

## Memorandum 66-4

Subject: Study 36(L) -- Condemnation Law and Procedure (Taking Possession Prior to Judgment)

We forward with this memorandum a copy of pages 1-27 of the text and pages 1-9 of the footnotes of the staff research study on Possession Prior to Final Judgment in California Condemnation Procedure. (We are sending you this portion of the study now so that you will have time to read it prior to the February meeting. We plan to send you the remainder of the study within the next few days.)

In accordance with the Commission's previous directive, we are planning to have the research study printed as a law review article (after the study has been edited and carefully checked) if we can make arrangements so that the published law review article will be available in time to permit us to reprint it in our report to the 1967 Legislature.

We will assume for the purposes of this memorandum that you have read the attached portion of the research study with care. Hence, we merely outline the policy question presented by this portion:

1. Constitutional amendment. It is impossible to predict with certainty the attitude ~~the~~ the California Supreme Court would take to legislation, rather than a constitutional change, extending the right of immediate possession. The study concludes that legislation extending the right of immediate possession would probably be held constitutional; nevertheless, we recommend that a proposed constitutional amendment (Study, pages 26-27) to Section 14, Article I of the California Constitution be included in our package on possession prior to final judgment.

The suggested amendment would give the Legislature power to determine

which condemners should have the right of immediate possession and for what purposes. It would also require that the "probable just compensation" for the property be paid to the owner of the property or deposited in court for him before possession of the property could be taken. The amendment is substantially the same as the one proposed by the Commission in 1961.

In connection with the history and constitutional problems of immediate possession procedure in California, see the attached exhibits: Exhibit XIII (gold) (argument submitted to the voters in support of the 1918 Constitutional Amendment); Exhibit XIV (white) and XV (pink) extracts from Debates and Proceedings of the 1878 Constitutional Convention.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

CONDEMNATION OF RIGHT OF WAY FOR PUBLIC USE. Assembly Constitutional Amendment 21. Amends Section 14 Article I of Constitution. Excepts counties from provisions requiring compensation be first made or paid into court for owner before right of way is appropriated; adds proviso authorizing state, political subdivision thereof or district, upon commencement of condemnation proceedings for right of way, to take immediate possession thereof upon making money deposits in such amounts as court may determine adequate to secure to owner immediate payment as compensation therefor, permitting court on motion and upon notice to alter amount of such security.

YES

NO

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Assembly Constitutional Amendment No. 31—A resolution to propose to the people of the State of California an amendment to section fourteen of article one of the constitution, relating to the taking of private property for public use.

The Legislature of the State of California, at its forty-second regular session commencing on the eighth day of January, 1916, a hundred and seven, two-thirds of the members elected to each of the two houses of the said legislature

voting therefor, hereby proposes to the people of the State of California that section fourteen of article one of the constitution of this state be amended so as to read as follows:

PROPOSED AMENDMENT.

(Proposed changes in provisions are printed in black-faced type.)

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, and no right of way shall

be appropriated to the use of any corporation, except a municipal corporation, or a county, 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 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 in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.

Section fourteen, article one, proposed to be amended, now reads as follows:

EXISTING PROVISIONS.

(Provisions proposed to be repealed are printed in italics.)

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, and no right of way shall be appropriated to the use of any corporation other than municipal 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 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. 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.

ARGUMENTS IN FAVOR OF ASSEMBLY CONSTITUTIONAL AMENDMENT NO. 31.

The principal purpose of this amendment is to permit the state, a county, a municipal corporation, or a drainage, irrigation, levee or reclamation district, when acquiring rights of way only,

in eminent domain proceedings, to take possession upon commencing a condemnation suit and depositing in court such amount of cash money as is fixed by the court to secure the owners in the final payment of the compensation and damages fixed by the jury. If it should appear later that this amount is inadequate the court is empowered to increase it.

Experience has shown that cities, in acquiring long stretches of rights of way for public purposes, are often held up by unreasonable and arbitrary owners who attempt to take advantage of a rule which requires that the city can not go into possession prior to a jury actually fixing the compensation to be paid.

This has led to the adoption of such an amendment as is here proposed in the following twenty-one states: Arkansas, Connecticut, Florida, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia and Wisconsin.

Also, in the acquisition of rights of way by public districts for flood control, it is sometimes absolutely imperative, because of storm and weather conditions, and in order to protect vast areas of land and save property of incalculable value, that these districts be given the power to enter into immediate possession.

Another change effected by the amendment is to extend to counties the same privileges that a municipal corporation now has to set off benefits that might result to an owner's property in determining the compensation that must be paid.

LEE GEBHART,

Assemblyman Fifteenth District.

As the law now stands, if the state, or any political subdivision thereof, seeks to condemn private property for a right of way, for example, for a road, an irrigation canal, or for flood protection, possession of the property can not be obtained until after a jury has determined the amount of compensation to be paid for the taking of such property. This may take several months. The amendment proposed merely permits the state or political subdivision thereof, after commencement of proceedings to condemn, by giving adequate security, to take possession of the property and proceed with the work before the jury has determined how much should be paid.

It can readily be seen that this amendment does not work any hardship upon the property owner. Under the present law the state or political subdivision can condemn property, and after a jury has fixed the damage and compensation to be paid, can pay such amount and enter into possession. This amendment merely permits a change in the order of proceedings. The property owner will receive exactly the same compensation that he would have received and has the same remedies.

Under existing law, no matter how urgent may be the necessity, or how great may be the damages suffered by delay, possession can not be obtained until after what may become protracted litigation.

This amendment is eminently just and fair and will protect adequately both the public interests and private rights.

L. L. DENNETT,

Assemblyman Forty-sixth District.

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DEBATES AND PROCEEDINGS -- Page 1190  
OF THE CONSTITUTIONAL CONVENTION

**Mr. HAGER.** Mr. President: I offer the following amendment to section fourteen: In line one, after the word "taken," insert "or damaged."

## REMARKS OF MR. HAGER.

**Mr. HAGER.** Mr. President: The original section reads, that private property shall not be taken or damaged for public use. I propose to restore those words. In some instances a railroad company cuts a trench close up to a man's house, and while they do not take any of his property, it deprives him of the use of it to a certain extent. This was brought to my notice in the case of the Second street cut in San Francisco. There the Legislature authorized a street to be cut through, which left the houses on either side high in the air, and wholly inaccessible. It was destroyed, although none of it was taken or moved away. There are many such cases, where a man's property may be materially damaged, where none of it is actually taken. So I say, that a man should not be damaged without compensation. I think the original report of the committee was right in that respect.

## REMARKS OF MR. WILSON.

**Mr. WILSON,** of First District. Mr. President: I think it would be dangerous to change this provision in this respect. This is the form in which it is found in nearly all the Constitutions in the United States. Now, to add this element of damage is to enter into a new subject. It is opening up a new question which has no limit. You take the case of street improvement, and this question of damage will open up a very wide field for discussion. My recollection is that when this question was under discussion in the Committee of the Whole, there was a very large preponderance of the committee in favor of this amendment to section fourteen. I regard it as very dangerous to undertake to enter into a new field. I have no disposition to enter into an argument upon it.

**Mr. HAGER.** I refer you to the Constitution of Illinois which says that property shall not be taken or damaged.

**Mr. WILSON.** That is one.

**Mr. HAGER.** And the Constitution of Missouri. [Laughter.]

**Mr. WILSON.** If it comes all the way from Pike, it must be good. [Laughter.]

**Mr. CASSELY.** I am sorry to see my friend's faith shaken in the Constitution of Missouri. He is now quoting from Illinois.

**Mr. WILSON.** I will say here that the fact that it is found in the recent Constitutions is no argument in its favor. But that it is found in nearly all the old Constitutions is an argument, because it shows that they have tried it. An experiment untried is no argument at all. Now, these new Constitutions which my friend constantly intrudes upon this Convention are simply untried experiments. They do not know whether they will work well or not. They are simply trying the experiment. In twenty years from now our children can refer to them, and if they have worked well, that will be an argument. But to present the Constitution of Missouri here without knowing whether it will work well or not, is no argument at all.

## REMARKS OF MR. ROLFE.

**Mr. ROLFE.** Mr. President: It will be remembered that the Committee of the Whole thoroughly discussed this question. These words, "or damaged," were reported by the Committee on Bill of Rights. There were many reasons urged why those words should be left out. A man's property might be damaged, when he would be entitled to no compensation. A man might have a public house on a public highway, and the highway might be changed for some good cause or other. The value of his property would be lessened by reason of the travel being diverted, and yet he would not have a just right to claim damages. He would be damaged by reason of a public use. I think it would be dangerous to insert such a provision as this. I am opposed to the amendment.

## REMARKS OF MR. ESTER.

**Mr. ESTER.** Mr. President: What if a corporation wanted to build a road through the streets of a city. Take for instance, the Second street cut. The property there is absolutely destroyed, and yet not a foot taken. The houses on either side are in absolute danger of sliding off into the street below. I know that what the gentleman from San Francisco says about this being an untried experiment, is true, but it strikes me that the justice of it is apparent; that when a man's property is damaged it ought to be paid for. I am in favor of the amendment. I think it is the best we can get.

**THE PRESIDENT.** The question is on the adoption of the amendment.

Division being called, the Convention divided, and the amendment was adopted, by a vote of 62 yeas to 23 nays.

**Mr. HERRINGTON.** Mr. President: I offer an amendment.

**THE SECRETARY** read:

"Strike out all after the word 'owner,' line three, down to and including the word 'corporation,' in line six."

## REMARKS OF MR. HERRINGTON.

**Mr. HERRINGTON.** Mr. President: I desire to call the special attention of the Convention to that portion of the section. I ask your careful and patient attention for a moment, and I think it will need no further argument. "Private property shall not be taken for public use without just compensation having been first made to or paid into Court for the owner," etc. Now, the first part of that section is in very plain terms. That ends the matter, as far as a municipal corporation is concerned. But there can be no use for the second clause, after we have said expressly that the compensation must be first made or paid into the Court for the owner.

**THE PRESIDENT.** The question is on the adoption of the amendment.

Lost.

**Mr. CROSS.** Mr. President: I offer an amendment.

**THE SECRETARY** read:

"Insert after 'jury,' in line seven, 'unless a jury be waived, as in other criminal cases,'"

**Mr. CROSS.** Mr. President: I will state briefly the object of this. This section provides that all cases where damages are assessed, in taking private property for public use, it must be assessed by a jury. I see no reason why this should always be done by a jury, if both parties choose to waive a jury. The question of damages in this class of cases is no different from the question of damages in other cases. It is enough to give either party the right to demand a jury. The jury entails considerable expense, and if both parties choose to waive a jury, that is all sufficient.

**Mr. JONES.** Mr. President: I would merely make one suggestion, that the same object can be accomplished by striking out that portion in relation to a trial by jury, and then section seven comes in and says that the right of trial by jury shall remain. That will make the section shorter, instead of longer.

**Mr. CROSS.** I would prefer to do it this way, and then there will be no danger of the Legislature getting around it, and saying that the question of damages may be determined by the Courts.

**THE PRESIDENT.** The question is upon the adoption of the amendment.

Adopted.

**THE PRESIDENT.** The question is upon the amendment recommended by the Committee of the Whole, as amended by the Convention.

Adopted.

DEBATES AND PROCEEDINGS  
OF THE CONSTITUTIONAL  
CONVENTION (1878)

Pages 346-353

EMINENT DOMAIN.

**Mr. VAN DYKE.** Mr. President: I move that the Convention now resolve itself into Committee of the Whole, the President in the chair, to take into consideration the remainder of the report of the Committee on Preamble and Bill of Rights.

Carried.

IN COMMITTEE OF THE WHOLE.

**THE CHAIRMAN.** The Secretary will read the section as reported by the Committee on Judiciary and Judicial Department.

**THE SECRETARY** read:

**Sec. 14.** Private property shall not be taken for public use without just compensation having been first made to or paid into Court for the owner.

**THE CHAIRMAN.** The question is on the amendment to section fourteen, offered by the gentleman from Solano, Mr. Dudley. The gentleman from Solano moves to amend by adding the following: "And no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury in a Court of record, as shall be prescribed by law."

REMARKS OF MR. DUDLEY.

**Mr. DUDLEY, of Solano.** Mr. Chairman: I desire to offer one word upon that matter before the vote is taken. The only idea in the amendment is simply this, that damages shall be assessed and paid irrespective of the benefits that may be supposed to accrue to property because of any proposed improvement. It was stated just before the recess that the present law prevented the offsetting of the value of land by prospective damages. Undoubtedly that is correct. But it has been the rule, and I presume that it is yet the rule, that damages outside of the value of real estate condemned, damages arising from the surveys run, or from cutting a farm into irregular shape, are assessed by the offset prospective benefits which will accrue to that property. In this there is very little of justice. The whole community, in the case of a railroad, for instance, are equally benefited with the person who is suffering, and there is no good reason why one man should be compelled to suffer damage to his property for the benefit of a whole community.

Now it was urged here before dinner, that the Courts had already construed this matter, and we were requested to let it alone and not interfere with it. The amendment reported even by the Committee on Judiciary is different from the old clause, which is the last clause in section eight of the Bill of Rights in the old Constitution. That is, the ideas are expressed in a greater number of words. Being a change of course it will be subject to a reconstruction by the Courts. It must be borne in mind that we are engaged in manufacturing a new Constitution, which will involve the passage of new laws, and will require a

construction by the Courts on these new laws. I do not think that such reasoning as that will lie against this amendment.

Under the law which was passed, as I understood the gentleman from San Francisco, Mr. Barnes, in eighteen hundred and fifty-one, and what remained upon the statute book until eighteen hundred and sixty-eight, it was the rule, or at least it was the practice, particularly on the California Pacific road, to offset the entire damages by the supposed prospective benefits. Now, if under the old Constitution such an act was passed and was in force, unless it is prohibited, there is a possibility of the reenactment of such a law and the reestablishment of such a rule of construction. I submit that there is that possibility, and I ask the attention of members of the Convention to this matter, particularly those who are residents of the agricultural districts, and are liable in the future to be damaged in this way. It must be borne in mind that, as land becomes more valuable, as it is more generally taken up and cultivated, and as the railroads increase, they can not be run across the country without doing very material damage; without severing farms into irregular shape; without separating buildings and destroying orchards, and there is no justice in permitting the general advantages accruing to the community to offset that class of damages.

SPEECH OF MR. EDGERTON.

**Mr. EDGERTON.** Mr. Chairman: The provision recommended by the Committee on Judiciary is as follows: "Private property shall not be taken for public use without just compensation having been first made to or paid into Court for the owner." This is a subject that has been very frequently before the Legislature in this State, and it has been very frequently before the Supreme Court of the State for adjudication. It has been a very vexed question, and the rule in regard to it has, until lately, been a very shifting one. But, finally, a system has been perfected—I say that because I so value in regard to it—a system has been adjusted to the Constitution, or that clause of the Constitution as it now exists; and this only modifies that clause by the insertion of the word "first," at the suggestion of the gentleman from San Bernardino, Mr. Waters, so that it reads "compensation first made to or paid into Court," etc.

Now, sir, it will be well enough to examine this system briefly, as it is now established, to see whether any change should be made in the Constitution, as it now stands, but the simple amendment made by the Judiciary Committee. The rule as to the compensation for the condemnation of land is as follows:

"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 assessed."

We have got thus far the compensation for a thing taken—a thing taken out of the ownership, possession, and control of the individual and surrendered to a public use—no matter what it is. It may not be a railroad bed that is the thing taken under the exercise of the right of eminent domain. The whole value of the thing has to be paid independent of any considerations of benefit resulting to an adjoining property.

"2. If the property sought to be condemned constitutes only a part of a large parcel, the damage 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."

That is, if it is a part of a thing, the remainder of which is left in the ownership and fee—the control and possession of the owner then that is to be considered in the manner indicated in the section I have read.

"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 plaintiff; and if the benefit shall be equal to the damages assessed, under subdivision two, 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."

Let us see a moment as to the flexibility of this rule. A railroad company desires to lay its track right between a large house on the one side and a man's barn and granaries, a couple of hundred yards distant, on the other. Neither the house nor barns are taken, but only the land between, but the whole value is paid for. Now, it would be unjust not to pay those secondary damages in that case, and these damages are secured to the owner of the property. But take this case, where a man has got a tract of land, two hundred and fifty acres perhaps, and you want to lay it out into streets, and the very prospect of laying it out into streets increases the value of the property five, ten, or fifteen per cent., and makes a man rich in a night, before he knows it, ought he to be paid for any damages in such a case as that? That is the flexibility of this rule. My friend from Solano must take into consideration the fact that in the case of a company it is the agent of the public, the agent of the State, because that power resides in the State alone. It is the very highest prerogative of any government to walk into a man's land and take his property. It is not railroad companies alone that are affected by this rule. It affects every swamp land district, every county or municipality that desires to open roads or streets, and every community that is interested in the construction of public works. The provisions of the law as it now stands have been adjusted to the decisions of the Supreme Court, not only in this State but in other States, and are approved by the writers on Constitutional Limitations and Law, like Bedgwick and Cooley.

Now let us see about the Act that was passed last winter. In the first place the citizen here has a privilege which so far as I am advised is not enjoyed by the citizens of any other State. I know that in a large majority of the States they do not give the citizen the right to a jury in these cases. It is a great principle in this country that the rights of a private individual must always yield to the rights of the public. In this State a person has the right of trial by jury, and as soon as a verdict is rendered the Court makes an order that the money which the jury awards shall be paid into Court, and such sum as in the discretion of the Court may be required to answer to further damages, if upon a new trial being granted by the Supreme Court, they should be awarded. This money is to be paid into Court for the use of the individual. He has a right to withdraw it, reserving his right to proceed on motion for a new trial. If he does not take it the corporation has to keep that deposit good. If it is lost, the corporation has to make that deposit good before it can take that property. If he desires to appeal to the Supreme Court, it has to be paid into the State Treasury and kept for him. I submit that the system as it is adjusted to the decisions of the Supreme Court under that clause of the Constitution as it now stands, is as judicious, safe, and guarded, as it can possibly be made for the citizen, and it does not need any handling by this Convention.

Mr. DUDLEY, of Bolano. Mr. Chairman: If this matter refers to municipal corporations as the gentleman says it probably might need some amendment, and I ask the privilege of amending my amendment by inserting after the word "corporation," I think in the second line, between the words "corporation" and "until," the words "other than municipal," so that it will read: "And no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury in a Court of record, as shall be prescribed by law."

THE CHAIRMAN. If there be no objection, the gentleman will have leave to make that amendment. Hearing none, it is so ordered.

Mr. WATERS. Is there more than one amendment now pending?

THE CHAIRMAN. Two.

Mr. HOWARD. Mr. Chairman: I hope that the amendment offered by the gentleman from Bolano will prevail. Everybody knows that the provision read from the Practice Act by the gentleman from Sacramento was a provision adopted under the influence and in the interests of the railroad. And everybody knows, also, that this provision of deducting the improvements from the value of the property has been abused and always will be abused in the interests of large and wealthy corporations. I hope the citizen will be protected from this abuse by the adoption of the amendment of the gentleman from Bolano.

Mr. EDGERTON. Mr. Chairman: I say, sir, and I know whereof I speak, that the Act referred to was passed against the interests of the railroad company and I know they opposed it. And I know that it was passed under the influence of certain gentlemen interested in swamp land matters, and other gentlemen interested in other public enterprises. The Supreme Court decided these questions right against the corporations from beginning to end. The money was to be paid or deposited at the end of a verdict by the jury, and even then, under the order of the Court, they must deposit such additional sum as might be required to cover any additional damages. This law was adjusted to the decision of the Supreme Court. Now, sir, I know these facts.

REMARKS OF MR. WATERS.

Mr. WATERS. Mr. Chairman: As the history of this eminent domain bill, as it is called, has been asserted by one member to be one way and by another member to be another way, it appears to me to be pertinent in me to state what the history of that bill is. In the first place the eminent domain law, as you might call it, as it stood prior to this last act, was such as to allow the corporation seeking to exercise this right to file a bond in the District Court, and upon that to take the property of a citizen and fight him about the compensation afterwards. A suit under that act was carried to the Supreme Court, and it was held to be unconstitutional. When the last Legislature met a bill was handed to a Mr. Young, who then represented Santa Cruz county in the lower house of the Legislature, which he introduced, seeking to get over that difficulty. I forget the exact phraseology of that bill, but I think it authorized the payment of the money into Court, as the Supreme Court, in the case to which I refer, had said that a mere bond could not be considered sufficient security, as the bondsmen might flee the State or get out of its jurisdiction. Secondly, the bill handed to Mr. Young to introduce had a provision that the money might be paid into the State Treasury and the bond of the State Treasurer held good for it. That bill was reported back from the Judiciary Committee, and Mr. Young, becoming somewhat suspicious about it, one day asked leave to withdraw the bill, mentioning it by number and not by title. Of course he got leave to withdraw it. The next day the Chairman of the Judiciary Committee introduced a bill containing another amendment to Mr. Young's section. That went to the Judiciary Committee, and various distinguished gentlemen representing corporations, and others interested in the right of eminent domain, came before the committee and argued very fully this question, and also various gentlemen who opposed that scheme. Now, this bill, that is upon the statute books is a forced compromise, and I think, in the main, is a very good one, or as near right as you can get it where strong powers are brought to bear upon the Legislature. I considered it at the time a very fair compromise measure. There is one thing in it that I do not like. If the man whose property is taken concludes to contest the matter as to whether the taking is for a public use, he must leave the money on deposit, for if, under the bill, he takes an appeal, after taking the money, he waives everything else except the measure of damages. Now, with that one exception, the bill is a good one as it stands.

Mr. EDGERTON. Is the gentleman aware that the very first section provides that the Judge shall order an additional sum to be paid into Court to cover further damages?

Mr. WATERS. The gentleman knows that if a man desires to get anything for his property in the meantime, while the corporation is using it, he must relinquish that question as to whether it is a public use or not. In other words, if the Legislature was to say that the right to take land upon which to dump tailings was a public use, and was to pass a law to that effect, the party could come into Court and defend that it was not a public use. If the company could put up money enough in the Court, and the Judge of the District Court should hold that it was a public use, the company could cover that farm five hundred feet deep with tailings, if it chose, and the farmer, if he had not wit enough to take his appeal, and leave the money in Court where it was placed for him, would have the satisfaction, at the end, to have his farm with an additional territory above it. I think that principle is wrong. In order to have his right to an appeal he should not be compelled to waive that question as to whether it is a public use or not. With that one exception, I say that the law passed last Winter is a good one. I contended, last Winter, that the Supreme Court had decided against the argument of those gentlemen who were in favor of the first bill proposed. I contended that the Supreme Court had adjudged that the preliminary taking is a taking in the sense of the law, and that compensation should be simultaneous with the preliminary taking. In order to remove any doubt, I propose to add after the word "or," in the amendment offered by the Judiciary Committee, and before the word "paid," the words "ascertained and," so that it will read: "Private property shall not be taken for public use without just compensation having been first made to or ascertained and paid into Court for the owner." If you leave it as it is, it might be open to the construction by the Courts and by the Legislature, that if the money paid into Court will be in the nature of security which may remain there for years, and the party have no right to draw it out. Before the taking is had the compensation should be ascertained and paid into Court, and the money should lie there subject to the order of the owner, and not merely as a security. With that amendment I think it is a very good section now. I think the position as to the damages is correctly stated by Mr. Edgerton. I have no factions fight to make upon this. I think we ought to be satisfied if we can get this matter good enough without having an extreme matter put into the Constitution.

