than the total severance damage estimate of any single witness if it is arrived at by an arithmetical combination of component valuations from the testimony of various witnesses. Specifically, the court reasoned:

> Each witness calculated his respective lump-sum figure from several opinion factors of his own, including different per-acre values and acreage figures assigned by him to various areas of the Jarvis ranch both before and after the condemnation. The differences among these factors presented conflicts in the evidence; these were

for the jury to resolve (People v. Hayward Bldg. Materials Co. (1963) 213 Cal.App. 2d 457, 467 [28 Cal.Rptr. 782]), aided by its independent view of the premises. (Rose v. State of California (1942) 19 Cal.2d 713, 738-739 [123 P2d 505].) The range limiting its severance-damage figure ran up to the highest valid arithmetical combination of factors selected from the testimony of all the witnesses; any verdict less than such highest possible figure was -- as this one was -- "shown by the testimony of the witnesses" (People ex rel. Dept. of Public Works v. McCullough, supra, 100 Cal.App.2d 101 at p. 105; Redevelopment Agency v. Modell, supra, 177 Cal.App.2d 321, 326-327) and, hence, supported by the evidence.

Id. at 227 (footnotes deleted).

Interestingly, the trial court had to reduce the jury's verdict because it was in excess of defendant's prayer.

C. [§18.3] Recommendation

The case law has sufficiently defined the rules regarding the verdict in condemnation trials. There is no need for statutory intervention.