Mr. EDGERTON. Mr. Chairman: I have but one additional word, that is as to the last amendment. I do not care anything about it. I do not think it would make it any stronger or any weaker. As to this question of fact I do not know anything of the compromise the gentleman refers to. I do know this, that this law—this amendment to the Code that I have read—was made by gentlemen not connected in any way with a corporation. They were connected with large tracts of territory that had been flooded by the Sacramento River. A large number of them came here attempting to get legislation through, providing for the construction of canals, to straighten the Sacramento River, and to relieve the swamp land districts; and these gentlemen connected this law; these gentlemen pressed it; and these gentlemen waited upon the Executive of the State and brought him to give his approval of the bill.

SPEECH OF MR. BARNES.

Mr. BARNES. Mr. Chairman: This subject of eminent domain is one of paramount interest, and from a professional standpoint, having been engaged in some of the heavy litigation upon that subject, I will invite the attention of the committee very briefly to the history of this right of eminent domain in this State. In the year eighteen hundred and sixty-one, when the amended railroad Act was passed, and long before the people had felt the oppression and difficulties that have grown up out of the management of the railroad system in this State, the people were very lenient to railroad corporations. They were not only lenient, but they laid down everything they had before them. They sought to encourage their construction in every mode in which they could express themselves by legislation. You will see by reference to the Act of eighteen hundred and sixty-one—"an Act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," approved May twentieth, eighteen hundred and sixty-one—and it will be found in the statutes of that year, page six hundred and seven, that in section twenty-two of this Act it was provided:

"Any railroad company, organized under the provisions of this Act, or any railroad company now organized under the laws of this State, which shall accept the provisions of this Act, as herein provided, is hereby authorized to enter upon any land for the purpose of surveying the line of its proposed railroad, the company being responsible for any damage occasioned by such entry; and such company is also authorized to acquire, purchase, and hold, any real estate, or any right, title, or interest therein, which may be necessary or proper for the purposes of the construction or maintenance of the track or tracks, water stations, depots, machine or workshops, turn-tables, or other building or structure, necessary for such railroad; but such company shall not hold such real estate, or any right, title, or interest therein, acquired or used solely or mainly for the construction or maintenance of the track or tracks of said railroad beyond the time of the legal existence of said company, nor after the location of said track or tracks has been changed therefrom, nor after the said company shall have failed, or ceased to use the same, for the maintenance of such track, for the space of five years consecutively; but in each of such cases, the said real estate, and all the right, title, and interest therein, shall revert to the person or persons, and his or their assigns, from whom the same was acquired by said company."

Special proceedings were provided in that Act, under which land might be condemned. It is simply provided that a petition should be

filed in the County Clerk's office setting forth the estate sought to be condemned, and its extent, the names of the persons interested in the land and the nature of their interests, and the Court thereupon should fix a time for the hearing of the petition, and the owner should be notified, and notice of the hearing should be given by publication. The parties owning the land were permitted to make such answer as they could to the petition in the matter of condemnation. Then Commissioners were appointed to fix the value of the lands sought to be condemned. Section thirty says:

"The said Commissioners shall proceed to view the several tracts of land, as ordered by said Court, or Judge, and shall hear the allegations and proofs of said parties, and shall ascertain and assess the compensation for the land sought to be appropriated, to be paid by said company to the person or persons, having or holding any right, title, or interest in or to each of the several tracts of land."

Now, here comes the provision to which the gentleman from Solano objects, and I think with great reason—

"And in ascertaining and assessing such compensation, they shall take into consideration and make allowance for any benefit, or advantage, that in their opinion will accrue to such person or persons, by reason of the construction of the railroad as proposed by said company."

It provided, also, for a new trial, and for the confirmation of the reports. And that—

"Upon the report of the Commissioners being filed for record, as above provided for, and upon the payment, or tender, of the compensation and costs, as prescribed in this Act, the real estate, or the right, title, or interest therein described in such report, shall be and become the property of said company for the purposes of its incorporation, and shall be deemed to be acquired for, and appropriated to, a public use."

The effect of that statute, Mr. Chairman, was simply this: that any railroad company, after it had determined upon the line upon which it would run, and complied with the provisions of the statute in respect to the filing of the proper papers, might enter upon and take possession of any man's land they saw fit, and while still being in the possession of it have a proceeding to condemn it, and Commissioners appointed upon whose judgment the land should be paid for. But the Commissioners were allowed to take into account the benefit the party was to derive from it, and if they thought he got a greater benefit than the value of the land amounted to, the railroad paid him nothing for his land, and it was considered an act of grace that they did not require him to pay for the additional benefit obtained. That law continued until the adoption of title seven of the Code of Civil Procedure. Eminent domain is there defined as follows:

"Eminent domain is the right of the people or Government to take private property for public use. This right may be exercised in the manner provided in this title."

We all know that the right of eminent domain is a right as old as government. I believe it was either Caesar or Nero in Rome that undertook to take the ground of a private citizen for his private garden. That brought about revolution. It is a right that is imported here from monarchical countries. In America the Legislature, instead of exercising the right itself for strictly public purposes, has granted to these quasi public corporations the right to exercise it as an agency of the State. That right is conferred upon railway corporations in the discretion of the Legislature, and they provide the means by which that right may be exercised. It provided, in fact, for Commissioners, and compelled the party to resort to a judicial proceeding in the Courts of the land. The corporation seeking the condemnation of a man's land commenced a suit, and it must all be tried according to the forms of law and under the safeguards which the law provided, and after providing what shall be done, as was stated by the gentleman from Sacramento, they made this change in the railroad law. Instead of the Court being allowed to offset the benefit against the value of the land, the law declared that in any event the value of the land, as proven, must be paid. They paid for what they got. Then the Court was directed that—

"If the property sought to be condemned constitutes only a part of a large 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."

In other words, they direct the Court to consider what a man suffers by reason of his land being cut up into inconvenient shapes; by taking a fair open field where plowing and agricultural work would be done and diagonally cutting it by a railway, so that a man instead of having a fair field to plow would have it divided into an irregular and inconvenient shape, by the railway running through his land in such a way as to divide his upland from the lowland so that it ceased to be valuable for pasture, and diminished its value. All these things were taken into consideration by this section. These were the two elements against the corporation: first, the value of the land; and second, the damages the parties sustained by reason of the severance. Then the Court was directed to take into account how much the property remaining was benefited by the construction of the improvement, and if the benefits should be equal to the damages he should have no damages. If the benefit was less he should have the difference, but in no case was the property owner required to pay anything for the blessing of a railroad passing through his property. Then they also required the Court to find out how much the fences would cost. The company might elect to build the fences and cattle guards and make proper crossings, and that forms an element also in the judgment. If the company give a bond they need not pay the cost of the fences. They give a bond in double the valuation of the fences, cattle guards, etc., and if they built the fences within three years they need not pay the money.

But in connection with this was the proposition that "at any time after the service of the summons"—and there was the injustice of it—

"the Court may 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 and until the final conclusion of such proceedings, and may stay all actions and proceedings against the plaintiff on account thereof; but the plaintiff must give security, to be approved by such Court or Judge, to pay, as well the compensation in that behalf, when ascertained, all damages which may be sustained by the defendant, if for any cause the property shall not be finally taken for public use."

It fell to my lot to contest the constitutionality of that provision in this State. It was in the case of the Spring Valley Waterworks vs. the San Mateo Waterworks. Under that statute the Judge of one of our Courts made an order, allowing the plaintiff to go into possession of property sought to be condemned, upon filing a bond in a very small amount. He affirmed the constitutionality of the act, and I invited him to the Supreme Court upon a petition for a writ of review. It is to be found in the fiftieth volume of California Reports, the case of the San Mateo Waterworks vs. the Judge of the Twelfth District Court. I read from the syllabus:

"After summons had been served on the defendant, the Court made an ex parte order, upon the application of the plaintiff, permitting the plaintiff to take possession of and use the land during the pendency of the proceedings, upon executing a bond in the sum of ten thousand dollars, for the payment to the defendant of the compensation to be ascertained, and also for the payment of damages if the property was not finally taken. This was on application to the Supreme Court to review the order as in excess of jurisdiction."

Now, by the Court:

"The taking in this case amounts to a taking of private property for public use in the sense in which that phrase is used in the Constitution, and can only be effected upon the conditions prescribed in the Constitution—that is, upon just compensation being simultaneously made. Order annulled."

They followed that up with another case, Sanborn vs. Belden, in the fifty-first of California Reports. Gentlemen will find it on page two hundred and sixty-six of that volume. It was a railroad case, where the Santa Cruz Railroad Company commenced proceedings in the Twelfth District Court, County of Santa Cruz, to condemn certain lands of Sanborn and others for the use of its road. After summons had been served, the Court made an order, under section one thousand two hundred and fifty-four of the Code of Civil Procedure, authorizing the company to take possession of and use the land sought to be condemned until the final conclusion of the proceedings, upon giving bonds to pay damages. The bonds were given and approved, and a writ of assistance issued out of the Court to the Sheriff, who, by virtue thereof, placed the Railroad Company in possession of the land. The owners of the land thereupon obtained a writ to have the proceedings certified to the Supreme Court for review. Now the Court says:

"It is not necessary, in this case, to decide whether, under the Constitution of California, it is essential to the validity of a law for the exercise of eminent domain (when the property is taken directly by the State, or by a municipal corporation by State authority) that it should provide for tender of pecuniary compensation before actual taking."

"When property is taken by a private corporation, which, although for this purpose it is regarded as the agent of the State, appropriates it as well for the benefit and profit of the members of the corporation as for the public use, it is at least essential that an adequate fund (in the custody of an agent of the public other than the corporation or its officers) be provided, from which the owner of the property can certainly obtain compensation. As remarked by Mr. Justice Cooley: 'It is not competent to deprive him (the citizen) of his property, and turn him over to an action at law against a corporation, which may or may not prove responsible, and to a judgment of uncertain efficacy.' (Con. Lim. 562.)"

"We are satisfied that wise policy and sound constitutional principles require us to hold that a bond, executed by sureties who may be supposed to be, or who in fact may be, responsible, when the preliminary order is made, does not constitute a certain and adequate compensation."

"If the corporation has acted on the order of the District Judge, the property of the petitioners has been actually taken. (San Mateo Water Co. v. Sharpstein, 50 Cal. 284.)"

"If it be competent to the Legislature to declare that a mere bond shall constitute compensation upon a taking at the commencement of the condemnation proceedings, it might also declare that such bonds should constitute compensation upon the final taking—which would operate a plain violation of the provisions of the Constitution restraining the exercise of eminent domain."

They then put the corporations in this fix. They could no longer march upon a man's land and go to work to construct their railway; break up his farm, march down his crops, and make their way through by giving him a bond; but when they came to the line of a party's property there they had to stop and wait until the Court had determined what they should pay, under this provision of the statute, and pay it before they got through. These cases proceeded in that way, and it was found that notwithstanding a man's neighbors came forward and testified in favor of the owner of the land, at least putting what might be called a fair valuation on the land, and the company was willing to pay that price, after the case was tried and the judgment rendered and the damages assessed, there were still questions upon which a party might appeal and take it to the Supreme Court, and prevent a needed public improvement from being advanced as it should be. In other words a man could lie like a hog as against the rights of all his neighbors, as against the rights of every farmer, as against the right of every traveler, and could stop them until he could take it up to the Supreme Court and could make it the means of extorting more money than the Courts or the jury of his own county in their wildest and most generous extravagance could see

fit to give him. The Legislature was again resorted to, and it was provided that:

"At any time after trial by jury and judgment entered upon their verdict, 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, or Judge thereof at chambers, as a fund to pay any further damages and costs that may be recovered in said action, 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 District Court in which the action was tried, or the Judge thereof at chambers, may, upon notice of not less than ten 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 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 of the Court, or Judge thereof at chambers. It shall be the duty of the Court, or Judge, upon application being made by such defendant, to order and direct that the money so paid into the Court for him, be delivered to him upon his filing a satisfaction for the judgment, or upon filing a receipt therefor, and on abandonment of all defenses to the action, 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 the defendant, as aforesaid, shall be held to be an abandonment, by such defendant, of all defenses interposed by him, excepting his claim for further compensation. In ascertaining the amount to be paid into Court, the Court, or Judge thereof at chambers, 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, deficiencies, 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, or the Judge thereof at chambers, shall order the money to be deposited in the State treasury, and it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for and safely keep the same in a special fund, to be entered on his books as a condemnation fund for such purpose, and for such duty he shall be liable to the State upon his official bond. The State Treasurer shall pay out such money, so deposited, in such manner and at such times as the Court, or Judge thereof at chambers, may, by order or decree, direct."

In other words, the money has to be paid into Court. The County Clerk deposits it with the State Treasurer. It does not make any difference if it is lost or stolen, the fund has to be kept good by the corporation all the while, fully and completely. Now, it seems to me that if the right of eminent domain is to be maintained at all, that there can be no fairer mode than that provided by this statute. It is, as gentlemen will see, in harmony with the decisions of the Supreme Court of the State. The Courts have infringed upon the privileges of the corporations so that they can no longer take a man's property without paying for it. They can no longer take it at their own valuation, but they must take from the jury a judgment, and if, during an appeal, they want to take it, they must go to the Judge and he shall name a further sum which shall be sufficient, in his judgment, to cover all further costs. And that is all of the right of eminent domain to be maintained, that the citizen ought to have. The early legislation was all in favor of the corporation. The later legislation acts, as it ought to act, and as I hope it will always act, in favor of the individual and against the corporation.

There are a great many purposes contemplated in this eminent domain law. The right to condemn land for the purpose of providing a deposit for the material from the mines, for canals and waterways, for a thousand purposes as necessary to agriculture and to mining as they are to any of the railroads. And when we have now, at last, after so many years, pushed this question back upon the corporations until it puts them in the position that they cannot take any man's property until they pay for it, and at its full value, I do not see why we need alter the Constitution. It may be said that the Legislature that has encroached upon the privileges of the corporations may recede from that position and put them back where they were. It may be well, and it seems to me that we ought to put in the Constitution some clause that shall epitomize and give eternal effect, in the shape of an organic declaration, to these principles laid down in this line of decisions, so that the Legislature shall not have the right to recede from the position into which they have been urged by the people. We want to see that the corporations do not get a verdict in their favor and secure the reenactment of the Act of eighteen hundred and sixty-one. That we all want to look out for. That, I am sure, I am as anxious to prevent as any gentleman on this floor. Then let us take hold of it and make sure of that law.

I do not like the idea of the gentleman from Solano, because you take the case of county roads; that is a matter in which every neighborhood in this State is interested. Now, when you go to condemn a piece of land—

Mr. DUDLEY, of Solano. Mr. Chairman: The amendment as it now stands does not apply to the county roads, nor swamp land districts, nor streets in towns, or anything of that kind.

Mr. BARNES. Mr. Chairman: That is what I am coming to. That is what I understood. There can be no doubt of this, Mr. Chairman, that any man who owns property should not, under our Constitution or under the principles of the Government under which we live, be deprived of it for any purpose or object, except upon just compensation being made. Now, the motion of the gentleman from Solano is that if a man has a farm, and a county road is put through it, he should not have pay for his land, provided that the benefit is equal to the damage. I say that in all cases the man is entitled to be paid for his property, no matter who takes it, whether it is a county or municipality seeking to condemn land for any purpose, or whether it is a railroad seeking to condemn it for its road. That is the first principle that the Constitution must look to—payment for the land; and payment in money, not promises. The principle of assessing benefits and damages seems to be somewhat misunderstood. The rule of the Courts in this State and in the other States is that the assessments of land shall not be reduced by reason of the general benefit that accrues to the country. A railway coming through any sparsely populated country must, of course, increase the value of the property. There is no question about that as a general proposition. But that is not the benefit that is meant. It is where the benefit is peculiar and especial to him, and not one shared by him in common with all the rest.

Under these decisions, and with these principles in view, there certainly cannot be any difficulty in our arriving at a proper conclusion. These principles have been established and stand upon the provisions of these Acts as construed and maintained and directed by the Supreme Court of the State, and the Constitution ought not to be amended, except that the rights of the citizen as now guarded, as against this great and growing power, should be maintained, so that never hereafter shall the State recede from this position, or place the citizen for an hour at the mercy of combinations, from whatever source they may come. I think the people of the State require it and ought to have it. The tendency of the times is towards popular rights and popular liberty, and wherever a point can be put about it, there is where the good work here will be put in.

#### REMARKS OF MR. SHAFER.

Mr. SHAFER. Mr. Chairman: I would ask to have the amendment proposed by the gentleman from Solano read.

The CHAIRMAN: The Secretary will read the amendment for information.

The SECRETARY read:

"And no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury in a Court of record, as shall be prescribed by law."

Mr. SHAFER. Mr. Chairman: I hope that the Convention will retain the section precisely as it comes from the Committee on Judiciary, and for the reasons which have been so clearly given by the gentleman from San Francisco, Mr. Barnes.

The rule adopted in the formation of our earlier Constitution was to confine its provisions to a general declaration of principle, leaving all that related to their execution to the Legislature. In case of simplicity of object and expression, the Constitution often executed itself, and in other cases, on account of jealousy of the legislative department, elaborate provisions were inserted providing for all the details necessary to the accomplishment of the general principle. This latter course, it seems to me, is only to be justified in case of actual necessity. It is an open attack upon and assumption of the purely legislative function. The existing statutes seem to be attempts to effectuate the promise of our present Constitution, that private property shall not be taken for public use "without just compensation" shall be made therefor. It has always seemed to me, that the statutes of eighteen hundred and sixty-one, and other years, violate, instead of executing this provision. I know the books say, that the deposit of money in Court, or perhaps, in the hands of some public officer, subject absolutely to the call of the owner of the property taken, is sufficient, and that by such deposit the compensation is made. But how the county liability, or that of some individual who has given security, is the equivalent of money, it is impossible to see. In the one case, the injured party gets his compensation—money; in the statutory case he has a right of action merely. It doubtless is the purpose of the Committee of the Judiciary to prevent such legislation in future. As to corporations other than municipal, the committee proposes to provide that the owner of the property condemned shall be compensated in money before his property is taken. As they propose the provision stands.

"Private property shall not be taken for public use without just compensation having been first made to, or paid into Court for, the owner."

The phrase "having been" involves the idea of a completed transaction, and the word "first" seems to add nothing to it. It, however, is there; it may add something to the precision of the idea involved, and may as well stand. The gentleman from San Bernardino now moves to insert "ascertained and." I do not see that these words change in any way the true construction of the provision into which it is proposed to insert them. They neither add to, nor take from, the force or effect of the words already used. What is the compensation spoken of? It is an ascertained sum agreed upon by the party that takes, and the party that pays, as settled and adjudged by some competent authority. The objection to this proposed amendment is, that it covers more space, creates a question of construction without any necessity therefor, and leaves the true interpretation, after it is ascertained, just what it was before the interpolation. The character and intention of this section fourteen is well worthy of further attention. For what is the compensation provided for therein given?

The old Constitution provides that "just compensation shall be made."

when private property is taken for public use. Under this provision the increase in value of adjacent property belonging to the party whose land is taken, may be deducted from the value of such land, the balance being treated as the just compensation intended. That is, the party shall be made whole. This liability to pay applied to all corporations alike. This section proposes changes, not only vital in themselves, but unjust in their discriminations. The right in the owner of private property taken, is now declared to be, to pay for that taken and for damages to all other property of his which is incidentally damaged by the proposed public use. But when it comes to the question, shall the benefits resulting from such improvement be considered and deducted from the value of the land taken, and damage to other property, there is an important distinction made. The municipality, by legislative enactment, may be enabled to deduct the benefits from the sum it would otherwise have to pay, while the railroad or turnpike corporation is prevented from acquiring any such right of offset. The right of the owner is just the same in both cases—to be made whole. If the owner of the property taken has any just or moral claim to be paid, without regarding his improvements, the municipality shall so pay; if not, the railroad should not pay.

Originally, there was serious question whether railroad corporations had the right of condemnation. This right was at last judicially declared—with many wry faces—upon the sole ground that these corporations were quasi-public; that is, the use to which they devoted property was public, and to the extent of such use they were performing a part of the functions of the State, by maintaining a variety of highway. That the corporation which charges itself with the performance of a duty which the State owes its subjects can be rightfully charged with liabilities which the State does not recognize as to itself, does not seem philosophical or just. The discrimination between different classes of corporations is no more unjust than is the provision itself. A corporation runs its road along the side of a hill; on the one side the excavation makes a bluff, or embankment; on the other, the cut is left at the grade of the road. The upper lot, or field, rendered less accessible, is damaged a hundred dollars; the lower portion is benefited a thousand dollars. The road must pay the hundred dollars, but is entitled to no recompense for the augmentation of value which it has created. That this provision is intended to punish or penalize railroad corporations, and not to do justice, is not only apparent from the considerations which I have already stated, but the fact is made further apparent by the provisions now before us relative to counties, cities, and towns. In the report of the committee having charge of these matters, it is proposed that the expense of roads and streets shall be met upon the property benefited, however remote from the road or street to be opened. In this latter case "benefits" are set-off against "damages." The object attained is just compensation to the citizen who is injured. The natural persons assessed are required to pay money enough, and no more, than the person whose property is taken or damaged is entitled to have. The innocent, however, five persons incorporate, their liability is enlarged; not because the person to whom payment is to be made has suffered any more, or is morally entitled to more or less, but because it is thought a fit and proper exercise of governmental authority to wrongfully take a corporation's money and give it to a man who has no just claim to it. It makes, in the minds of some, a marvelous difference whose ox is gored, and whose bull it is that has offended. From these considerations, I think that the proposed section is unjust, and ought not to be approved. There is another difficulty important to be considered. There is, doubtless, an appeal to be allowed from the judgment fixing damages. This will create large delays, seriously postponing important and pressing public improvements, including streets and highways as well as railroads. Now, is it advisable to allow such appeal to have the effect of producing great inconvenience and public loss; or is it not better to allow the work to proceed upon depositing the assessed damages with the Court, leaving the corporation subject to any increase which may result from a new trial?

These questions, it seems to me, are properly subjects of legislative action, and to the Legislature they ought to be left. It is, however, useless to press this consideration. This section presents a feature quite unusual, here—a general declaration of a principle—an attempt at inserting executive provisions but half accomplished, and leaving to the Legislature the task of finishing up the work, and of extricating, if possible, the subject from the muddle which the Constitution creates.

#### REMARKS OF MR. HERRINGTON.

Mr. HERRINGTON. Mr. Chairman: I would like, myself, to offer an amendment if it were possible to be done. I am opposed to the amendment offered by the gentleman from Solano, and for this reason. It permits precisely the very thing which we have always attempted to avoid—that is, allowing in the exercise of the eminent domain, the parties to take the property in the first instance, and then compel the other parties to sue for damages that may accrue. That ought not to be done, and I submit, in engrafting upon the organic law measures of that character, I am opposed to considering the effect that it will have upon the interests of the general public. It is well understood that the exercise of the right of eminent domain, is vastly different in its character from the established proceedings in a Court of justice, and under that state of circumstances the jury need not necessarily appraise the property. The consequence is, that if the Legislature see fit they may appoint any other tribunal to determine that question. "Due process of law," as was defined the other evening by my friend from San Francisco, Mr. Barbour, had reference, as was stated, to twelve jurors—to a trial by twelve good and lawful men. I know that such has been some of the decisions. I know that among the many opinions rendered upon the subject—in a case in the Thirtieth N. Y., *Wynehamer vs. The People*—I believe, three or four Justices gave the opinion that it had reference to the common law jury. Now, Judge Cooley defines "due process

of law" to mean "such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Now, to what class does it belong when it comes to the question of property? Unless you put it in your organic law, and in language that cannot be mistaken, the present provision you have in your Constitution, securing jury trial, will not give you a trial to fix your compensation for damages after the taking of the property. I desire to have it fixed in this identical provision that a jury trial may be had. And I desire that the jury shall determine in the first instance, the amount of compensation which any party shall be paid whose property is taken. There are none of us but want that. I am not desirous that any different rule from that which has prevailed, with reference to municipal corporations, should be adopted, but I am desirous that in every instance the jury shall determine the compensation to be paid. It is the most fatal blunder in the world to incorporate anything of that kind in a constitutional proposition. I propose to offer this amendment, if this one now pending is defeated:

"Amend section fourteen as amended by the Committee on Judiciary and Judicial Department, by adding thereto: 'And the amount of compensation shall be without rebate for benefits to accrue, and shall be first determined by a verdict of a jury, or as the parties interested shall agree.'"

There is nothing lumbering about that. That cuts to the marrow bone. It fixes your railroad companies and binds them to have the question tried before a jury. It makes one law govern all cases. I am opposed to allowing bonds to be given. I did not feel that under my duty here before this body I could sit still and permit a provision of that character to be voted upon without entering my protest against any such measure. It has been engrafted in our laws in the very birth of the Constitution, and the Courts have gone so far even as to issue orders directing the Sheriff to put parties in possession of property under such circumstances. Of course the Supreme Court held that that could not be done under the Constitution; but it has put a great many of our private citizens to a great deal of trouble. These are the things which we seek to avoid. If there is any hardship, let those other parties undergo the hardship.

I am opposed to this amendment for the reasons I have offered. I think it is a fatal provision to insert allowing any such things as bonds to be given and property taken in that way. I hope the amendment will be voted down, and I shall have an opportunity to present this amendment, and that it will be adopted.

#### REMARKS OF MR. DUDLEY.

Mr. DUDLEY, of Solano. Mr. Chairman: I did not expect, when I offered that amendment, that it was going to create so much discussion. It is admitted finally by the gentleman on my left that the rule is to offset absolute damages by supposed benefits. Now, my amendment covers that one single idea alone and no other; that is, that absolute damages shall not be set off by supposed benefits. There is no question of bonds. Neither does it enable any individual to file in the way of any corporation in any manner that does not now exist. The amendment refers simply to corporations other than municipal. So far as swamp land districts, counties, towns, or any other municipal corporation is concerned, it does not affect them at all. The clause provides that "no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or secured by a deposit of money by the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury in a Court of record, as shall be prescribed by law." That is the one idea in the amendment—simply to prevent the offsetting of absolute damages against supposed benefits. It does not affect streets or public roads. And there is this difference between a railroad and a public road. A public road is generally run at right angles, and does not cut up farms into inconvenient shapes, while railroads are the very reverse of that rule. That alone might form one reason for making a little difference. Gentlemen have sought during this discussion to mystify and lead astray gentlemen of the Convention upon this subject. They have tried to make it appear that it is all right now. It is asserted that after a good deal of trouble we have Judge-made law to cover the case. We have got the decisions of the Supreme Court. Now we are providing a new Constitution, and under that Constitution there will be new legislative enactments. For the purposes of not troubling any judges to make law, I propose that this Constitution shall have this clause, which shall make it a law unto itself.

#### REMARKS OF MR. MILLS.

Mr. MILLS. Mr. Chairman: I have listened with a great deal of interest to this discussion, and it has mainly been on the question of what is compensation. Now, the law respecting the taking of private property, provides that before property can be taken, it must appear, first, "that the use to which it is to be applied is a use authorized by law; second, that the taking is necessary; third, if already appropriated in some public use, that the public use to which it is to be applied is a more necessary public use." Under that proposition, sir, the question as to the necessity of its being taken for that particular use, is made a question of law alone, and is never submitted to a jury. The right to submit that question to the jury is denied by the Court. Whether it be necessary to take property or not, it seems to me, might be the first question and the main question for the jury to determine. An attempt may be made to locate a public highway across an orchard or through a man's garden, or through his door-yard. Now, should that question not be submitted to the jury? It seems to me, sir, that it should. I am in favor of the amendment. The rule has been well settled that general benefits are not to be counted, but it not infrequently happens that the

damage to the land that is taken is very small while the damage to other property not taken is very large. It seems to me that this amendment places it beyond question. How can it be said that there are any other benefits than the benefit to the whole community? What particular benefit is it to a man to have a railroad run directly through his place? It seems to me that this amendment will put that question at rest and settle it.

## REMARKS OF MR. CROSS.

MR. CROSS. Mr. Chairman: This right of eminent domain is perhaps the highest right exercised by government; a right under which one individual really gets the benefit of taking away the property of another without the consent of the owner. Now, if that is the highest prerogative of this government, it ought to be guarded, and pretty well guarded too. In framing a Constitution, we should put into it such provisions as we think will protect private rights, and the proposition of the gentleman here that it is not the proper place to guard these rights in Constitutions, is disputed by the fact that a large number of Constitutions have incorporated similar provisions. One of them has almost the words in which Mr. Dudley has proposed it. The Constitution of the State of Iowa has a provision which I will read:

"Private property shall not be taken for public use without just compensation first being made, or secured, to be paid to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to the said owner on account of the improvement for which it is taken."

Now, the proposition clearly stated, as I understand it, is this: The proposition first proposed to the committee amounts to this, that if the railroad company means to take half of my land, and takes it in such a way that not merely the land is taken but adjoining lands are injured, then the question will take the shape stated by Mr. Barnes. If the railroad runs between my house and my barn they pay for the acreage taken. They may also be assessed for the damage which it is to me to have a railroad between the house and barn, but they may offset against that the fact that I may derive some advantage by having the railroad so located. Now the objection to leaving the definition in the shape that the benefits may be offset against the damages, is illustrated by a case like this, which came within my personal knowledge. The railroad which runs from the City of Chicago to the City of Joliet, in condemning a right-of-way, had to take from a large building the ground upon which a wing of the building stood. Now the community were greatly interested in having that railroad constructed. Their minds were inflamed with ideas of the great advantages to be derived. So they took the ground upon which the wing of the house stood and the railroad track run within thirty feet of the side of the building. When the jury came to assess the damages the evidence introduced as to the benefit which would result was to this effect: that this building was a large building; that it could be turned into a boarding-house or a place for the traveling public to put up; people would put up at the house on account of its proximity to the railroad; and that the advantages to accrue in that way would more than offset the increased danger of fire and the inconvenience of alarms at unreasonable hours, and other prospective damages. And the jury brought in no damages on account of the proximity of the railroad track to the building. But when the man came to try it on and make a boarding-house out of it, he found the station located at another place, and the result was that the man's property was ruined. The danger in this class of cases is this—and I refer to General Howard for the experiences of southern California during the late construction of railroads in that country—that when men hear of a railroad coming they almost think that it is heaven come down to earth. Land worth five dollars an acre is going to be worth fifteen or twenty dollars an acre. Sometimes that happens and sometimes it don't. But the ordinary jury, as to the question of benefits, do become inflamed until they give unreasonable benefits, and that will be the observation and experience, I think, of men who have seen the thing. I have seen railroads constructed in a certain town where a man could hardly get the government price for his land, on account of the inflated sentiment of the public as to benefits. But what is the fact? The land adjacent that is not taken is benefited even more. The men whose lands are immediately adjacent do not get the benefit. Who does not know that the lots one or two or three blocks off are even more benefited? Then the result of the rule amounts to this: that the man over whose ground the railroad is constructed receives really no benefit from the construction of the road, because they take from him the measure of damages, or take it in such a way that he receives no benefit. But other men, through whose land the railroad does not run, get the benefit of the railroad and stand no part of the damage.

Now, as to this legislative provision, it seems to me that in the main it is a very good one. But we have not merely to inquire as to the quality of the present legislative enactment. We have to inquire as to the certainty of its being a permanent provision. If this enactment of the Legislature is in that shape that no railroad influence can shake it; if it is in that shape that twenty-five years from now it will stand just as it does to-day, it might answer the purpose very well. But who is not familiar with the fact that not only in this State, but in every State in the Union, the railroad power has been strong enough, whenever it took the matter thoroughly in hand, to control legislation, and to get such legislation as it seemed to want. Now, sir, we have a duty to perform here in making such a permanent provision in regard to this matter as seems to us necessary and right. The question is asked, what difference is there between the method of assessing damages for laying out a public road and for laying out a railroad? My idea of the matter is this: when you have laid out a public road every man has a right to the benefits of that road without cost or expense, and it is maintained by the public taxes. But when we come to talk about a railroad, railroads are not built for the public good. They are built for private gain,

and if any man desires to have the benefit of the railroad he can have it by paying just what the railroad company asks him for enjoying the privilege. This is one difference, or one reason why the rule for laying out a public road and for damages in such a case is not a good rule for damages in the case of these quasi public corporations who may take private property for their public use. As was suggested here, these prospective damages can be taken into consideration as well as the prospective benefits, and I will give you a true example of it from the words of one of the gentlemen who spoke on the other side. It was said that under these provisions a farm might be taken to be used as a place to deposit tailings. Suppose that can be done under the principles which they want left in the Constitution, whenever parties propose to take a farm as a place to deposit tailings upon, the man who proposes to take it as a field to dump his tailings on has the right to say to the man whose land is taken, "Sir, tailings will improve your land. True, I take your land to deposit tailings on, but in five years the tailings will make better soil than you have to-day." Then the jury take into consideration the fact that at some future time the soil will be better than it is now. That is an illustration of the result of what the gentlemen want to engraft upon this system. But if, as they say, to put this provision in here will have no effect, I ask why it is that since this question has been up certain gentlemen, whose motives and intentions are not known, are standing about the doors of our Convention, and sending in for gentlemen to come out and talk with them on this very provision? I ask, if this has nothing to do with these matters, why it is that gentlemen who have been guardians of these rights for some years back are excited, and make such eloquent speeches on these matters? I wish that some abler man than I could deal with this question, some man who could rivet the attention of this body to the real question at issue for a moment, would stand up here and advocate this matter. But the principles we advocate are right and we must stand for them. That is what we are here for, and if we cannot talk—well, we know how to vote right on such propositions. [Applause.]

MR. BARTON. Mr. Chairman: I do not intend to make a speech upon this proposition at all; but, Mr. Chairman, I desire to say a few words. If the members of this Convention desire to do the people of this State a good—if they desire to render the people of this State a safeguard—they will not listen to the sophistries of the gentleman opposed to this amendment, but they will put this safeguard in the Constitution in behalf of the people. I shall support this amendment, and these are the reasons why I shall support it: because I believe that it is the only safeguard that can be placed in this connection.

THE CHAIRMAN. The question is on the adoption of the amendment offered by the gentleman from Solano, Mr. Dudley.

The amendment was adopted.

THE CHAIRMAN. The question recurs on the amendment offered by the Committee on Judiciary as amended.

MR. HITCHCOCK. Mr. Chairman: I have an amendment to offer.

THE SECRETARY read:

"Private property shall not be taken for private use, with or without compensation, unless by the consent of the owner, except for right of way for drainage ditches across the lands of others for agricultural, mining, and sanitary purposes, in such manner as may be prescribed by law."

MR. HITCHCOCK. Mr. Chairman: My reason for offering that amendment is to cover an interest in the county in which I live, and I think the same interest exists in a large portion of the State. It is to secure the right of drainage. During the winter our land is subject to overflow, and now we have no means by which we can get drainage. One individual can block up a country of ten or fifteen thousand acres of land, and you cannot buy a right of way from him. There was a bill to cover our case, but it was inoperative because it was considered unconstitutional. We think there should be some way provided in this Constitution by which we could have the power, by paying for the right, to reclaim our lands. That is all.

MR. TERRY. Mr. Chairman: I offer an amendment to that, to follow after the last word of that.

THE SECRETARY read:

"Provided that any resident of this State who is, or who has filed his declaration of intentions to become, a citizen of the United States, and who is not the owner of one hundred and sixty acres of land, may enter upon, take, and hold, for the purpose of cultivation or residence, any unoccupied or uncultivated land in this State, not exceeding one hundred and sixty acres, upon his paying the owner thereof, or depositing to his credit in a solvent bank, the value of such land, as the same is entered upon the assessment roll for State and county taxes made last before such entry, with twenty per cent. in addition to such assessment value, and from the time of such payment or deposit the party so entering shall be the owner of, and be entitled to the exclusive possession and use of such land."

MR. TINNIN. Mr. Chairman: I rise to a point of order. It is that the amendment is not germane to the subject before the house.

THE CHAIRMAN. This amendment was only read for information. It was offered as an amendment to the amendment offered by the gentleman from San Joaquin, Mr. Hitchcock. The Chair is of the opinion that both are in violation of Rule Twenty-eight, which says: "No subject different from that under consideration shall be admitted under color of amendment."

MR. WATERS. Mr. Chairman: I move to amend section fourteen so that it will read: "Private property shall not be taken for public use without just compensation having first been made to, or ascertained and paid into the Court for the owners."

I will state briefly the object of my offering this amendment. The reason is this: the amendment proposed by the Committee on Judiciary is good, with the one exception that it allows the property to be taken when the complaint is first filed in the suit, by making a deposit in

Court. Now, it seems to me that is not the object of this Convention, but that is the way it reads, and it has been adopted. In other words, it says the taking shall be when the money is paid into Court as security. Now, as I understand it, the Convention does not wish the deposit put there as security. It seems to me that this Convention adopted that amendment without consideration, or without understanding it. That is its effect, unless I have mistaken its reading. Now, the reason why I support this amendment in preference to that part of the old Constitution upon the same subject is this: this clause, as Judge Cooley says, is liable to construction, one way or the other, and while we are sitting here we should do away with the chance of misconstruction. I think we should make the terms so plain that the Supreme Court, or the Supreme Court lawyers, may not be able to get around it. It says that the damages shall first be ascertained and paid into Court, where they can get them, after being ascertained by the jury; that he can receive his pay, if he desires to receive his pay, or he can let it remain there until the final termination of the case. I think that that is all we could ask, and it seems to me that the Convention should adopt it. But the amendment you have already adopted, although it allows them to take the property of that man, he may not have the right to go there and draw down the money. I think that is a mistake you have made.

Mr. BARNES. Mr. Chairman: During the remarks of the gentleman from Nevada, Mr. Cross, I had occasion to speak to a member in another part of the room, and I went there and did not hear his speech, at least not all of it. But following that the amendment was adopted. I think that there should be some little care about the adoption, and certainly about the phraseology of an article that is to stand for so long a time.

[Cries of "louder."]

A very distinguished gentleman was once making a speech and somebody kept hallooing "louder, louder," and he said he doubted not that at the last day, when the heavens should be rolled away as a scroll, and the elements were melted away with fervent heat, and men should be summoned to the judgment, there would be some fellow from that part of the hall hallooing "louder, louder." I think if the gentlemen wish to listen they can hear. But with reference to this amendment, I wish it to be understood that I desired, and I so stated, to see the results of the statutes and the decisions of the Supreme Court crystallized into this Constitution, so that they will stay there. That was my idea, and I supposed that the debate would continue long enough to enable us to effect that object. I would suggest now that this section be referred back to the committee for to-night, to present to-morrow a properly phrased amendment to the section, if the committee so desire, which shall fix it so as to conform to the statutes as now determined by the Courts of the State.

Mr. DUDLEY, of Solano. Mr. Chairman: That amendment that I offered is couched in the identical language contained in the Constitution of Alabama. I did not trust my own ability to express ideas in language to suit the gentlemen here.

Mr. BARNES. Mr. Chairman: I did not mean to reflect on his language or upon the law of it as it stands, only to put it together properly. I was not criticising any particular thing.

Mr. DUDLEY, of Solano. Mr. Chairman: I do not know what objection there is to it. The first part of the section stands exactly as reported by the Committee on Judiciary. The latter part of the section reads: "The right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury in a Court of record, as shall be prescribed by law." Now I have no pride at all with regard to the manner in which the ideas shall be expressed. I only ask that this Convention shall stand by the decision it has made. I have no objection to its being couched in other language. But I believe, that considering the fact that it is expressed in English, that one part is written by the Committee on Judiciary, and that the balance is expressed in the language that has been adopted in the Constitution of the State of Alabama, you might as well stand by it.

The CHAIRMAN. The question is on the adoption of the amendment offered by the gentleman from San Bernardino, Mr. Waters.

Mr. DUDLEY. Mr. Chairman: I would like to ask whether, if this amendment is adopted, my amendment will stand as a part of the section.

The CHAIRMAN. No, sir; it will not. If this is adopted it will strike out the amended section.

Mr. ESTEE. I rise to a point of order: that there can be no amendment made to it that strikes that amendment out. If I understand that the amendment proposed by the gentleman from San Bernardino will entirely wipe out the amendment that was presented by the gentleman from Solano, I hold that it is out of order.

Mr. WATERS. If that is the case, in view of the fact that I do not think the Convention desires to put in a clause that this is a mere security to be placed in Court, and as that seems to be the evident construction, I move that the vote by which that amendment was adopted be reconsidered.

Mr. HERRINGTON. I second the motion.

Mr. ROLFE. Mr. Chairman: I think the same object can be accomplished in a different way, if the gentleman will change his amendment by simply moving to insert the two words "ascertained and" between the words "or" and "paid."

Mr. WATERS. I would state to the gentleman that only having heard it read, and not having it before me, I cannot put in the amendment there.

Mr. HAGER. Mr. Chairman: I would like to hear the proposition read in a way that we can hear it. I am unable to tell what it is. I thought that the amendment as reported by the Committee on Judiciary

would stand as reported, and that the amendment of the gentleman from Solano would come in after it. If I understood it properly, the section reported by the Committee on Judiciary still stands and is not stricken out. Now, then, if I can hear it read, and if we can all hear it read, we will understand it.

Tax SECRETARY read:

"Amend section fourteen, by adding the following, namely: No right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury in a Court of record, as shall be prescribed by law."

Mr. HAGER. Mr. Chairman: I ask that the proposition be read as amended. The Secretary reads the amendment. I want the proposition read as amended.

The SECRETARY read:

Sec. 14. Private property shall not be taken for public use without just compensation having been first made to or paid into Court for the owner. No right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury in a Court of record, as shall be prescribed by law.

Mr. HAGER. It reads as I suppose it was intended to be. That is the first proposition as reported by the Committee on Judiciary stands as it was reported by them: "Private property shall not be taken for public use without just compensation having been first made to or paid into Court for the owner." In that it is provided that private property shall not in any case be taken without compensation being made to or paid into Court for the owner. That stands as it is. Then comes the succeeding amendment about the right of way. Now, there may be a little conflict between the two propositions. The one relating to the right of way seems to adopt a rather different rule in order to ascertain the damages from what the first proposition does in regard to private property. That is, that one must be paid to the owner, or into Court for the owner, and that the other seems to squint at the idea that it may be in some way secured. It would open the door for a bond, or something of that kind. I think it should read right; that compensation being paid to the owner, or being placed in Court for him, he could be able to obtain it; and so that those who wish to make improvements shall pay it after the jury has made the award of the proper compensation. It ought to be secured beyond a peradventure that he should have a right to get the money out whenever they are put in possession.

Mr. EDGERTON. Mr. Chairman: I have but one word to say. The author of this amendment, in his zeal to wrestle with a question that has exercised the finest jurists in this country, who have sought to place this right of eminent domain on a footing that would be just to the people and to those who want to condemn, has run off to a foreign Constitution and abstracted a provision which restores the whole question to the place where it was before this last legislation was had. The gentleman from San Bernardino, Mr. Waters, is entirely right when he says that it robs the owners of private property of the benefit of every beneficent provision as contained in the laws as they stand. Any railroad corporation, under this amendment, can walk into any man's farm and file a bond and take his property and go ahead with it. A deposit of money or security—

Mr. DUDLEY, of Solano. Secured by a deposit of money.

Mr. ESTEE. Mr. Chairman: I certainly think that this thing is a little mixed, and I think that in order to clearly express the views of this Convention, as indicated by the adoption of the amendment offered by the gentleman from Solano, that it would be wise to re-refer it to the committee to formulate it so that it will express the idea desired. Certainly, I hope it will not be adopted in its present shape. In that respect I agree with the gentleman from San Bernardino, Mr. Waters, and to some extent with the gentleman from Sacramento. I move that the committee rise and recommend that this section be re-referred to the Committee on Judiciary, with instructions to formulate it so as to contain the ideas expressed in the amendment.

Mr. EDGERTON. Mr. Chairman: I have one word to say in regard to the reference. I wish to advise the Convention of this fact, that this subject was most maturely considered in the committee. I do not see any use in sending it back to the committee, because it would undoubtedly come back from them with the same recommendation that they have made.

Mr. ESTEE. Let it come; but we do not want that section as it now is to go into the Constitution.

The CHAIRMAN. The question is not debatable.

Mr. BARTON. I desire to make an amendment.

The CHAIRMAN. The question is not debatable.

Mr. BARTON. I wish to amend the gentleman's motion, that it be referred back to the Committee on Preamble and Bill of Rights.

The CHAIRMAN. The gentleman from San Francisco, Mr. Estee, moves that the committee rise and report this section to the Convention, and request that it be referred to the Committee on Judiciary.

The motion was lost.

The CHAIRMAN. The Chair will state the precise condition of the question: Section fourteen, as reported by the Committee on Judiciary and Judicial Department, is reported as an amendment. It has not been adopted by the committee. It stands as an amendment offered. The gentleman from Solano moved an amendment to that amendment, and it was adopted. The gentleman from San Bernardino, Mr. Waters, moves to strike out and insert a substitute which he has offered, and which is as follows: "Private property shall not be taken for public use

without just compensation having been first made to or ascertained and paid into Court for the owner."

Mr. McCALLUM. I understand that the question is on the motion to reconsider.

Mr. WATERS. I withdraw that motion to reconsider.

Mr. BARBOUR. I would like to know how on a question of order that amendment was withdrawn?

THE CHAIRMAN. The amendment is not withdrawn. The question is on the adoption of the amendment offered by the gentleman from San Bernardino, Mr. Waters, to strike out the whole of this section as amended, and insert this substitute, which I have just read.

The amendment was lost.

THE CHAIRMAN. The question now recurs on the adoption of the amendment offered by the Committee on Judiciary, as amended.

Mr. LAINE. I move to reconsider the vote by which the last amendment was adopted. It seems to me that the word "secured" has crept in there. It will drive us back to the place we have been laboring out of for the last ten years.

Mr. HOWARD. Mr. Chairman: He is entirely mistaken. The language employed in the amendment of the gentleman from Solano is: "Until full compensation therefor be first made in money, or secured by a deposit of money." It is secured by the money paid into Court. All that any of the provisions which have been adopted or proposed will effect is simply that. The money is paid into Court, and the money remains in Court for security. There is no ambiguity about it. There is no trouble about it.

Mr. WHITE. I think that word "secured" is most objectionable, and I trust the Convention will reconsider it.

Mr. DUDLEY, of Solano. I ask leave to amend it by striking out the words, "secured by a deposit of money," and inserting the words, "or deposited in Court." Then it will conform to the section as reported by the Committee on Judiciary; that is, in that respect it will be just like their report.

THE SECRETARY read:

"Until full compensation therefor be first made in money, or deposited in Court for the owner."

THE CHAIRMAN. It will require unanimous consent of the committee.

Mr. WATERS. I move to amend that so that it will read: "Until full compensation therefor be first made in money, or ascertained and paid into Court for the owner."

Mr. DUDLEY, of Solano. I am willing to accept that amendment if the committee is willing.

THE CHAIRMAN. It cannot be done except by general consent.

No objection was made.

Mr. SHAFER. Mr. Chairman: I call attention to the fact that this provision of the Alabama Constitution has been repealed for several years.

THE CHAIRMAN. The question recurs on the adoption of the amendment offered by the Committee on Judiciary as amended. The Secretary will read the section as it now stands amended.

THE SECRETARY read:

SEC. 14. Private property shall not be taken for public use without just compensation having been first made to or paid into Court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury in a Court of record, as shall be prescribed by law.

The amendment was adopted.

Mr. McCALLUM. I move that the committee rise and report this article to the Convention as amended.

Carried.

POSSESSION PRIOR TO FINAL JUDGMENT  
IN CALIFORNIA CONDEMNATION PROCEDURE\*

\*This study was prepared for the California Law Revision Commission by Clarence B. Taylor, who serves as Special Condemnation Counsel on the staff of the Commission. No part of this study may be published without prior written consent of the Commission.

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POSSESSION PRIOR TO FINAL JUDGMENT  
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INTRODUCTION

Across the United States there is a groundswell of interest in the law of eminent domain. In approximately half of the states, legislative committees, special commissions or other advisory bodies are engaged in, or recently have completed, studies of the subject.<sup>1</sup> With respect to Federal or Federally assisted acquisitions, committees of the Congress have completed and submitted thorough studies with far-reaching proposals.<sup>2</sup>

The prime concern and question in these investigations is whether the philosophy, standards, and details of constitutionally assured "just compensation" are being appropriately applied in an era of the freeway and the launching pad. Somewhat more broadly, detailed inquiry is being made into the current balance of the historic equation sought between the property-owning citizen, on the one hand, and the tax or rate-paying citizen, on the other. Uniformly, however, it is being discovered that the fundamental question of fairness and compensation is interlocked with the total procedure provided for exercise of the power of eminent domain. The resulting objective of those thoughtfully concerned has been statutory revision sufficiently comprehensive "to codify, amend, revise and consolidate the

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\* This article was prepared by Clarence B. Taylor, who serves as Special Condemnation Counsel on the staff of the California Law Revision Commission. It was prepared to provide the commission with background information in its study of this subject. However, the opinions, conclusions, and recommendations contained are entirely those of the authors and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission. Portions of this article are similar to a study published by the commission in 1961. That study, the recommendations of the commission, and the resultant legislation are cited and discussed in this article.

laws relating to eminent domain."<sup>3</sup> Obstacles to that end are obvious.

The entire subject is viewed by some as abjectly adversary and as involving a precarious balance of powers and positions that cannot feasibly be disturbed. The statutory and constitutional debris accumulated over more than a century is at least a formidable technical barrier. Additionally, the intertwining and interaction of "substance" and "procedure" demand meticulous care and precision in any significant revision.

Determining the stage of the proceeding at which the condemnor may or must take possession of the property has proven to be one of the most troublesome and pivotal points in condemnation procedure. In the tempo of these times, the question and its resolution are important in themselves. Comprehensive studies and resulting legislation have been directed to this aspect of the matter considered separately.<sup>4</sup> Secondly, whatever mode is provided for exercise of the power of eminent domain, a taking is a process rather than an event. A series of steps and a lapse of time inevitably occur between the acquisitive idea and final exchange of title and consideration. A substantial portion of condemnation law therefore revolves around the resulting questions of sequence and tempo. There is, for example, an important temporal dimension to the running of interest, proration of taxes, time of payment, allocation of the risk of loss, fixing of the date of valuation, and any number of problems of compensation. These matters, in turn, cannot be considered apart from the timing of the change of possession. The provisions made for possession prior to final judgment must therefore be key features of any comprehensive condemnation statute.

These generalizations are exact in California.

In 1956, the Legislature first directed the Law Revision Commission to study features of the California law of eminent domain.<sup>5</sup> Legislation enacted

pursuant to its recommendations have comprised the only systematic changes in California condemnation law since adoption of Title 7, Part 3, of the Code of Civil Procedure in 1872<sup>6</sup> (§§ 1237-1266.2). The latest directive to the Commission requires that its continuing study of the subject be with a view to recommendation of a comprehensive statute.<sup>7</sup> The purpose of this article, therefore, is to assist the Commission in formulating the approach that it would recommend with respect to the taking of possession in a comprehensive revision and restatement of California condemnation law. Effort is made to state and analyze California's two distinct sets of provisions for "possession pending appeal" and the taking of "immediate possession" on the filing of the condemnation action. The latter set of provisions, including Section 14 of Article I of the California Constitution, present especially vexing alternatives to the Legislature, and particular attention is therefore given to the actual and assumed requirements of the California Constitution.

#### BACKGROUND

Generally, Section 14, Article I, of the California Constitution authorizes specified public agencies to take possession of the property sought to be condemned upon commencement of eminent domain proceedings when the condemnation is for "right of way" or "reservoir" purposes. This authorization and implementing statutory provisions are commonly referred to as "the immediate possession" legislation.

Code of Civil Procedure Section 1254, in its present form, authorizes any plaintiff in eminent domain proceedings to take possession "after trial and judgment entered or pending an appeal". This section is conventionally referred to as the "possession pending appeal" provision.

Each of these procedures entails deposit in court of the "probable just compensation" and, since 1961, permits withdrawal of the full amount of the deposit by the condemnee.

These provisions apart, the plaintiff is not entitled to possession<sup>9</sup> until the date of possession stated in the final order in condemnation.<sup>10</sup> With the single exception of a preference on the trial calendar,<sup>11</sup> condemnation proceedings are governed by the rules applicable to civil<sup>12</sup> actions generally, both at the trial and appellate levels.

With this background, and acting upon the Law Revision Commission's<sup>13</sup> recommendations, the 1961 Legislature enacted two measures relating to<sup>14</sup> the taking of possession and related matters. The first, amended Code of Civil Procedure Section 1248, and added Code of Civil Procedure Section 1252.1 and Revenue and Taxation Code Section 5096.3, to provide for the proration and reimbursement to the property owner of prepaid taxes.

<sup>15</sup>  
The second measure made several very important changes in preexisting law. Most importantly, the statute extended the property owner's right to withdraw funds deposited to all immediate possession cases (rather than to those in highway condemnations) and provided that the entire deposit (rather than seventy-five percent) may be withdrawn. The measure also codified and clarified the judicial procedures involved in taking immediate possession, permitted the condemnor to appeal after taking possession, clarified the law in relation to risk of loss, eliminated a great deal of uncertainty as to interest on awards, and finally qualified the condemnor's right to abandon eminent domain proceedings where the condemnee has irrevocably changed his position. The statute also provided the existing procedures by which the court may increase or decrease the sum deposited upon motion of the property owner.

All of this legislation assumed continuance of existing constitutional provisions on the subject. Two related proposals were recommended by the

Commission but not adopted by the Legislature in 1961. First, a proposed constitutional amendment would have amended Section 14 of Article I of the Constitution to provide generally that the Legislature may "prescribe the manner in which, the time at which, the purposes for which, and the persons or entities by which" immediate possession of property might be taken. The amendment would have required a deposit of court-determined "probable just compensation" and prompt payment to the property owner. All other content of Section 14 dealing with possession prior to final judgment would have been deleted.

The related statutory proposal would have amended Code of Civil Procedure Section 1243.4 to delete its existing content and to provide simply that "in any proceeding in eminent domain the plaintiff may take immediate possession of the property sought to be condemned in the manner and subject to the conditions prescribed by law."

That measure would have accorded with Code of Civil Procedure Section 1243.5 which provides the procedure for, and various incidents of, immediate possession "in any proceeding in eminent domain in which the plaintiff is authorized by law to take immediate possession."

Reasons for failure of the Legislature to act upon these two measures appear to have been several:

(1) The effect of the simultaneous enactment of general, unfettered provisions for withdrawal of the total deposit (see Code of Civil Procedure Section 1243.7) was not fully appreciated.

(2) The provisions for immediate possession would have applied uniformly to all condemnors in takings for all purposes; the effects of this change in longstanding patterns was not fully understood.

(3) Various safeguards provided for the property owner in immediate possession cases (also enacted in 1961) were not fully considered in connection with the proposal.

(4) The objection of certain condemnors to the measure, of course, was that by eliminating the existing immediate possession provisions from the Constitution, the proposals would have permitted the Legislature to further restrict, rather than extend, the right to immediate possession.

(5) The objection of property owners appears to have been that the proposal would have had an intangible and oblique, but important, effect upon compensation in negotiated as well as contested cases.

The latter two objections were forcefully stated in the recommendation of the State Bar Committee on Condemnation Law and Procedure, as follows:

The attorneys employed by the condemning agency regard the order of immediate possession as being absolutely necessary in rights of way cases. Their objection to 1961 S.C.A. No. 6 is that it takes away from the constitutional security of their right to an order of immediate possession, and it is not their desire, in view of the necessity of their respective employers, that the power of immediate possession be subjected to legislative change.

Those members of the committee not employed by public agencies regard the order of immediate possession as an extremely coercive tool in the hands of the condemnor, and therefore its use should be restricted solely to rights of way and reservoir cases.

The power of the order of immediate possession can be, although it may not be intentionally used as such, a coercive force in the hands of a condemning agency, because of the hardship forced upon the owner who often finds himself without a home or place of business, finds that he continues to be obligated to make payments on his construction loan who also finds that the funds that he will receive from the condemnor may not be forthcoming for as much as a year. He finds that he is expected to pay his loan off immediately, that he is unable to negotiate a new loan, and that he will receive an indefinite sum of money at some time in the future.<sup>16</sup>

The last observation takes no account, of course, of the blanket provisions for withdrawal of the total amount of the deposited "probable just compensation," i.e., substantially simultaneous exchange of possession for funds.

As the policy and provisions of Section 14 of Article I of the California Constitution are of overriding importance on this topic, it is appropriate to give detailed consideration to that section before considering appropriate legislation.

#### HISTORY AND CONSTITUTIONALITY OF IMMEDIATE POSSESSION IN CALIFORNIA

##### Derivation of Section 14, Article I, California Constitution

One of the relatively minor consequences of the various amendments to Section 14 has been to render the section unreadable. For example, it is impossible to read the phrase "right of way or lands to be used for reservoir purposes" without knowing that the words "or lands to be used for reservoir purposes" were added at a later date. With patience and an eye to history, however, the section can be at least grammatically devined.

The derivation of the section indicates that it should be read as if divided into clauses as follows:

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,

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 improvements proposed by such corporation,

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

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

The unitalicized words of the first clause comprise the entire wording  
17  
of the provision on eminent domain in the Constitution of 1849. To  
explain the derivation of the section it is necessary to repeat, in the

same clauses, the language of the section as adopted in the Constitution of 1879:

Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner,

and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation,

which compensation shall be ascertained by a jury, unless a jury be waived, as in other cases in a court of record, as shall be prescribed by law.

Assuming, temporarily, that the language of the 1879 Constitution may be so divided into three clauses; that the second clause, whatever it says, is addressed only to the problem of offsetting "benefits"; and that "compensation" in the third clause refers to "just compensation" in the first clause, rather than to "full compensation" in the second, it can be seen that the subsequent amendments have obscured but not changed the basic construction.

The section has been amended four times. An amendment of 1911 added the last sentence of the section as it now exists, which deals with taking for logging railroads. Addition of the sentence followed an opinion of the California Attorney General that condemnation for logging railroads for interests entirely private to the condemnor did not effectuate a "public use."<sup>18</sup> The Supreme Court of Oregon had previously rendered decisions<sup>19</sup> to the same effect. In view of the since extended judicial conception of "public use" and the expanded "plenary jurisdiction" of the Public Utilities Commission, continuance of the sentence in the Constitution seems unnecessary.

An amendment of 1918 enlarged the words "corporation other than municipal" to "corporation, except a municipal corporation or a county" in the second clause. That amendment also added the elaborate proviso dealing with immediate possession, but as added in 1918 the proviso included only the state, counties, municipal corporations, drainage, irrigation, levee, and reclamation districts.

It is clear that the proponents of the 1918 amendment represented to the voters that the second clause prevented the offsetting of benefits, and that addition of the proviso was necessary to permit any condemnor to take possession prior to jury determination of the amount of compensation.

The argument submitted with the proposed amendment of 1918 read, in part, as follows:

The principal purpose of this amendment is to permit the State, a county, municipal corporation, or a drainage, irrigation, levee or reclamation district when acquiring rights of way only, in eminent domain proceedings, to take possession upon commencing a condemnation suit and depositing in court such amount of cash money as is fixed by the court to secure the owners . . . .

Another change effected by the amendment is to extend to counties the same privileges that a municipal corporation now has to set off benefits that might result to an owner's property in determining the compensation that must be paid.

As the law now stands, . . . possession of the property cannot be obtained until after a jury has determined the amount of compensation to be paid for the taking of such property.

Under existing law, no matter how urgent may be the necessity, or how great may be the damages suffered by delay, possession cannot be obtained until after what may become protracted litigation. [Emphasis in original.]<sup>20</sup>

The specific argument that jury trial prior to any taking of possession is required goes unexplained. The California Supreme Court had previously seemed to indicate that, whatever other requirements the section may make, pre-assessment of compensation by jury is not one of them.

An amendment of 1928 merely added the words "or the State" in the first line of the second clause, presumably to assure the off-setting of "special benefits" in takings by the State of California.

The last amendment in 1934 added "lands to be used for reservoir purposes" to both the second clause and to the immediate possession proviso. The amendment also added the words "metropolitan water district, municipal utility district, municipal water district, . . . water conservation district, or similar public corporation" to the proviso dealing with immediate possession. Rather oddly, the amendment added all of the districts, including drainage, irrigation, levee, and reclamation districts which previously had appeared only in the proviso, and "similar public corporations," to the second clause which presumably deals with the off-setting of benefits. The argument submitted to the voters in connection with the amendment of 1934 indicated that the concern in that amendment was with immediate possession in takings for reservoirs. It may well have been, however, that, by that time, the section was beyond untangling by draftsmen as well as by the voting public.

Decisions since 1934 have held that a taking for airport purposes is not the taking of a "right of way" and that a condemnation for water wells and the right to take water is not a taking for "reservoir purposes." These decisions recognize the fact that there is no statutory authorization for possession prior to entry of judgment, and that the constitutional provisions are exclusive in the sense that they are the only existing warrant for the taking of immediate possession.

The same is true, of course, as to the named class of condemnors permitted to take immediate possession. Condemnors not named in the proviso

to Section 14 may not take possession prior to entry of judgment because<sup>25</sup>  
they are not so named. The only decision dealing with the inclusiveness  
of the named classes has held that the words "similar public corporation"  
includes a sanitary district.<sup>26</sup>

#### The Constitutional Convention of 1879

The proposals and debates of the constitutional convention give a clear insight into the meaning of Section 14, with an arguable exception as to the enigmatic second clause of that section. This background indicates that the section is to be read as three separate clauses and that the second clause has to do only with the question of offsetting benefits.

There were two versions of the proposed section introduced in the convention. One provided:

Private property shall not be taken for public use without just compensation be [sic] first made, or secured by deposit of money to the owner, and such compensation shall be ascertained by jury of twelve men, without deduction for benefit to any property of the owner, in a court of record, as shall be prescribed by law.<sup>27</sup>

The other proposal read as follows:

; nor shall private property be taken or damaged for public use without just compensation. Such compensation shall be ascertained by jury, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested.<sup>28</sup>

From these proposals, the Committee on Preamble and Bill of Rights prepared this version:

Sec. 14. Private property shall not be taken or damaged for public use without just compensation having been made to or paid into court for the owner, except in cases of war, riot, fire, or great public peril, in which cases compensation shall afterwards be made; such compensation or damages to be assessed by a jury, unless waived by the parties . . . .<sup>29</sup>

That version, however, was referred by the convention to the Committee on Judiciary and Judicial Department, which reported to the convention the following brief statement:

Sec. 14. Private property shall not be taken for public use without just compensation having been first made to or paid into court for the owner.<sup>30</sup>

This version having been reported to the convention for adoption, there ensued a struggle, that characterized a great part of the convention, between Jacksonian Democracy and the legislative or constitutional finesse supplied largely by the nineteen members of the Judiciary Committee. A Mr. Dudley offered the following amendment, as addition language to the brief proposal of the Judiciary Committee:

; and no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury in a court of record, as shall be prescribed by law.<sup>31</sup>

The statement made in support of the addition indicated that it was intended only to reverse "a rule of the past that when damages were assessed for right of way, to allow the prospective advantages to offset the damages."<sup>32</sup> The gentlemen of the Judiciary Committee pointed out that such a rule might have existed under the notorious railroad acts of that era but that the rule had been changed by enactment of Code of Civil Procedure Section 1248 in 1872 to provide a uniform rule on the offsetting of benefits.<sup>33</sup>

The statements of the proponents of the additional language indicate that the additional language may have been intended to distinguish between so-called "general" benefits and "special" benefits. As the proponent of the additional language stated:

It must be borne in mind that, as land becomes more valuable, as it is more generally taken up and cultivated, and as the railroads increase, they cannot be run across the country without doing very material damage; without severing farms into irregular shape; without separating buildings and destroying orchards, and there is no justice in permitting the general advantages accruing to the community to offset that class of damages. [Emphasis added.]<sup>34</sup>

This possible interpretation of the additional language was directly  
35  
applied in Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083 (1902). That confusing decision holds that the second clause of Section 14 refers only to general benefits; that the provision forbids their being set off by "corporations other than municipal"; that to make sense of the clause, it should and must be read to work no discrimination between condemnors in this respect; and that, therefore, the provision merely prevents the setting off of general benefits by all condemnors. There is inconsistent language in decisions rendered both before and after 1902, but presumably  
36  
the Beveridge proposition remains the constitutional law of this state.

Numerous statements indicate that the sole concern of the proponents of the additional language was with benefits:

I did not expect, when I offered that amendment, that it was going to create so much discussion. It is admitted finally by the gentlemen on my left that the rule is to offset absolute damages by supposed benefits. Now, my amendment covers that one single idea alone and no other; that is, that absolute damages shall not be set off by supposed benefits. There is no question of bonds. Neither does it enable any individual to lie in the  
37  
way of any corporation in any manner that does not now exist . . . .

The allusion to bonds refers to the series of California Supreme Court decisions leading up to 1879 holding that railroads might not take immediate possession upon furnishing of bonds as such bonds simply did not constitute "just compensation" within the meaning of the Constitution of  
38  
1849.

To complete the origin of the language in that convention, the additional language was amended on the floor of the convention by its proponent to insert the words "other than municipal" after the word "corporation." Again, that change had reference to benefits rather than to any question of prepayment or preascertainment of just compensation. <sup>39</sup>

At a later stage of the convention, the first clause of Section 14 was amended to insert the words "or damaged" after the word "taken." The remarks of both the proponents and opponents of that change indicate that its sole purpose was to constitutionally assure that damaging of property should come within the constitutional requirement of just compensation. In short, the intention was to expand the range of compensability; no reference was had to "damage" in the sense of possession prior to payment or jury verdict. <sup>40</sup>

Section 14 was also amended to insert the words "unless a jury be waived, as in other civil cases" after the word "jury" in the third clause of the section. In connection with this change, it was pointed out that Section 7 of Article I of the Constitution as proposed at the convention presumably guaranteed jury trial in eminent domain proceedings. The change was adopted, however, in the interest of clarity, and there was no indication that the language was considered to impose any requirement of jury assessment of compensation before the taking of possession. <sup>41</sup>

The section was adopted in that form and as set forth above.

The general purpose of this analysis of the origin of the language of Section 14 has been to demonstrate the futility of a grammarian's approach to interpretation of the section. For example, the word "first" in the initial clause may have a fundamental import, but it has nothing to do with

the time for change of possession in regularly instituted eminent domain proceedings. California Supreme Court decisions both immediately before and after the constitutional revision of 1879 held (1) that takings by eminent domain must be via judicial proceedings first instituted,<sup>42</sup> and (2) that compensation must be first or simultaneously made.<sup>43</sup> The much-debated decision in Steinhart v. Superior Court<sup>44</sup> may be confused in other respects, but it is demonstrably correct in holding that the first clause of Section 14 precludes the taking of possession by filing a bond or furnishing security other than deposit in court, and that the deposit must be available to the owner. In these connections, the revision of Section 14 in 1879 merely continued pre-existing constitutional policies.

The word "first" in the second clause has the same application and limitation. In the constitutional debates objection was taken to the phrasing of the second clause because it seemed to imply that security, rather than substantially simultaneous payment was assured to the condemnee. Thereupon the wording of the clause was changed by its proponent to read that in the case of condemnation of rights of way by "corporations other than municipal," the compensation must "be first made in money, or ascertained and paid into court for the owner." The stated purpose of that change, insofar as prepayment and pre-determination of compensation is concerned, was to make that clause coincide in effect with the first clause.<sup>45</sup>

#### The Judicial Decisions

Since adoption of the California Constitution in 1879, the bearing of Article I, Section 14 upon possession prior to final judgment has come before the California Supreme Court on four occasions:

46

Spring Valley Water Works v. Drinkhouse in 1892

47

Steinhart v. Superior Court in 1902

48

Heilbron v. Superior Court in 1907

49

Central Contra Costa etc. Dist. v. Superior Court in 1950

From the first three decisions, it is possible to derive an argument that statutory provisions for possession pending appeal are constitutional, but that provisions for possession at any time prior to the interlocutory judgment in condemnation proceedings would be unconstitutional. The last decision displays a judicial attitude inconsistent with the mode of analysis upon which that argument is based.

To understand the argument, it is necessary to trace the evolution of Code of Civil Procedure Section 125<sup>4</sup>, which now deals only with possession pending appeal.

As enacted in the eminent domain title of the Code of Civil Procedure in 1872, Section 125<sup>4</sup> provided that at any time after service of summons, the plaintiff might have possession by giving "security" approved by the court.<sup>50</sup> The Code Commissioners' Notes indicate that the Code Commission "in a first report, proposed to provide for a preliminary assessment of damages, and that the amount thereof shall be deposited in Court before the entry can be made." The note proceeds to explain the Commissioners' reasons for providing the alternative of permitting the posting of "security," especially a bond. That section was declared unconstitutional by a number of Supreme Court decisions in the 1870's.<sup>51</sup>

In 1877 the section was changed to provide for possession "at any time after trial by jury and judgment entered" upon payment into court of the amount of the judgment.

In 1880, after the constitutional revision of 1879, the wording was changed to read "at any time after trial and judgment entered" and other revisions were made.

Each of these versions permitted withdrawal of the total amount deposited.

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In Spring Valley Water Works v. Drinkhouse,<sup>52</sup> the California Supreme Court upheld application of the section as against various arguments based upon the peculiar wording of Article I, Section 14 of the California Constitution as adopted in 1879.

In 1897, for some unfathomable reason, the Legislature changed the section generally and provided that possession might be had "at any time after the filing of the complaint, and the issuance and service of the summons thereon." Most remarkably, in view of the history of this subject, that version permitted the plaintiff to "pay a sufficient sum of money into court, or give security for the payment thereof, to be approved by the judge of such court." Obviously, in case of the posting of a bond, no funds could be withdrawn by the property owner prior to final judgment. The section was hopelessly ambiguous whether funds deposited, if that course were followed, could have been withdrawn on their deposit and the change of possession, or only upon final judgment.

An order for immediate possession under those provisions came before the Supreme Court in Steinhart v. Superior Court.<sup>53</sup> The opinion does not indicate whether, in that particular instance, a bond was filed or cash was deposited. The court granted prohibition to prevent execution of the order. All that one can learn, for certain, from the opinion is that a railroad might not acquire immediate possession in 1902 under such provisions. Again, that result is not surprising in view of the history recited in this

article. The decision is usually analyzed as requiring that funds be deposited subject to withdrawal by the property owner before possession may be taken.<sup>54</sup> The rationale of the opinion is, however, completely unfathomable. In this respect, the opinion parallels the one in the companion case of Beveridge v. Lewis<sup>55</sup> which dealt with the application of Section 14 to the offsetting of benefits.

In any event, in 1903 the Legislature again amended Code of Civil Procedure Section 1254 to provide for possession "at any time after trial and judgment entered or pending an appeal" upon the payment into court "for the defendant, the full amount of the judgment." The section was also changed to provide, as it now does, for withdrawal of the total amount deposited by the defendant.

An order for possession under these provisions came before the court in Heilbron v. Superior Court.<sup>56</sup> The court sustained the provisions without overruling or criticizing the Steinhart decision, other than to comment that the 1897 provisions did not provide for payment of compensation into court "for the owner" as required by the first clause of Section 14, Article I, of the California Constitution.

With respect to the provisions of 1903, the court observed:

The constitution merely guarantees that there shall be ascertained and paid into court before plaintiff's right of entry attaches, the amount of the judgment, and this, notwithstanding that that judgment may be reversed and that the defendant may ultimately obtain a verdict for a much larger amount of money.<sup>57</sup>

It is at this point in developments that the various amendments to Section 14 begin, including in particular the amendment of 1918 to authorize immediate possession in acquisitions of rights of way and the amendment of 1934 to include takings for reservoir purposes.

Language added by the amendment of 1934 was presented to the court  
for construction in Central Contra Costa etc. Dist. v. Superior Court.<sup>58</sup>  
The question of construction was whether sanitary districts were included  
in the amendment as "similar public corporations." The court held such  
districts to be included. The significant contrary view, however, was  
expressed by Justice Carter, dissenting, as follows:

I think it is clear that the people of this state have not  
thus far expressed their willingness to confer such power  
upon a sanitary district and the holding of the majority to  
the contrary is a palpable distortion of the plain language  
used to express the intention of those who drafted the 1934  
amendment and the voters who adopted it.<sup>59</sup>

In short, the argument is that, by long standing assumption, changes  
to be made in the procedures for possession prior to judgment are to be  
made by amending Section 14 of Article I of the California Constitution.  
Presumably, those who have done the assuming include the Legislature in  
making its changes of 1903 in Code of Civil Procedure Section 1254, and the  
proponents of the 1918 and 1934 constitutional amendments, and the voters  
who adopted those amendments. In any event, the court emphatically rejected  
that approach as a guide to construction of Section 14.

There are several other appellate decisions, mostly dealing with  
problems of the date of valuation, that use rationales compatible with  
the Legislature's freedom to legislate in this area. In City of Los Angeles  
v. Oliver,<sup>60</sup> the court observed:

[T]he constitutionally guaranteed right to receive just  
compensation of property taken or damaged for public purposes  
neither includes nor implies the right to have such compensation  
ascertained by any particular procedure or as of any certain  
date.<sup>61</sup>

Similarly, in City of Los Angeles v. Tower,<sup>62</sup> the court states the  
constitutional "guarantee" to the property owner, as follows:

[I]t cannot be successfully contended that the mere entry into possession by the condemnor amounts to such a complete and irrevocable taking as to require application of the rule that the owner is entitled to the value of his land at the time it is taken. The Constitution guarantees that he be compensated only for whatever is taken from him--the value of the use for the time he is deprived of it, and the value of the fee or easement, and damages as of the time when title either actually or constructively passes.<sup>63</sup>

Much support for the view that the Legislature has power to act in this area, within the broad and reasonable limits of the first clause of Section 14, can be derived from the decisions arising under Article I, Section 14 1/2 of the California Constitution. That section authorizes so-called "excess" condemnation and condemnation for purposes of exchange under very limited circumstances. The decisions have held that the effect of this section is not exclusive and does not preclude legislative authorization of excess condemnation or condemnation for exchange purposes<sup>64</sup> in other and much more extensive sets of situations.

#### Conclusion as to Constitutionality

It is impossible to predict with certainty, of course, the attitude the California Supreme Court would take with respect to legislation, rather than constitutional change, respecting the taking of possession prior to judgment. It seems incredible to suppose that the court could be persuaded of the validity and current application of the supposed rationale of the Steinhart decision. It seems equally unlikely that the court would adopt the view of Justice Carter dissenting in the Central Contra Costa decision.

The attitude of the court might well depend upon its underlying view of the fairness, mutuality and practicality of the particular provisions enacted. That has been the recent experience in Illinois. The Supreme

Court of that state overruled a contrary decision of only seven years' standing, clarified over a century of confusion in this area, and brought that state's view into keeping with the great weight and trend of authority in the United States.<sup>66</sup>

The result might also depend to some extent upon the aid offered the court in reconstructing the constitutional and legal history on this general problem. The Supreme Court of Arizona very recently sustained its general immediate possession statute under constitutional provisions which duplicated Section 14 of Article I of the California Constitution as adopted in 1879.<sup>67</sup> The formal basis, at least, for the court's decision was its inquiry into the intentions and purposes manifested in that state's constitutional convention.

There is the converse of the problem of the property owner objecting to legislation in the absence of constitutional change: It is at least conceivable that legislative change of the existing provisions for immediate possession, without constitutional amendment, would be held not to be permissible. It has been held that the power of those agencies and entities now authorized to take immediate possession is derived from the Constitution, and that there need be no mention of the power in the entity's or agency's condemnation authorization statute.<sup>68</sup> The legislation on immediate possession enacted in 1961 specified and clarified, rather than substantially changed, application of the detailed provisions in Section 14 of Article I of the Constitution.

In its recommendations of 1961, the Law Revision Commission resolved these questions in favor of recommending statutory provisions made contingent upon adoption of a constitutional amendment. That course would again seem

most feasible whether the legislation be specific legislation or part of a comprehensive revision of the eminent domain title of the Code of Civil Procedure.

Before turning to the advantages and features of comprehensive and uniform provisions on possession prior to judgment, it seems appropriate to first consider the substance and features of an appropriate constitutional amendment.

#### RECOMMENDATIONS CONCERNING A CONSTITUTIONAL AMENDMENT

The recommendation of the Law Revision Commission in 1961 pointed out that, if there are to be substantial improvements in this area of the law, Section 14, Article I, of the California Constitution should be clarified and changed (1) to give the Legislature the power to determine which agencies should have the right to immediate possession and the public purposes for which the right may be exercised and (2) to guarantee the property owner that he will actually receive compensation at the time his property is taken. These revisions would make it unnecessary to amend the Constitution every time it is found that the existing immediate possession procedures need adjustment or change and would permit California to follow the general trend established in other states.

The revision proposed in 1961 would have retained the initial clause of Section 14, which reads as follows:

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.

The recommendation would also have retained the last sentence of this section dealing with takings for logging or lumbering railroads.

All other parts of existing Section 14 would have been deleted except for the following language:

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. The Legislature may by statute authorize the plaintiff in a proceeding in eminent domain to take immediate possession of and title to the property sought to be condemned, whether the fee thereof or a lesser estate, interest or easement be sought, and may by statute prescribe the manner in which, the time at which, the purposes for which, and the persons or entities by which, immediate possession of property sought to be condemned may be taken. Any such statute shall require that the plaintiff shall first deposit such amount of money as the court determines to be the probable just compensation to be made for the taking and any damage incident thereto and that the money deposited shall be paid promptly to the person entitled thereto in accordance with such procedure and upon such security as the Legislature may prescribe.<sup>69</sup>

Only the following minor criticisms appear to be appropriate as to that proposal:

1. The three clauses of the section should be appropriately paragraphed.
2. The words "take possession upon or following commencement of the proceedings" would be preferable to "take immediate possession," as the word "immediate" has no temporal point of reference.
3. The words "and title to" should be deleted. For over a century California condemnation law has known no transfer of title prior to filing or recordation of the final order in condemnation. Public financing and the accomplishment of public improvements have not required the acquisition of title prior to judgment and final order. Judicial decisions and the legislation enacted in 1961 appear to have worked out all necessary consequences and details of possession being in the condemnor and "title" remaining in the condemnee. A feature appropriate to administrative condemnation should not unnecessarily be incorporated into a purely judicial scheme.

4. The words "the property sought to be condemned," in the context, can and should be reduced to "the property."

5. The words "just compensation be first paid to the owner or that" should precede the words "the plaintiff shall first deposit." Symmetry with the first clause of the section is thereby maintained. Further, there appears to be no reason to prescribe deposit in court and withdrawal as the sole mechanism for making payment to the property owner. Conceivably, absent title or allocation-of-award problems, an affable condemnor might simply pay the property owner the established probable just compensation.

6. The words "paid promptly" would more appropriately read "available" in view of possible title and allocation-of-award problems.

7. The words "person entitled" should read "person or persons entitled" in the interest of clarity in the same respect.

8. The word "security" should be expanded to "security for return of overpayment" in the interest of clarity.

9. Unless its current utility or necessity can be demonstrated, elimination of the last sentence would be appropriate. Its content might be added, as a statute, to Code of Civil Procedure Section 1238 or to the Public Utilities Code.

10. Lastly, the word "ascertained" in the first line should be changed to "determined" in the interest of more accurate expression and to eliminate the last vestige of the unfortunate wording of the ill-fated second clause of the section as adopted in 1879.

The foregoing minor changes would cause the substance of the recommended section to read as follows:

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. ~~;- 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~~

Such just compensation shall be ascertained determined by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.

The Legislature may by statute authorize the plaintiff in a proceeding in eminent domain to take possession of the property upon or following commencement of the proceedings, whether a fee or lesser estate, interest, or easement be sought, and may by statute prescribe the manner in which, the time at which, the purposes for which, and the persons or entities by which, possession of the property may be taken. Any such statute shall require that just compensation be first paid to the owner or that the plaintiff first deposit such amount of money as the court determines to be the probable just compensation to be made for the taking and any damage incident thereto and that the money deposited shall be available to the person or persons entitled thereto in accordance with such procedure and upon such security for return of overpayment as the Legislature may prescribe. ; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in

which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as seen as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.

### A GENERAL POLICY ON POSSESSION

It is often assumed that the condemnor's single aim is to take possession as quickly as legally possible and that, on the other hand, the property owner must exhaust every means at his disposal to forestall that event. These being diametrically opposed positions, one might assume that a procedure mutually least inconvenient to both parties is impossible to devise. In many situations, however, relinquishment of possession prior to final judgment is to the property owner's advantage and may even be vitally necessary to protection of his interests, e.g.:

A case I tried in Marin County in 1964 discloses a void in the condemnation law which created . . . an injustice to the condemnees. That void consists in the inability of the condemnee to compel the condemnor (the State in this case) to take immediate possession, deposit security for the part taken, and allow the condemnee to proceed with the remainder of the construction without waiting the outcome of the ultimate trial and thus delay the construction on the remainder with the consequent losses to the condemnee.

The facts are as follows - Condemnees were in the act of constructing two twelve-unit apartment buildings, construction had progressed to the point where the structures were ready to be roofed and interior work to commence, when the Summons was served. The State did not request an Order for immediate possession and consequently there was no security deposit for the take.

Under C.C.P. Section 1249, condemnees were prevented from making expenditures on the property for the purpose of saving.

or protecting the structures from weather, vandalism and deterioration by the lapse of time. I petitioned the Court for an Order directing the State to take immediate possession of the taken portion so that the work in the remainder might proceed, pointing out the losses, delay in the completion of the twelve-unit structure on the remainder with cost to the condemnees. The Court held that there was no legal authority by statute to compel the State to take immediate possession even under these circumstances, and the Court would not resort to its inherent equitable power to compel the State to do so. The Court held that under C.C.P. 1243.5, the condemnor alone is the judge of whether he wishes to take immediate possession and the Courts may not compel the condemnor to do so.

The structure stood open to the weather and other hazards for ten months, delaying completion and occupancy of the remainder for that length of time and causing other damage resulting from deterioration and vandalism. The Court would not allow as an element of damage the loss of income as well as some of the loss caused by vandalism to the remainder to be assessed as special damage.

From the foregoing I reached the conclusion that there ought to be in the proper case a mutuality of remedy; the condemnee ought to have the right to compel the condemnor to take immediate possession or in the alternative that damages resulting from failure to do so after a demand therefor be deemed proper elements of damage recoverable by the condemnees.<sup>69</sup>

On the basis of appellate decisions, the mentioned trial court's rulings were inevitable. In a similar situation, one property owner tendered possession of the property to the condemnor prior to the filing of the action upon learning of the proposed condemnation. After the filing of the action he repeated the tender. In the ensuing litigation he contended that the prior request of the condemnor that construction halt or, at least, the filing of the action, should be considered the constitutional "taking" for purposes of interest, tax proration and the like. His argument was based on the fact that the date of valuation provided in Code of Civil Procedure Section 1249 (issuance of summons) is often explained on the basis of the filing of the action being a "constructive taking." The appellate court

held, inevitably, that the filing of the action has no bearing on such matters apart from an order for possession or the taking of actual<sup>70</sup> possession.

Property owners generally have been confused by the muddled picture of possession prior to judgment, especially since the constitutional amendment of 1918. Reading the constitutional guarantee of being "first paid," and the judicial decisions expressing the constitutional policy of substantially simultaneous exchange of money and property, they have sought to obtain "probable just compensation" before final disposition of the condemnation proceeding. The uniform result, of course, has been holdings that all discretion lies with the condemnor either as to immediate possession<sup>71</sup> or possession pending appeal.

With specific reference to the problem of buildings or other improvements under way at the time of service of the summons, a number of measures have been introduced in the Legislature in recent years which would alleviate the position of the property owner, most of them providing<sup>72</sup> changes in the rules of compensation.

Adverse effects of any great delay in exchange of land and money after the taking has become inevitable is a familiar theme in property owner complaints. The following is typical:

In my opinion, an outstanding case of inadequacies [of the existing law is] found in Newark School District v. Orsetti, which is a condemnation case which was filed and tried in the Alameda County Superior Court. The case was tried almost one year after the condemnation proceedings had been filed. Some sixteen plus acres of land out of a twenty acre ranch were being taken. The improvements, consisting of a very nice home and farm shops for a major operation covering other leased and owned land in the southern part of Alameda County was being taken. Naturally the valuation date was set as of the time of filing the suit. The valuation as of the time of filing the

suit, upon adequate evidence as far as an appeal would have been concerned but contrary to the same amount of other adequate evidence, was determined by the jury to be \$9,500.00 an acre. Meantime, land prices were simply skyrocketing and comparable and almost adjacent land to that taken, was selling from \$10,500.00 an acre to \$12,000.00 an acre. . . .

. . . Contrary to the underlying theory, Mr. Orsetti could not take the money he was awarded and buy other acreage as a substitute therefor. Prices advanced so much that to the extent involved he was put out of his business. . . .

Of course this inadequacy is somewhat remedied where immediate possession is taken and a major portion of the eventual award can be drawn down by the condemnee under the present C.C.P. provisions.

. . . Because the school district could not make up its collective mind as to when possession of the premises would be necessary, the matter of the suit hanging over his head upset the planting and harvesting schedules of the owner of the land. To all intents and purposes, he lost the use of the land for the year during which the suit was pending. This situation was magnified by the fact that the land owner was notified sometime before the suit was filed that his land was going to be condemned. . . . The land owner naturally had to pay taxes on the premises during the year that the suit was pending even though he was getting a much curtailed use out of the land and it is doubtful whether he even made enough out of it to pay the taxes. [Emphasis added.]<sup>73</sup>

The problems and considerations mentioned in this protest are usually considered in connection with determination of the appropriate date of valuation to be applied in eminent domain cases. Although the problems and others do inhere in the fact that in condemnation proceedings the exchange of money, title, possession, and the incidents of ownership are not simultaneous, it has often been pointed out that they cannot be remedied or even substantially alleviated by merely shifting the date of valuation from one point to another in the total condemnation process. <sup>74</sup>

The objective the law should seek has probably never been better stated than in a very early decision dealing with the date of valuation:

The true rule would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder Court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary by the forms of law, to conduct the inquiry. . . .<sup>75</sup>

In general, the most often heard protest of condemnees is that they do not occupy, in these matters, substantially the same position as a voluntary seller of property. The obvious reply of the condemnors is that it is neither possible nor appropriate that they have that position while enjoying the "luxury of a law suit." Even the most carefully designed, and equitably applied, rules pertaining to possession cannot eliminate all of these complaints. However, a sensible policy on the change of possession, clearly stated, and uniformly applied, can accomplish a great deal in this direction.

In California the dread of any general or uniform provisions for possession prior to the final judgment in condemnation is largely historical. And, in this respect, it is well founded. However needful may have been the constitutional amendments providing for immediate possession enacted in 1918 (rights of way) and 1934 (reservoirs), they were disturbing measures as overlaid on California condemnation law. No safeguards to the property owner, other than deposit of security, were provided in any respect. The property owner, for example, was not assured of any notice of the effective date of the order for possession. Even worse, the amendments did not work out any of the legal or practical consequences of the change in possession. Consider an extreme example. Possession of an owner's property

could be taken for a local improvement. Although "security" was to be deposited, before 1961 the property owner obtained none of the funds prior to judgment. If the assessment process moved rapidly enough, the assessment lien might attach to the barren title remaining in the owner, and he would find himself paying a portion of the cost of the public improvement for which his own property was taken. <sup>76</sup> Similarly, no statutory provision was made for compensating the property owner for the loss of possession, use and enjoyment in the period intervening between the taking of possession and his eventual receipt of the award. <sup>77</sup> This experience would make unacceptable in California any proposal for a shift from the judicial to the administrative theory or method of condemnation, <sup>78</sup> or for the overlaying on California condemnation procedure of any such enactment as the Federal Declaration of Taking Act. <sup>79</sup>

This history is also informative as to the undesirability of attempting to deal with such matters by constitutional amendment rather than leaving to the Legislature the responsibility of dealing with the problems as they arise from time to time.

Turning to the needs of public property acquisition, it has become apparent that more broad and uniform measures for taking possession prior to final judgment are essential. California condemnation law, in general, is the prototype of the purely judicial method of condemnation. Determination of compensation by jury is the cornerstone of the system. Preserving and further effectuating this historic right makes essential that provision be made for possession prior to final judgment in appropriate cases, without limitation as to the specified public purpose for which the property is being taken, and without regard to the capacity of the particular condemnor.

The ever increasing need for public improvements, the exigencies of public finance, and the practicalities of public contract letting, simply do not permit delay until final resolution of every issue encountered in the property acquisition program necessary for a given public improvement. The general reaction of state legislatures across the country has been enactment of general statutes that build rational procedures for change of possession into the eminent domain law. <sup>80</sup> While these measures bear the unfortunate sobriquet of "immediate possession statutes" they can and often do adequately safeguard the interests of the property owner in providing for relinquishment of possession and in other respects.

In California, the legislation enacted in 1961 accomplished a great deal in bringing order to the rules governing immediate possession situations. But that legislation and the existing provisions of Section 14, Article 1 of the Constitution remain inadequate for a dynamic law of eminent domain. The remaining portion of this article considers most of the features, problems and shortcomings of existing California law and makes related recommendations. For purposes of comparison, frequent references are made to the model statute from which Illinois recently adopted its <sup>81</sup> legislation.

### Problems and Features of Uniform Legislation

#### Classification of Condemnors

In 1961, the Commission recommended that legislation be enacted extending the right of immediate possession to all condemnors to become effective if and when the Constitution is amended to permit the Legislature to determine who should have the right of immediate possession and the conditions <sup>82</sup> under which the right may be exercised.

Presently the California Constitution and statutory law limit the public agencies which can obtain an order of immediate possession to "the State, or a county, or 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."<sup>83</sup> A sanitary district has been<sup>84</sup> held a "similar public corporation."

Apart from the classifications in Article I, Section 14 of the California Constitution, the general theory and practice of California law assumes the lack of any need for such classification. Under that theory, the property owner is basically concerned with only two questions:

1. Is there authority to take in the particular instance?
2. Will he receive just compensation?

The first matter is governed by statutes delegating the Legislature's power of condemnation, defining public use, and the like. As to the second, the capacity of the condemnor should be an irrelevance.

In fact, the California Supreme Court has indicated that it is appropriate to look at these matters from the view of the property owner, and that from that view it would be a denial of equal protection of the laws to vary the lot of the property owner depending upon the capacity of the condemnor or<sup>85</sup> the purpose of the condemnation.

The administrative steps leading to the authoritative resolution to condemn vary almost as widely as do the types of governmental entities authorized to exercise the power of eminent domain. But once the authoritative decision to take has been made and the action filed, it is believed that there should be no classification of condemnors for the purposes of procedure as to taking possession. This has been the conclusion reached in all of the thorough studies

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of the law of eminent domain in other states. In fact, one of the major objectives of these legislative proposals has been to make uniform the jumble of varying condemnation procedures existing in many jurisdictions. Fortunately, since the enactment of the Code of Civil Procedure in 1872, California has had but one procedure for all condemnations (with the single exception of property owned by public utilities).<sup>87</sup>

It is possible, of course, to draw distinctions between state and local governments, or between either of them and non-governmental condemnors.<sup>88</sup> As to the latter class, the peculiar practice in California of undertaking to specify all public uses for which public property may be taken,<sup>89</sup> and then seeming to authorize takings by any entity or person<sup>90</sup> for those purposes creates the illusion of the possibility of wholesale, unrestricted property acquisition by condemnation. The condemnor, however, must be "authorized" to apply the property to the particular use.<sup>91</sup> With respect to privately owned public utilities and common carriers, the certificate of convenience and necessity issued under the Public Utilities Code plays a vital role.<sup>92</sup> Moreover, acquisition of property through eminent domain proceedings is "conclusive evidence of the dedication of the property for public use."<sup>93</sup> And, as one would expect, condemnation by purely private persons or concerns is virtually a myth.<sup>94</sup>

It seems especially illogical to distinguish between one governmental entity and another, or between a governmental entity and a public service corporation, when all may be providing the identical public service. The necessary safeguards should be built into the law dealing with possession prior to judgment rather than seemingly derived from constitutional classification.

The previous recommendation of the Commission was and remains sound.

### Classification and Public Purposes

The Constitution and the Code of Civil Procedure limit the purposes for which immediate possession may be taken to "any right of way" or "lands to be used for reservoir purposes."<sup>95</sup> The court order for immediate<sup>96</sup> possession must reflect one of these purposes. The courts, however, give<sup>97</sup> the terms an expansive construction.

The two separate constitutional amendments authorizing immediate possession for, first, "rights of way" and, second, "lands for reservoir purposes" seem to have, as their basis, the exigencies of land assembly. This consideration divides, in turn, into two aspects: (1) The delays inherent in obtaining the last parcel necessary for projects for which many parcels are needed; and (2) the problem of limiting compensation to that which is "just" in dealing with any property owner who would bargain on the basis of the public needs in such situations.

The arguments submitted to the voters in connection with the constitutional<sup>98</sup> amendment of 1918 (right of way) are enlightening:

As the law now stands, if the state, or any political subdivision thereof, seeks to condemn private property for a right of way, for example, for a road, an irrigation canal, or for flood protection, possession of the property can not be obtained until after a jury has determined the amount of compensation to be paid for the taking of such property. This may take several months. The amendment proposed merely permits the state or political subdivision thereof, after commencement of proceedings to condemn, by giving adequate security, to take possession of the property and proceed with the work before the jury has determined how much should be paid.

\* \* \* \* \*

Under existing law, no matter how urgent may be the necessity, or how great may be the damages suffered by delay, possession can not be obtained until after what may become protracted litigation.

As to the effect on compensation, the argument continues:

Experience has shown that cities, in acquiring long stretches of rights of way for public purposes, are often held up by unreasonable and arbitrary owners who attempt to take advantage of a rule which requires that the city can not go into possession prior to a jury actually fixing the compensation to be paid.

\* \* \* \* \*

It can readily be seen that this amendment does not work any hardship upon the property owner. Under the present law the state or political subdivision can condemn property, and after a jury has fixed the damage and compensation to be paid, can pay such amount and enter into possession. This amendment merely permits a change in the order of proceedings. The property owner will receive exactly the same compensation that he would have received and has the same remedies.

Virtually identical arguments were submitted in connection with the 1934 amendment (reservoirs).<sup>99</sup>

Whatever the logic of these arguments it is apparent that the two stated purposes do not encompass all projects for which sizeable land assemblies are necessary. Further, not all takings for these two purposes have any particular urgency about them.

It is believed that rather than merely designating two major public purposes as justifying immediate possession, a more discriminating, situational approach would be appropriate.

#### Appeals, Standards, and Judicial Discretion

The order for possession pending appeal under Section 1254 of the Code of Civil Procedure has been held to be an appealable order.<sup>100</sup> The order for immediate possession under Section 14, Article I of the California Constitution is not appealable, however.<sup>101</sup> Mandamus to compel issuance,<sup>102</sup> or prohibition to prevent issuance, are the appropriate remedies.<sup>103</sup>

The legislation proposed by the Law Revision Commission in 1961 would have included the following language in the section<sup>103</sup> authorizing court orders for immediate possession:

The plaintiff may appeal from an order staying the order authorizing immediate possession. Any aggrieved party may appeal from an order granting or denying a motion to vacate an order authorizing immediate possession. The appeal does not stay the order from which the appeal is taken or the order authorizing immediate possession; but the trial or appellate court may, in its discretion, stay the order authorizing immediate possession pending review on appeal or for such other period or periods as to it may appear appropriate.

That language was deleted and only the provisions for a subsequent motion to modify the amount of the security deposited were included.

The appellate courts speak of a discretion at the trial level to grant or withhold an "order of immediate possession."<sup>104</sup> It is clear, however, in each instance, that they are referring to the order for possession after judgment under Section 125<sup>4</sup> of the Code of Civil Procedure. Under Code of Civil Procedure Section 125<sup>4</sup>, the court has discretion whether or not to grant the order for possession pending appeal.<sup>105</sup> Determination of the amount, in addition to that of the interlocutory judgment, to be deposited is also discretionary.<sup>106</sup>

It is fairly certain, however, that the constitutionally authorized order for immediate possession is available without regard to any other conditions or circumstances.<sup>107</sup> In this connection, the legislation recommended by the Commission in 1961 would have included<sup>108</sup> the following language:

At any time after the court has made an order authorizing immediate possession and before the plaintiff has taken possession pursuant to such order, the court, upon motion of the owner of the property or of an occupant of the property, may:

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

Notwithstanding the Legislature's omission of this language, it would appear that a comprehensive statute applying to all condemnors, and to condemnations for all purposes, should and could be made to provide standards.

The statute enacted in Illinois requires the application for an order of immediate possession to include the following:

. . . the formally adopted schedule or plan of operation for the execution of the petitioner's project; the situation of the property to which the motion relates, with respect to such schedule or plan; and the necessity for taking such property in the manner requested . . . .

Acting on this information the court finds whether "reasonable necessity" requires taking of possession in the manner requested.

This language probably omits some circumstances that would amply justify an order. Emergency highway and flood remedial work are examples. But it is believed that language covering these and all other situations could be devised to give the courts at least some indication of legislative policy. The Illinois statute was attacked principally because of its asserted lack of sufficient standards; and sustained in this and other respects by that state's supreme court.

#### Preliminary Determination of Public Use and Necessity

One objection to any generalization of immediate possession provisions is that, at the time of the taking of possession, the court has made only a preliminary and ex parte determination of any issues going to the condemnor's right to take the property. Under Code of Civil Procedure Section 1243.5(d), the court is required to determine whether "the plaintiff is entitled to take the property by eminent domain," but that determination is purely preliminary and has no effect upon ultimate resolution of that issue.

As a general proposition, however, as the Supreme Court of the United States has emphasized, in "an eminent domain proceeding, the vital issue -  
and generally the only issue - is that of just compensation."<sup>112</sup>

In all but extraordinary cases, the "right to take" reduces to three issues: (1) public use under the federal and state constitutions and the specification of public uses in Code of Civil Procedure Section 1238 and other statutes; (2) public necessity for the improvement and the necessity of the particular property for the improvement under Code of Civil Procedure Section 1241; and (3) the requirement that the project be located "in the manner which will be most compatible with the greatest public good and the least private injury" in Code of Civil Procedure Section 1242.

The first of these issues is, of course, a constitutional one which cannot be foreclosed by any procedure short of final judicial determination.<sup>113</sup>  
It is seldom raised and even less seldom sustained.<sup>114</sup> In most instances the issue of necessity is governed by the conclusive presumption provided by Section 1238 of the Code of Civil Procedure. In cases of takings by all others, it is the burden of the court to conduct a more thorough inquiry<sup>115</sup> into that requisite. The issue as to location is dealt with as is the issue of necessity, and is governed by the same rules and presumptions.

Notwithstanding the important role that judicial determination of public use and necessity may have played historically, it is not believed that, as a practical matter, the need for a preliminary determination of these issues should preclude a general and uniform statute governing the taking of possession prior to judgment. Article I, Section 14 of the California Constitution itself contemplates situations in which the preliminary determination should ultimately be reversed. It provides in this respect

that the security deposited must cover this eventuality. That section accords with Code of Civil Procedure Section 1255(a), governing abandonment, which contemplates the necessity of restoring the premises to the property owner if a proceeding is abandoned after possession has been taken.

With respect to withdrawal of the deposit made to obtain immediate possession, Code of Civil Procedure Section 1243.7(g) provides that "if withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all defenses in favor of the person receiving such payment except his claim for a greater compensation." This provision for waiver by withdrawal is entirely appropriate, as it would be both factually and legally inconsistent for the condemnee to withdraw the funds while contending that the proceeding ultimately will fail.

If California's immediate possession provisions were recast to provide notice of the application for immediate possession, the revision could and should require the property owner to set forth all defenses, other than his claim to compensation, prior to determination of the application. Although the period of notice of the application would probably be rather short, condemnation is almost invariably preceded by administrative actions which advise, in at least a general way, of the impending acquisitions. In Federal practice, quite apart from any application of the Federal Declaration of Taking Act, any issue other than that of just compensation must be heard and determined by the court before consideration of the issue of compensation.

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#### Preliminary Determination of Compensation

The problem of determining the amount to be deposited by the condemnor in immediate possession cases is very similar to the problem of making a preliminary determination of other issues.

Article I, Section 14, of the California Constitution requires that before immediate possession be taken, the condemnor deposit "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 payment of just compensation for such taking and any damage incident thereto. . . ."

The section goes on to provide that:

The court may, upon motion of any party to set eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.

Code of Civil Procedure Section 1243.5(d) added in 1961, preserved this procedure, adding only the thoughtful stipulation that "Prior to judgment, such security may not be reduced to an amount less than that already withdrawn pursuant to Section 1243.7."

The statutory change did clarify the constitutional requirement to specify that the security should be in the amount that the court determines to be "the probable just compensation which will be made for the taking of the property and any damage incident thereto."

Prior to the enactment of a general provision for withdrawal of the total amount deposited in 1961,<sup>118</sup> no great significance attached to the amount of the deposit. Property owners had little or no concern with the amount of the deposit or with the fact that it is typically determined on ex parte application by the staff appraiser's affidavit.<sup>119</sup> With the general provisions for total withdrawal, and especially in a comprehensive statute standardizing procedure in immediate possession cases, the preliminary determination of probable just compensation becomes a much more important matter.

Even though the property owner is permitted a motion to increase the amount of the deposit, and even though the amount which he may recover in excess of the amount deposited will bear interest from the date possession is taken,<sup>120</sup> the general policy of permitting total (and insofar as possible, convenient) withdrawal, the necessity of a reasonable preliminary determination of probable just compensation argues strongly in favor of a noticed motion, rather than ex parte, procedure.

Although it is not believed to have the same significance in California, the procedure provided for determining the estimated amount of compensation assumes great constitutional importance in other jurisdictions. This is true even in those states which have been unfortunate enough to borrow California's constitutional provision on the subject. The Supreme Court of Washington, for example, invalidated that state's immediate possession provisions because they required the condemnor to deposit the amount of its last offer to the property owner.<sup>121</sup> The Arizona Supreme Court has sustained its statute, but the statute itself provides for fixing of the deposit by the court on noticed motion after consideration of such evidence as the court considers necessary.<sup>122</sup> The Supreme Court of Idaho agreed with the Washington court rather than that of Arizona, in invalidating an immediate possession statute in which the deposit was based upon the condemnor's affidavit as to value.<sup>123</sup>

A concurring opinion in the Washington decision undertakes to explain the differences and the essential problem as follows:

The significant difference in the Arizona statutory procedure is the fact that thereunder the trial judge, without a jury, takes evidence as to probable damages or compensation, and thereupon determines or fixes the amount of probable damages or compensation. [Emphasis by the court.]

\* \* \* \* \*

If legislation of the latter-mentioned type, comparable to that involved in [Arizona] had existed, it is my best judgment, and I am strongly convinced, that the court in the early Washington cases could, and probably would, have decided the basic questions involved in the same manner, but without being compelled to advert to the broad, sweeping language with reference to the matter of prepayment of compensation or damages.

\* \* \* \* \*

These defects render our legislation invalid constitutionally (Art. I, § 3, state constitution), strictly upon the ground of a lack of acceptable due process safeguards for property owners in eminent domain proceedings, where the state is seeking immediate possession of property for right-of-way purposes. The defects in the eminent domain procedure, as I see them, may be corrected by appropriate legislation, without the necessity of constitutional amendment.<sup>124</sup>

Constitutional problems quite apart, it would seem that these considerations argue strongly for a noticed motion procedure for immediate possession cases. In the context of generalized and uniform provisions for immediate possession, a property owner's right to be heard, except in the extraordinary case, seems reasonable. In all other respects, California's experience with existing deposit provisions seems to have been satisfactory.

#### Procedure for Obtaining Order (Ex Parte or Noticed Motion)

Although provisions for immediate possession were included in the eminent domain title of the Code of Civil Procedure as enacted in 1872, since that time the matter has undergone an erratic statutory and constitutional history. From the constitutional amendment of 1918 through 1961, procedure for obtaining an order of immediate possession was specified in Section 14 of Article I of the California Constitution. There were no statutes on the subject, but it was assumed that the order of possession was obtained by ex parte application and that practice developed.

This practice was continued and expressly provided for in the 1961 changes recommended by the California Law Revision Commission. Although Code of Civil Procedure Section 1243.5, as added in 1961, requires service of the order for possession upon owners and occupants for specified periods before the taking of possession, the substance of the Law Revision Commission's recommendation was not enacted. That recommendation would have attempted a compromise between ex parte procedure and noticed motion procedure by greatly expanding the motion to be made by the property owner after ex parte order but before possession is taken. The following language would have been included in Code of Civil Procedure Section 1243.5 under that recommendation: 125

(e) At any time after the court has made an order, the court, upon authorizing immediate possession and before the plaintiff has taken possession pursuant to such order, upon motion of the owner of the property or of an occupant of the property, may:

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

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

(f) [Provisions for appeal.]

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

Other states make various provisions as between ex parte or notice of motion procedure. The California idea of ex parte procedure, with motion to modify is not usual, stemming as it does directly from the amendments to the Constitution. For example, the draft model statute prepared by the Highway Research Board exemplifies provisions enacted in many states, and has been used as the basis for legislation even in those states in which condemnation for highway purposes is treated as unique. 126 The Highway Research Board study provides alternatives in this respect. The motion is provided by that draft as follows:

Whenever the State or any of its agencies, instrumentalities or political subdivisions institutes proceedings to condemn property for highway purposes, it may file a written motion either simultaneously with the petition to condemn or at any time before judgment, requesting that it be vested with title in fee simple or any lesser estate in the property or easement being condemned and be authorized to take possession and use thereof; or only the possession and use of the property, if the court determines that possession and use without title is sufficient, pending the final determination of damages. The motion shall contain or have annexed thereto: (a) a statement of the authority under which the property or any interests therein or any easement is taken; (b) a statement of the public use for which such property or any interests therein or any easement is taken; (c) a description of the property or any interests therein or any easement sought to be taken, sufficient for the identification thereof; (d) a statement of the legal estate or interest sought to be taken; (e) a statement of the formally adopted schedule or plan of operation of the project and the relationship of the property sought to be taken to such schedule or plan; (f) a statement as to the need for the early vesting of title and/or possession of the property.

Under one alternative recommended in that study, the court makes its order for immediate possession based entirely upon the "written motion" contemplated in that recommendation. Under the alternative, the suggested statute would continue with a provision for notice of the motion and its disposition, as follows:

#### Alternative Provision

The court shall fix a date, not less than \_\_\_\_\_ (five) nor more than \_\_\_\_\_ (ten) days after the filing of such motion, for the hearing thereof, and shall require notice to be given to each party in the proceeding whose interests would be affected by the requested taking, except that any party who has been or is being served by publication and who has not entered his appearance in the proceeding need not be given notice unless the court so requires, in its discretion.

At the hearing, if the court has not previously determined that the petitioner has authority to condemn property, that the property sought to be condemned is subject to condemnation, and that such right is not being improperly exercised in the particular proceeding, then the court first shall hear and determine such matters. The court's order therein shall be a final order, and an appeal may be taken therefrom by either party within \_\_\_\_\_ (ten) days after the entry of such order.

No such appeal shall stay the further proceedings herein prescribed unless the appeal is taken by the petitioner, or unless an order staying such further proceedings shall be entered by the trial court or by the appellate court.

If the foregoing matters are determined in favor of the petitioner and further proceedings are not stayed, or if further proceedings are stayed and the appeal results in a determination favorable to the petitioner, then the court shall hear the issues raised by the petitioner's motion for taking. If the court finds that reasonable necessity exists for taking the property in the manner requested in the motion, the court then shall hear such evidence as it may consider necessary and proper for a preliminary finding of just compensation, and in its discretion, the court may appoint three competent and disinterested appraisers as agents of the court to evaluate the property to which the motion relates and to report their conclusions to the court within five days after their appointment. The court then shall make a preliminary finding of the amount constituting just compensation.

The substance of that recommendation is also included in the Illinois  
127 study and has been enacted in that state. It would not be essential that hearing or disposition of the motion finally determine all issues other than the issue of just compensation. California condemnation law has worked out most of the consequences of the remote possibility that an order for immediate possession can be obtained and the action finally fail.

Service of notice of the motion would be a problem. But service of summons and of the order for possession must be made under existing practice. It would be necessary to add the substance of Code of Civil Procedure Section 1254.3, dealing with service on unknown defendants and others, to any provisions made for service of the notice of motion. And, the language of Code of Civil Procedure Section 1243.5(c), providing for certain  
128 emergency situations, should be incorporated. In general, however, service of the notice of motion would not appear to present any problems not connected with service of summons and order for possession under existing procedure.

Disposition of the motion would not necessarily entail consideration of any evidence or matters not now considered, at least in theory, on the ex parte application. The exception, of course, would be whatever evidence the property owner might choose to offer to support his contention. This should be required to be presented solely by affidavit or declaration. In the great majority of cases, disposition of the motion should prove to be as expeditious as consideration of the ex parte application.

If the existing constitutional classification as to condemnors and purposes is considered to have merit, then ex parte procedure might be retained for those takings, with a noticed motion procedure made available for all others.

Yet another, and more rational, alternative would be to develop and generalize the Commission's earlier recommendation to preserve ex parte procedure while making generous provision for remedial motion by the property owner. That course entails careful attention to the notice period provided in the order for possession.

#### Immediate Possession of Public Utility Property

Section 32a, Article XIII, of the California Constitution confers on the Legislature "plenary" and "unlimited" authority to delegate to the Public Utilities Commission <sup>129</sup> "power" and "jurisdiction" to "fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings." This authorization and its implementing legislation are the only exception to the uniform application of the eminent domain title of the Code of Civil Procedure to all condemnation.

Pursuant to this authority, the Legislature has enacted Public Utilities Code Sections 1401-1421, which provide an alternative procedure to

proceedings under the eminent domain provisions of the Code of Civil  
130  
Procedure. Section 1202.1 of the Public Utilities Code expressly  
provides for the taking of possession prior to the determination of  
compensation in railroad crossing proceedings, whether the proceeding is  
initially commenced in the superior court or before the Public Utilities  
Commission.

Even when the proceedings are in the superior court, there are precepts  
that have unique application to the taking of property owned by public  
131  
utilities. For this reason, this article merely notes the existence  
of the immediate possession provisions uniquely applicable to takings of  
public utility property and defers consideration of these provisions for a  
subsequent article.

#### Immediate Possession Distinguished from Entry for Survey, Examination or Appraisal

In a number of jurisdictions, the provisions for possession prior to  
trial include the authorization made in virtually all states for a  
preliminary entry upon property for purposes of survey, location, exploration,  
appraisal and the like. Since its adoption in 1872, Code of Civil Procedure  
Section 1242 has authorized all condemnors to "survey and locate" property  
required for public use. The section makes no provision for formalities or  
compensation, "except for injuries resulting from negligence, wantonness,  
132  
or malice."

In 1959, Code of Civil Procedure Section 1242.5 was added to make much  
more elaborate provision for preliminary entry for purposes of survey and  
exploration in takings for reservoir purposes. The section provides for a

deposit of security in the superior court, exposure of the deposit in certain respects, and for a court order to facilitate entry for these purposes.

Notwithstanding the language and various changes in Section 14 of Article I of the California Constitution, the general California provision has been held justified as a means of permitting a condemnor to comply with various provisions of the eminent domain law which require the preparation of maps, plans and the like.<sup>133</sup> The permission has been held to be limited, however, to "such entry and superficial examination as would suffice for the making of surveys or maps and as would not, in the nature of things, seriously impinge on or impair the rights of the owner to the use and enjoyment of his property."<sup>134</sup>

In any comprehensive revision of the eminent domain laws, the distinction between this sort of entry and immediate possession should be maintained and continued. It might be advisable to adapt such provisions as those of Code of Civil Procedure Section 1242.5 for application to all condemnation.

In a related context, Section 14 of Article I of the California Constitution refers to immediate possession of property "whether the fee thereof or an easement therefor be sought." California statutes and courts uniformly refer to immediate "possession" even though the use or privilege prior to trial is not "possession" in the legal sense.<sup>135</sup> This long standing practice seems not to have led to difficulty, and it seems unnecessary to contrive any more precise terminology.

#### Enforcement of Orders for Possession

The order for immediate possession under Article I, Section 14 of the California Constitution and Code of Civil Procedure Section 1243.5, the order for possession pending appeal under Section 1254, and the final order of

condemnation under Section 1253, are not to be confused with either "writs of possession" or "writs of assistance." Although they entitle the condemnor to possession in accordance with their terms, such orders are not effective as instructions to enforcement authorities.

The "writ of assistance" was the summary process appropriate for placing a party entitled by judgment or decree to possession in actual possession of the property. The writ as developed in chancery practice continues under the Code of Civil Procedure, especially Section 187 which authorizes the adoption of "any suitable process or mode of proceedings" <sup>136</sup> for effectuating a court's jurisdiction. In California there is no statutory delineation of the process. Because various sections of the Code of Civil Procedure use the term "writ of possession" in connection with unlawful detainer and quiet title proceedings, that term is now used more commonly <sup>137</sup> than "writ of assistance."

Whatever the terminology, the writ is the remedy available to a condemnor <sup>138</sup> entitled to possession. Where the right to possession has been determined, the writ is obtainable as a matter of right, and mandamus will issue to <sup>139</sup> require its issuance and execution.

The eminent domain title of the Code of Civil Procedure formerly made provision for writs of assistance in condemnation proceedings in Section 1254. Those provisions were deleted, apparently through inadvertence, in one of <sup>140</sup> many revisions of Section 1254 for other purposes. In a comprehensive eminent domain statute it might be desirable to include an appropriate provision, codifying existing judicial practice, applicable to all orders under Code of Civil Procedure Section 1243.5 (immediate possession), 1254 (possession pending appeal), and 1253 (final order).

### Period of Notice to the Condemnee

Section 14, Article I, of the California Constitution does not mention any delay in the effective date of the orders of immediate possession for which it provides.

In 1957, Section 1243.5 was added to the Code of Civil Procedure to require three days' notice in immediate possession cases.

To further reduce the possibility of hardship, Code of Civil Procedure Section 1243.5 was amended in 1961 to require that the condemnee be given 20 days' notice prior to the time possession is taken by the condemnor.<sup>141</sup> That section contains an exception to the normal 20 days' notice which permits the court, upon "good cause shown by affidavit," to reduce the notice period to not less than three days.

This history illustrates and underscores the very summary nature of California's provisions for possession prior to trial. If such possession is to be made more common, or even usual, the notice period will require careful reconsideration. Gauged by the current concern over the problem of dislocation of persons by governmental activities,<sup>142</sup> existing immediate possession procedures may be defective in failing to provide the occupant of a residence or the person in possession of a place of business with a reasonable time in which to vacate the property. Twenty days' notice can cause the occupant great inconvenience and provides the condemnor with a "coercive tool" in cases in which the property is not needed immediately.

Massachusetts enacted legislation in 1964 which provides that no person shall be required to vacate property acquired by eminent domain until<sup>143</sup> four months after he has been given notice of the taking.

A study prepared by the staff of the Select Subcommittee on Real Property Acquisition of the Committee on Public Works of the United States House of Representatives contains a recommendation that "clearing or construction should be so scheduled that an occupant is not compelled to move from a home, business, or farm without at least 180 days written notice of the date by which the move is required."<sup>144</sup> Senate Bill 1201 was introduced in the 89th Congress to effectuate the recommendations of the staff of the Select Subcommittee. Hearings were held on the bill,<sup>145</sup> but no action was taken because various agencies requested time to study the comprehensive proposals of the Select Subcommittee.

The testimony at hearings took no strong objection to the 180 days' notice requirement, but the General Counsel of the Department of Defense made the following critical comment:

The requirement in section 101(a)(6) that the owner be given 180 days' notice before he can be made to vacate his premises provides a period of grace that is unreasonable in many cases, and in some is totally incompatible with the military need. During the Cuban missile crisis, for example, it was necessary to acquire easements for missile sites on an expedited basis, and it would have been utterly impracticable to comply with this requirement.<sup>146</sup>

Generally speaking, other persons testifying took the view that the recommendation would impose a feasible requirement.<sup>147</sup> For example, a representative of the Bureau of Public Roads stated the following view:

The amount of time required for planning is not the controlling factor since in many instances the notice could not be given until the planning is complete and final right-of-way lines have been established. The 180-day requirement would provide additional leadtime for the orderly right-of-way acquisition. After an initial slowdown to provide this leadtime, the program should proceed without further delays because of the requirement.<sup>148</sup>

H.R. 7984, the Housing and Urban Development Act of 1965 as passed by the House, contained the following provision:

(6) the construction or development of any public improvements shall be so scheduled that no person lawfully occupying the real property shall be required to surrender possession on account of such construction or development without at least 90 days' written notice from the applicant of the date on which such construction or development is scheduled to begin.

The Senate did not include this portion of the bill because Senate Bill 149 1201 and other bills were pending in a Senate Subcommittee.

Of course, most California condemnees receive notice of impending condemnation long before the filing of any action. For example, information provided by the California Department of Public Works indicates that advance notice of the date when possession is required is given by:

- (1) Letters to the occupants.
- (2) Personal visits to the occupants.
- (3) Public hearings on proposed projects.
- (4) Public meetings to discuss right of way procedures.
- (5) Pamphlets handed to the public at public hearings and also mailed or delivered personally prior to inspection of the property for purposes of making an appraisal.

In the vast majority of cases, the persons occupying property taken by that department receive at least 90 days' notice of the date possession of the property will be required. In a few cases, however, less than 90 days' notice is given. Further, the occupant of property being taken by the California Department of Public Works is given more notice than is given in other states.

From this information, it appears reasonable to require that, in the ordinary case, the condemnee be allowed 90 days within which to relocate. The requirement would be limited, as in the Federal proposal, to residences,

farms and places of business. The requirement should clearly provide that such notice may be given before, as well as at the time of or after, the condemnation action has been filed. Provision should also be made for emergency and urgent situations in which the condemnor may move the court to shorten the notice period to not less than three days.

This general recommendation would provide the property owner with more adequate notice and do much to preclude the possibility of immediate possession being used as a "coercive tool." If enacted, the Federal legislation would apply to all Federally assisted acquisitions. Therefore, consideration should also be given to conforming California law to period of notice required by any federal statute.

#### Interest in Immediate Possession Cases

Since adoption of Code of Civil Procedure in 1872, Section 1249 has provided that:

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.

This section was rendered meaningless in immediate possession cases by changes in Section 1254 that made that section refer only to possession after judgment. In a landmark decision in this area, the California Supreme Court held that the property owner is entitled to damages for the use and possession of his property from the date of the taking of possession to entry of the final order in condemnation. <sup>150</sup> The decision further held the damages, for convenience, may be computed as 7% in interest on the amount of the judgment.

Clarification of this matter was accomplished in 1961. Code of Civil Procedure Section 1255b now provides that interest in immediate possession

cases accrues from the time possession is taken or the date after which the plaintiff is authorized to take possession by an order for possession, whichever is earlier. There is little, if any, disagreement over this policy, since all agree that if the property is physically taken, the condemnee has for all practical purposes lost his property and should be allowed legal interest until he is paid the award.

Section 1255b also provides that interest shall cease "as to any amount deposited pursuant to Section 1243.5, [on] the date that such amount is withdrawn by the person entitled thereto." This permits the property owner to leave the deposit in the court and to recover seven percent interest on the final award from the date that interest begins to accrue. Unlike California, the Federal government and a number of states stop interest on the money deposited from the time of the deposit.<sup>151</sup> Interest must be paid, of course, on the difference between the final award and the amount of deposit. It would be highly desirable for California to attain this result. As stated by a representative of the California Attorney General's office:

Code of Civil Procedure section 1254 provides that in cases where plaintiff is not in possession of the property and there is a judgment, the plaintiff can proceed ex parte to obtain an order authorizing it to take possession by depositing the amount of the judgment, plus such further sums as may be required by the court, and in such event, if there is an appeal, interest ceases to run as of the date of deposit of the money. See Code of Civil Procedure section 1255b. However, no like provision provides for the termination of interest after judgment and deposit of the amount of the judgment when plaintiff has taken possession prior to judgment, except in instances where the defendant fails to secure a larger award following his appeal.

It is felt that there should be a provision added to section 1255b of the Code of Civil Procedure providing that interest shall terminate as to any amount paid into court after judgment when the condemnor files a statement providing that the defendant's right of appeal is not waived and that the defendant has a right to the proceeds of the judgment deposited into court for his benefit. If the defendant is successful on his appeal and ultimately obtains a larger judgment, interest would, of course, be paid upon the difference between the amount previously deposited and the final judgment.<sup>152</sup>

A Federal directive goes further and stops interest from the time of deposit in all immediate possession cases. With respect to highway funds, the directive provides that:

Federal funds will not be available for reimbursement of any interest payments to the property owner after the date payment is made available to him, on the portion of the final settlement or award represented by such partial payment. <sup>153</sup>

Whether deposited funds are "available" to the California condemnee within the meaning of the directive appears not to have been determined. Although California allows withdrawal of all of the deposit, where there are owners of various interests in the property, the period between deposit and withdrawal will necessarily be lengthened. As set forth in the following subtopic, there are inherent problems in withdrawing the funds deposited in such situations. The Illinois statute causes interest to cease or not based on the simple test whether the condemnor opposes the <sup>154</sup> withdrawal. Such a provision could, and probably should, be woven into the text of subsections (e) and (f) of Code of Civil Procedure Section 1243.7.

#### Withdrawal of Amount Deposited

Section 1243.7 of the Code of Civil Procedure was added in 1961 to provide a detailed procedure whereby the condemnee may withdraw all or any portion of the amount deposited for his property or property interest in an immediate possession case. Unlike deposit provisions aimed at assuring the solvency of a litigant, the primary purpose of the deposit in an immediate possession case is to enable the condemnee to withdraw and use the amount <sup>155</sup> deposited. Ordinarily, the condemnee can be expected to use the amount withdrawn to finance the purchase of a residence or the relocation of his place of business.

A condemnee seeking to withdraw all or a portion of the deposit must make an application to the court for an order permitting withdrawal. Such an order may not be made until at least 20 days after service on the condemnor of the application for withdrawal, or until the time for all objections to the withdrawal has expired, whichever is later. Within the 20-day period, the condemnor may object to the withdrawal on the ground that other persons are known or believed to have interests in the property being condemned. If the condemnor objects, he must attempt to serve personally such other persons with a notice that they must appear within 10 days of service of such notice if they wish to contest the withdrawal. If the condemnor is unable to make such personal service, the person seeking to withdraw the deposit must make the service. Failure of a person so served to appear and object within 10 days after service waives "any right to such amount withdrawn or further rights against the [condemnor] to the extent of the sum withdrawn."

If a person served appears and objects to the withdrawal, or if the condemnor so requests, the court shall hold a hearing after notice to all parties and shall determine the amounts to be withdrawn, if any, and by whom. If the court determines that a party is entitled to withdraw any portion of a deposit which another party claims, the court may require such party, before withdrawing such portion, to file an undertaking to assure repayment of any excess withdrawal, subject to certain statutory limits on the amount of the undertaking. When the final judgment determines the amount to which each person having an interest in the property is entitled, the person making a withdrawal in excess of the amount of his final award is required to repay the excess to the person entitled thereto, together with interest from the date of withdrawal.

If the total amount sought to be withdrawn prior to judgment exceeds the amount of the original deposit, the person or persons seeking to withdraw any amount in excess of the original deposit must file an undertaking to assure repayment of the excess. The statute provides that bond premiums for such purposes are recoverable costs. The amount withdrawn is credited upon the final award. The statute provides procedures for enforcing repayment of any excess withdrawals.

Withdrawal of all or a portion of the deposit constitutes a waiver by the person making such withdrawal of all defenses to the condemnation  
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except a claim for increased compensation.

These provisions for withdrawal of the entire deposit were enacted in  
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1961 upon recommendation of the California Law Revision Commission. At that time, the procedures were reviewed and revised in response to the Commission's recommendations, and appear to have been working satisfactorily in most cases. In situations in which the condemnation action necessitates jury valuation of separate interests (typically leasehold), however, it is apparent that further simplification will be difficult.

In 1939, the Legislature added Code of Civil Procedure Section 1246.1, which provides that where there are two or more estates or divided interests in property, the condemnor is entitled to have the value of the property first determined. The respective rights of the defendants to the award are then determined by the same finder of fact. The section contemplates that the rights of the various parties in a particular parcel of land and  
158  
in the award for that parcel shall be determined in one judgment.

Prior to the enactment of this section, the appellate courts had held that the deposit for the taking of immediate possession had to be segregated into separate interests existing in any one parcel. They held that in

this respect there was as great a difference between owners of separate interests in the same parcel of land as between owners of separate parcels of land.<sup>159</sup> It is assumed that this view has been changed by enactment of Code of Civil Procedure Section 1249.1, and the uniform practice appears to be to make an unsegregated deposit. Problems may remain, however, especially in view of the fact that the earlier cases were based upon an interpretation of Section 14 of Article I of the California Constitution.

It would seem that, as a minimum, the condemnor should be expressly authorized to make a segregated deposit in such relatively simple divisions of interest as between an owner and the holder of a deed of trust. This would permit a related provision halting interest and thereby, in effect, requiring withdrawal. Similarly, in such situations, the condemnees might be permitted to require segregated deposits to facilitate withdrawal. This is a matter that could be handled on disposition of the motion, if a noticed motion procedure for immediate possession were to be adopted.

#### Date of Valuation in Immediate Possession Cases

Under Code of Civil Procedure Section 1249, the basic date of valuation is fixed by the issuance of summons. If the cause is not tried within one year and the delay is not caused by the defendant, the valuation date is the date of trial. Great significance, partly real and partly imaginary, is commonly imputed to these alternative dates of valuation. Many explanations have been offered in justification of the basic date, but in the context of the Code of Civil Procedure as enacted in 1872 it seems clear that that date is taken simply by analogy to other civil actions. The alternate date also has debatable ramifications and has recently presented a major problem of construction.

In any event, the dates of valuation are not varied by the taking of immediate possession. An order for immediate possession cannot be obtained prior to commencement of the action. Hence, in most cases the date of valuation is fixed at some time prior to the taking of possession. It is possible, however, for the date of valuation to shift to the date of trial, leaving a long gap between the change of possession and the alternate date of valuation fixed for all cases.

California courts take the irreconcilable position that issuance of summons constitutes a "constructive taking" (in explanation of the date of valuation under Code of Civil Procedure Section 1249), yet that a taking of possession by the condemnor (under either the immediate possession or possession-pending-appeal provisions) is not a taking for such purposes. The date of valuation in immediate possession cases has been considered in a number of appellate decisions with uniform results. In the leading decision, the date of trial was approximately five years subsequent to issuance of summons, and possession had been taken shortly following the commencement of the proceedings. The property owner contended that property values had fallen and that he was constitutionally entitled to a date of valuation as of the change of possession. In holding that the taking of possession has no bearing on the date of valuation, the court discussed the situation as follows:

The legal basis of the contention that the 1942 value should have been considered, necessarily is that appellant had a constitutional right to have compensation fixed as of the date when plaintiffs entered into actual possession, and that the Legislature therefore was without the power to provide that values should be fixed as of any other time. The contention is not sound unless entry into possession by the condemnor was a "taking" of appellant's property, which would require that compensation be assessed according to the value at that time.

An owner who is deprived of the use and occupancy of his land before he is actually compensated in the amount of its value is entitled to be recompensed for his loss. To that end, an allowance of interest in the amount of the award to the time of judgment is proper [citations omitted]. But it cannot be successfully contended that the mere entry into possession by the condemnor amounts to such a complete and irrevocable taking as to require application of the rule that the owner is entitled to the value of his land at the time it is taken. The Constitution guarantees that he be compensated only for whatever is taken from him--the value of use for the time he is deprived of it, and the value of the fee or easement, and damages as of the time when title either actually or constructively passes. No doubt it would have been competent for the legislature to provide that compensation should be assessed according to values at the time the condemnor enters into possession . . . .<sup>161</sup>

Although this view is correct under the Code of Civil Procedure, it is not the result reached in most jurisdictions, even in those states that fix<sup>162</sup> the date of trial as the date of valuation. As stated in a leading decision from New York:

A recognized exception to the general rule exists where the condemnor, under legal authorization, enters into possession of the realty before he takes title. Under such circumstances, the value date is moved back to the date of compliance with the legal conditions for possession before title. [Citations omitted.]

\* \* \* \* \*

A review of the decisions leads to the conclusion that the rule generally to be applied in condemnation proceedings in this state is that the title vesting date or possession date, whichever is the earlier, shall be regarded as the value fixing date.<sup>163</sup>

Conceding that condemnees generally desire the latest possible date of valuation, and conceding that the alternate date provided by Code of Civil Procedure Section 1249 is of some value in causing condemnors to expedite proceedings, it is believed that the date of valuation should, in no event, be fixed later than the change of possession.

Legislation proposed for the Federal government, in reference to the date of possession, would provide:

The term 'date of valuation' means the date of possession, the date of a purchase agreement, the date of filing a declaration of taking, the effective date of a court order of possession, or the date of trial, whichever is the earliest.<sup>164</sup>

Admittedly, change of Code of Civil Procedure Section 1249 merely to deal with immediate possession cases hardly seems worthwhile. A major problem in connection with that section is whether the usual date of valuation should be shifted from issuance of summons to date of trial or some other date, or whether detailed legislation should be incorporated to deal with several subtle and important problems. The rule establishing the change of possession as the valuation date in cases of possession prior to final judgment should be built into that revision.

That result would coincide with the logic adhered to by the Law Revision Commission in 1961 to the effect that a change of possession prior to final order should pass all of the burdens and benefits of ownership to the condemnor, excepting title and a safeguarded right to "just compensation" retained to the condemnee.

#### Abandonment of Proceedings and Delay in Payment When Immediate Possession Has Been Taken

Under Code of Civil Procedure Section 1255a, whether or not **immediate** possession has been taken, the condemnor may abandon the condemnation proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment. However, upon motion of the condemnee, the court may set aside an abandonment if the court determines "that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced." This statutory restriction upon abandonment

of a condemnation proceeding was enacted in 1961 upon recommendation of  
165  
the Law Revision Commission. This treatment of the problem admittedly  
was a compromise between an unrestricted privilege to abandon and an  
absolute prohibition of abandonment in stated situations, such as the one  
in which immediate possession is taken.

In Federal practice and in a growing majority of the States, the  
proceeding may not be abandoned without consent of the condemnee after  
possession is taken. The reasons for this position have been aptly stated  
as follows:

First of all, the . . . position should not be an undue burden  
upon the condemnor: there have been relatively few abandon-  
ments following immediate possession since the creation of this  
right in . . . [1911]; and even with the proposed expansion of  
the right of immediate possession it is doubtful if there will  
be more than a nominal number of such instances in the future.  
Second, it must be emphasized that the right of immediate  
possession is an extraordinary power and as such its use should  
be controlled and the condemnee should be protected wherever  
possible. Third, not only is the character of the land often  
changed by the condemnor to the condemnee's detriment, but damages,  
even though they may make the condemnee "whole" in a legal sense,  
may not justly compensate the owner for lost business opportunities.  
Last, a rigid restriction against abandonment would establish a  
necessary check against any administrative abuse on the part of the  
condemnor who gains full dominion and control of the property.  
It should, of course, be noted that abandonment is always  
permissible by stipulation of the parties.<sup>167</sup>

If the condemnor is permitted to abandon the proceeding, Subsection  
1255a(d) requires that the condemnee be compensated for any "damages arising  
out of the plaintiff's taking and use of the property and damages for any  
loss or impairment of value suffered by the land and improvements after  
the time the plaintiff took possession of or the defendant moved from the  
property sought to be condemned in compliance with an order of possession,  
whichever is earlier." This provision obviously is designed to assure that

the condemnee will be made whole for any loss suffered as a result of the condemnor taking possession of the property or obtaining an order of immediate possession.

The provision is not self-explanatory, however, as to why immediate possession might justifiably have been taken (presumably to expedite a public project) and yet the property have been permitted to remain in a condition appropriate for return to its owner.

Further, even a qualified privilege to abandon without consent of the condemnee is entirely inconsistent with the uniform provisions for withdrawal of the total deposit. No provision is made for repayment or recoupment of the money withdrawn in such a situation.

It is recommended that very serious consideration be given to eliminating the unilateral privilege to abandon after possession is taken. The California Supreme Court has indicated that the power of eminent domain was never intended to permit "shopping" for either properties or favorable  
168 awards, and that policy would appear to have even stronger application to actions accompanied by immediate possession.

A related recommendation, pertaining to abandonment of proceedings generally but having especial application to immediate possession cases,  
169 is made in the notes.

The provisions governing payment of the award are closely related to those made for abandonment of proceedings.

As enacted in 1872, Code of Civil Procedure Section 1251 simply provided that "a plaintiff must, within 30 days after final judgment, pay the sum of money assessed." This basic provision remains, and in this connection, the eminent domain title defines "final judgment" as meaning "a judgment when all possibility of direct attack thereon by way of appeal, motion for  
170 new trial, or motion to vacate the judgment has been exhausted."

The 30-day period within which the condemnor must pay the award is therefore extended an additional 60 days within which an appeal may be filed after entry of judgment or disposition of a motion for new trial.<sup>171</sup> The period is also extended by the 10 days from notice of the entry of judgment within which either party may move for a new trial, or move to vacate or set aside the judgment.<sup>172</sup>

These long standing rules apply alike to cases accompanied or unaccompanied by immediate possession. As to the former cases, the rules emphasize the significance of the broad provisions made in 1961 for withdrawal of funds deposited to obtain immediate possession. The rule remains, in cases unaccompanied by immediate possession, that during the 90 days or more "afforded a condemnor for contemplation of the award and the advisability of paying that amount for the property or of abandoning the project," there is no method by which the condemnor can be compelled to take or pay for the property.<sup>173</sup> One of the advantages to the property owner of immediate possession being taken is therefore apparent.

In 1911, the beginnings of a provision for even further delay in payment were added to Section 1251. That provision now reads as follows:

In case the plaintiff is the State of California, or is a public corporation, and it appears by affidavit that bonds of said State or of any agency thereof, or of said public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; provided further, that if the sale of any such bonds cannot be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which such payment must be made.

A decision prior to an amendment of former language in 1937 had held that the one year exception applied only when bonds of the state or a public

corporation were to be sold and consequently had no application to bonds issued under the Street Opening Acts of 1903 or 1911, as such bonds were not those of the state or of a public corporation.<sup>174</sup> A similar result had been reached where the bonds to be sold to pay the judgment were those of an improvement district.<sup>175</sup> The reasoning of those and other such decisions was that any form of bonds, other than general obligation bonds, simply were not "bonds of said state or public corporation."<sup>176</sup> The amendment of 1937 added the words "or of any agency thereof" after the word "State" in the second phrase of the language. Perhaps the amendment was intended to extend the provision to include assessment bonds,<sup>177</sup> but the section appears never to have been construed in this respect.

In any event, use of the extension of payment provision appears not to have been extensive in connection with public improvements financed by assessments and the issuance of assessment bonds.<sup>178</sup> It does appear to have been invoked in a great many instances to permit issuance of revenue or general obligation bonds to permit local units of government to acquire ownership of entire utility system from private ownership.<sup>179</sup>

Any "option" available to the condemnor to delay payment for the one-year period from final judgment has been greatly restricted by a decision that the related provision for abandonment is not extended. After the lapse of more than 30 days from final judgment, the proceedings may not be abandoned by the condemnor even though the extension for issuance of bonds is applicable and even though the bond proceeds have not been forthcoming within 30 days from final judgment.<sup>180</sup>

It is not believed that the provisions of Code of Civil Procedure Section 1251 were intended to be a substantial deviation from the constitutional

policy of prompt payment to the property owner. Further, the extension provisions do not appear to be of sufficient practical importance to preclude procedures calculated to arrive at a substantially simultaneous exchange of property and compensation.

Should the Condemnor Be Required to Take Immediate Possession In  
Appropriate Cases

Several distinct advantages to the condemnee when immediate possession is taken have been discussed at various points throughout this article. Apart from prompt receipt of "probable just compensation," the procedure alleviates many disadvantages that inhere in any substantial delay between filing of the complaint and payment of the compensation. Upon commencement of the condemnation proceedings, a property owner is deprived of most of the valuable incidents of ownership. He cannot receive compensation for improvements to the property made after that time. He is precluded from effectively selling, renting, or dealing with the property. Moreover, in the usual case, the condemnee is deprived of any increase in the value of his property occurring after the commencement of the proceeding, for the condemnation award is based on the value of the property on that date. In addition, because his property is being taken, he must seek out and purchase new property to replace it and prepare to move. At the same time, he must incur the expenses attendant upon litigating the condemnation action. These expenses must be incurred whether immediate possession is taken or not, but the landowner receives no compensation until conclusion of the litigation unless immediate possession is taken. If he has no funds available to meet these expenses, the landowner may be forced to accept inadequate compensation merely to relieve the immediate economic situation caused by the condemnation

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action.

These considerations have led to recommendations in a number of states that the condemnee be on option to require the transfer of possession and deposit of funds. For example, a very thorough study of New Jersey's law of eminent domain led to the following recommendation:

F. From time to time, agencies may institute proceedings, but not take possession of the property until after an award has been made. In the meantime, the owner is without funds to acquire substitute property and is unable to efficiently manage his property because of loss of tenants and inability to re-rent pendente lite. This is a great hardship to property owners, particularly to owners of small properties. It is recommended that if the condemning body does not take possession within three months after institution of the proceedings, any party in interest, upon application to the court, may require the condemning body to take such possession and make the deposit herein required unless for good cause, the court shall direct otherwise.

Moreover, at least one State has enacted legislation based on such recommendations. Section 407(b) of the new Pennsylvania Eminent Domain law provides as follows:

If within sixty days from the filing of the declaration of taking, the condemnor has not paid just compensation as provided in subsection (a) of this section, the condemnee may tender possession or right of entry in writing and the condemnor shall thereupon make payment of the just compensation due such condemnee as estimated by the condemnor. If the condemnor fails to make such payment the court, upon petition of the condemnee, may compel the condemnor to file a declaration of estimated just compensation or, if the condemnor fails or refuses to file such declaration, may at the cost of the condemnor appoint an impartial expert appraiser to estimate such just compensation. The court may, after hearing, enter judgment for the amount of the estimated just compensation.

An official comment to the subsection makes clear its purpose and effect:

Even though the condemnor does not desire immediate possession after the condemnation, the condemnee, who may want to move immediately, has the right under this section, if the condemnor has not asked for possession within sixty days after the filing of the declaration of taking, to deliver possession to the condemnor and take the condemnor's estimate of just compensation without prejudice to his right to prosecute his claim for damages.

The various classes of condemnors should not be greatly inconvenienced by such a procedure. The filing of the action is invariably preceded by a more or less protracted course of administrative action. Negotiations with the property owner should have been conducted and have proven fruitless. Moreover, the filing of the action, and the timing of that step, lies within the control and discretion of the condemnor. Application of a businesslike tempo to the taking of possession and payment of the probable compensation after filing of the action would be entirely appropriate. If relatively minor administrative or fiscal obstacles would have to be overcome in certain situations, then such should be done in the interest of a more rational property acquisition program.

Probably a typical view of condemnors is stated by a representative of the Los Angeles County Counsel's Office as follows:

We submit that the condemning agency should retain discretion with respect to whether or not it should take immediate possession. The cost to the public at 7 percent interest, which runs under current law from the date of possession, is a substantial cost factor which should not be imposed upon the public if the condemning agency cannot use that possession in the best interest of the public.

In the event that the Commission might deem it desirable to allow a property owner to require the condemnor to take possession, then as a corollary of such change in present law, the condemnor should be empowered to require the condemnee to withdraw the money deposited to secure the Order of Immediate Possession. Perhaps the law could be drafted to provide that in the event that condemnee obtains an order requiring the condemnor to take possession that in such event no interest would be payable on the deposit to secure the order. We feel that such provisions would balance the equities between the legitimate public interest in holding the line on the cost of public improvements and the legitimate interest of some defendants in obtaining a sum of money approximately equivalent to the value of their property prior to the final determination of the valuation of the property.<sup>185</sup>

It would seem appropriate, therefore, for the Law Revision Commission to recommend enactment of legislation allowing the property owner a motion to

compel the taking of possession and payment of probable just compensation. The motion should be permitted at any time after issuance of summons. The effective date of possession under the order, however, should not be earlier than 30 days after service of the notice of motion unless the parties agree to an earlier date or the court, upon request of the condemnor, for good cause shown orders an earlier date. The recommended period of 30 days is based on the similar period for payment after final judgment, but it could be made 90 days by analogy to such period following entry of the "interlocutory" judgment.

As in other immediate possession cases, the order of immediate possession should fix the "probable just compensation" and require that such amount be deposited not later than the date of possession under the order. To assure that the deposit will be made within the time specified in an order made upon motion of the condemnee, the legislation might provide that if the condemnor fails to make the deposit the court shall order (1) that the condemnation proceeding be dismissed; and (2) that a new condemnation proceeding to acquire the property for the same public improvement may not be commenced for a prescribed period, such as three years.

A motion by the condemnee for an order of immediate possession would be made to act as a waiver of all defenses except the right to greater compensation. And, most importantly for condemnors, if the order is made upon request of the condemnee, interest should be prevented from accruing on the amount deposited after the date of such deposit.

The condemnee, of course, would be permitted to withdraw the deposit in the same manner as in other immediate possession cases.

Conforming the Provisions for Immediate Possession with Those for Possession Pending Appeal

As has been shown, the reason for California's two distinct sets of provisions for possession prior to final order is purely historical. The overlapping nature of these has been a source of confusion, especially in situations in which the condemnor takes immediate possession and continues in possession after entry of the judgment. <sup>186</sup> The legislation enacted in 1961 did not clarify these problems, as that revision retained and further segregated the two sets of provisions.

In a comprehensive revision, these sets could, and should, be synthesized. A single set, with uniform procedures and provisions would bring clarity to an often misunderstood segment of condemnation law.

CONCLUSION

The result of the existing language of Section 14 of Article I of the California Constitution has been a hamstringing of orderly acquisition of property for public improvements and an allocation of unnecessary burdens and uncertainties to the property owners. The section should be revised to clarify the power and the duty of the Legislature to restore and assure mutual fairness in the law of eminent domain. The property owner should be assured of a substantially simultaneous exchange of money and property.

Guides to fair and convenient procedures can be determined; the underlying policy considerations can be explored and implemented; and the Legislature can be entrusted to provide a law fair to property owners, feasible in operation, and understandable by those concerned.

Any comprehensive, forward-looking revision of eminent domain procedures demands and deserves the critical attention of those possessing the power of eminent domain, those groups having special knowledge of the subject, and, not least, property owners and their counsel. It is fitting that the California Law Revision Commission and the Legislature be given the benefit of such criticism.

Suggestions, criticisms or recommendations related to the subject of this article should be sent to the California Law Revision Commission, 30 Crothers Hall, Stanford, California 94305, and will be considered when the Commission determines what recommendation it will make to the Legislature.

POSSESSION PRIOR TO FINAL JUDGMENT IN  
CALIFORNIA CONDEMNATION PROCEDURE

FOOTNOTES

1. The more important published studies include the following: ALASKA LEGISLATIVE COUNCIL, REPORT ON EMINENT DOMAIN IN ALASKA (1962); KENTUCKY LEGISLATIVE RESEARCH COMMISSION, HIGHWAY CONDEMNATION IN KENTUCKY (Informational Bulletin No. 38, 1965); REPORT OF THE LEGISLATIVE COUNCIL COMMITTEE TO REVISE THE CONDEMNATION LAWS OF MARYLAND (1962); REPORT OF EMINENT DOMAIN REVISION COMMISSION OF NEW JERSEY (1965); PENNSYLVANIA JOINT STATE GOVERNMENT COMMISSION, EMINENT DOMAIN CODE (1964); REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL, REVISION OF EMINENT DOMAIN LAWS (1961).
2. STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION, HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS, (Comm. Print 1964); see also Hearings on S. 1201 and S. 1681 Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 89th Cong., 1st Sess. (1965).
3. Pennsylvania Eminent Domain Code (Act of June 22, 1964, P.L. 84).
4. Legislative studies devoted specifically to possession prior to final judgment, each setting forth a proposed statute, include: AMERICAN ASS'N OF STATE HIGHWAY OFFICIALS, COMM. ON RIGHT-OF-WAY, IMMEDIATE POSSESSION OF HIGHWAY RIGHT-OF-WAY (1951); LAW REVISION STUDIES--NO. 1, Study and Act Relating to Vesting of Possession Before Payment

in Eminent Domain Proceedings, 45 (U. Chi. Law School 1956); HIGHWAY RESEARCH BOARD, SPECIAL REPORT 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1958); Note, Montana's Condemnation Procedure--The Inadequacy of the "Commission System" of Determining Compensation, 25 MONT. L. REV. 105 (1963).

5. Cal. Stats. 1956, Res. Ch. 42, p. 263.
6. See Recommendation and Study Relating to Evidence in Eminent Domain Proceedings; Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings; Recommendation and Study Relating to the Reimbursement for Moving Expenses When Property Is Acquired for Public Use, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at A-1, B-1, C-1 (1961); Recommendation and Study Relating to Condemnation Law and Procedure: Number 4--Discovery in Eminent Domain Proceedings, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701 (1963) (also published with abridgements in 1 MODERN PRACTICE COMMENTATOR 459 (1964)). See also Cal. Stats. 1965, Ch. 1151 (evidence in eminent domain and inverse condemnation cases); Cal. Stats. 1961, Ch. 1612, p. 3439 (tax apportionment in eminent domain proceedings); Cal. Stats. 1961, Ch. 1613, p. 3442 (taking possession and passage of title in eminent domain proceedings); Cal. Stats. 1965, Chs. 1649 and 1650 (moving expenses). The recommended legislation relating to discovery in eminent domain proceedings has not been enacted.
7. The current directive authorizes study of the question "whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings." Cal. Stats. 1965, Res. Ch. 130.
8. 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1 (1961).

9. CAL. CODE CIV. PROC. § 1253. The judgment entered in a condemnation proceeding is "interlocutory" in the sense that it confers no right to possession until it has been complied with, time for appeal or motion for new trial has expired, and the final order rendered.
- Department of Public Works v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958).
10. CAL. CODE CIV. PROC. § 1264.
11. CAL. CODE CIV. PROC. § 1256.
12. CAL. CODE CIV. PROC. § 1257.
13. See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1 (1961).
14. Cal. Stats. 1961, Ch. 1612, p. 3439.
15. Cal. Stats. 1961, Ch. 1613, p. 3442; CAL. CODE CIV. PROC. §§ 1243.4, 1243.5, 1243.6, 1243.7, 1249, 1249.1, 1253, 1254, 1255a, and 1255b.
16. 36 CAL. S.B.J. 454, 461 (1961).
17. As to this derivation of the language of Section 14, see Historical Note in CAL. CONST., Art. I, § 14 (West 1954).
18. 2 OPS. CAL. ATTY. GEN. 415 (1911).
19. See Anderson v. Smith-Powers Logging Co., 71 Ore. 276, 139 Pac. 736 (1914). See also Annotation, Exercise of Power of Eminent Domain for Purposes of Logging Road or Logging Railroad, 86 A.L.R. 552 (1933); Annotation, Logging or Mining Road as a Common Carrier, 67 A.L.R. 588 (1930).
20. See SEC'Y OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 34 (1918).

21. Heilbron v. Superior Court, 151 Cal. 271, 278, 90 Pac. 706, 708 (1907).
22. See Cent. Contra Costa etc. Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950).
23. Almada v. Superior Court, 149 P.2d 61 (App. 1944). In 1958, the Legislature submitted, but the voters rejected, a proposal that would have extended the immediate possession provisions of Section 14 to include takings for airport purposes and takings by school districts.
24. O.T. Johnson Corp. v. Superior Court, 103 Cal. App.2d 278, 229 P.2d 849 (1951).
25. City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961).
26. Sanitary District v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950).
27. DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878 at 104 (State Printer, 1880) [hereinafter cited as DEBATES AND PROCEEDINGS].
28. DEBATES AND PROCEEDINGS at 97.
29. DEBATES AND PROCEEDINGS at 232.
30. DEBATES AND PROCEEDINGS at 262, 344.
31. DEBATES AND PROCEEDINGS at 344.
32. DEBATES AND PROCEEDINGS at 344.
33. See remarks of Mr. Barnes, DEBATES AND PROCEEDINGS at 345; Mr. Edgerton, DEBATES AND PROCEEDINGS at 346 ("The whole value of the thing [taken] has to be paid independent of any considerations of benefit resulting to an adjoining property").

Incidentally, the question whether benefits might be offset against the value of the property taken, as well as against severance

damages was not finally settled in California until the amendment to CODE CIV. PROC. § 1248(3) in 1965 to provide that "benefits shall in no event be deducted from the value of the portion taken". Cal. Stats. 1965, Ch. 51, § 1, p. .

- 34. DEBATES AND PROCEEDINGS at 344.
- 35. 137 Cal. 619, 70 Pac. 1083 (1902).
- 36. See Collier v. Merced Irr. Dist., 213 Cal. 554, 2 P.2d 790 (1931); People v. McReynolds, 31 Cal. App.2d 219, 87 P.2d 734 (1939).

Seemingly inconsistent decisions intervened between adoption of the Constitution of 1879 and the Beveridge decision in 1902. Decisions in Muller v. Railway Co., 83 Cal. 245 (1890) and Pacific Coast Ry. v. Porter, 74 Cal. 261 (1887) referred to the discrimination between "corporations other than municipal" and all other condemnors, but in establishing and applying the so-called "before and after rule" as to the value of the remainder they permitted, in effect, the offsetting of special benefits.

Decisions in Pacific Coast Ry. v. Porter, 74 Cal. 261, 15 Pac. 774 (1887) and Moran v. Ross, 79 Cal. 549 (1889) recognized and seemingly applied what the latter decision refers to as the "absurd and unjust" discrimination between classes of condemnors, but it is not clear whether those decisions were dealing with general or special benefits. In San Bernardino etc. Ry. v. Haven, 94 Cal. 489, 29 Pac. 875 (1892) the court seemingly also applied the discrimination, but it is very clear that that decision was dealing with general rather than special benefits.

- 37. DEBATES AND PROCEEDINGS at 350.

38. Vilhac v. Stockton etc. R.R., 53 Cal. 208 (1878); Sanborn v. Belden, 51 Cal. 266 (1876); Fox v. Western Pac. R.R., 31 Cal. 538 (1867).
39. DEBATES AND PROCEEDINGS at 347.
40. DEBATES AND PROCEEDINGS at 1190.
41. DEBATES AND PROCEEDINGS at 1190.
42. McCauley v. Weller, 12 Cal. 500 (1859); Weber v. County of Santa Clara, 59 Cal. 265, 266 (1881)("The Constitutional provision is prohibitory in its nature and is self-executing . . . . The Constitution contemplates and provides for proceeding in court in all cases where private property is sought to be taken for public use, and it prohibits any other proceeding to that end." [Emphasis in original.]).

This policy remains viable. The report of the Select Subcommittee on Real Property Acquisition includes the following recommendation:

(10) A property owner should not be compelled to file an inverse condemnation action (Tucker Act) in order to prove that the government has taken his property or any interest therein. The acquisition of property should be accomplished by purchase or condemnation proceedings, and not by deliberate acts of physical taking. [STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION, HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS at 123 (Comm. Print 1964).]

43. Jonson v. Alameda County, 14 Cal. 106 (1859)("The **compensation should** have preceded or accompanied the taking and without it every act of the [condemnor] was illegal and void."); Bensley v. The Mountain Lake Water Company, 15 Cal. 306 (1859)("there is nothing in the legislation of this state which gives any right of possession until the compensation is made, nor, if we may indicate our ideas of policy, should there be

in any state."); *San Mateo Water Works v. Sharpstein*, 50 Cal. 284 (1875) ("The taking in this case amounts to a taking of private property for public use in the sense in which that phrase is used in the constitution, and can only be effected upon the conditions prescribed in the constitution--that is, upon just compensation being simultaneously made.").

44. 137 Cal. 575, 70 Pac. 629 (1902).
45. DEBATES AND PROCEEDINGS at 352-353.
46. 95 Cal. 220, 30 Pac. 218 (1892).
47. 137 Cal. 575, 70 Pac. 629 (1902).
48. 151 Cal. 271, 90 Pac. 706 (1907).
49. 34 Cal.2d 845, 215 P.2d 462 (1950).
50. See Legislative History in CAL. CODE CIV. PROC. § 1254 (Deering 1959).
51. See the decisions cited, supra at note 38.
52. 95 Cal. 220, 30 Pac. 218 (1892).
53. 137 Cal. 575, 70 Pac. 629 (1902).
54. For an analysis of the Steinhart case that follows this analysis, see Note, Montana's Condemnation Procedure--The Inadequacy of the "Commission System" of Determining Compensation, 25 MONT. L. REV. 105, 126-135 (1963).
55. 137 Cal. 619, 70 Pac. 1083 (1902). See the discussion in the text, supra at notecall 35.
56. 151 Cal. 271, 90 Pac. 706 (1907).
57. Id. at 278, 90 Pac. at 708.
58. 34 Cal.2d 845, 215 P.2d 462 (1950).
59. 34 Cal.2d at 854, 215 P.2d at 467.

60. 102 Cal. App. 299, 283 Pac. 298 (1929).
61. Id. at 315, 283 Pac. at 303.
62. 90 Cal. App.2d 869, 204 P.2d 395 (1949).
63. Id. at 875-876, 204 P.2d at 400.
64. People v. Garden Grove Farms, 231 Cal. App.2d 666, 42 Cal. Rptr. 118 (1965); Redevelopment Agency v. Hayes, 122 Cal. App.2d 777, 266 P.2d 105 (1954).
65. Almost incidentally, neither the Fifth Amendment ("nor shall private property be taken for public use, without just compensation") nor the Fourteenth Amendment (due process) to the Constitution of the United States imposes any obstacle to rational revision of eminent domain procedure. There is no requirement that compensation be determined in advance of possession. Joslin Mfg. Co. v. Providence, 262 U.S. 668 (1922). "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution." A.J. Backus, Jr. & Sons v. Fort St. Union Depot Co., 169 U.S. 557, 569 (1897).
66. Department of Pub. Works v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958), overruling Department of Pub. Works v. Gorbe, 409 Ill. 211, 98 N.E.2d 730 (1951), and sustaining ILL. REV. STAT. 1957, Ch. 47, §§ 2.1-2.10.
67. Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 370 P.2d 652 (1962). Compare Hughes Tool Co. v. Superior Court of County of Pima, 91 Ariz. 154, 370 P.2d 646 (1962).

In addition to the Butler decision in Illinois, and the Desert Inn decision in Arizona, other recent decisions have sustained application of immediate possession statutes under varying constitutional provisions. These include: *Adams v. Arkansas State Highway Comm'n*, \_\_\_ Ark. \_\_\_, 363 S.W.2d 134 (1962); *Vivian v. Board of Trustees*, \_\_\_ Colo. \_\_\_, 383 P.2d 801 (1963); *Town of Darien v. Kavookjian*, \_\_\_ Conn. \_\_\_, 202 A.2d 147 (1964); *State Rd. Dep't v. Abel Inv. Co.*, \_\_\_ Fla. \_\_\_, 165 So.2d 832 (1964); *State Highway Dep't v. Smith*, \_\_\_ Ga. \_\_\_, 136 S.E.2d 334 (1964); *State v. Marion Circuit Court*, \_\_\_ Ind. \_\_\_, 157 N.E.2d 481 (1959); *State v. Bradford*, \_\_\_ La. \_\_\_, 141 So.2d 378 (1962); *Portland Renewal Authority v. Reardon*, \_\_\_ Me. \_\_\_, 187 A.2d 634 (1963); *Heidenreich v. Second Judicial District Court*, \_\_\_ Nev. \_\_\_, 352 P.2d 249 (1960); *Pittsburgh Rys. v. Port of Allegheny County Authority*, \_\_\_ Pa. \_\_\_, 202 A.2d 816 (1964); *Jefferson County Drainage Dist. v. Gary*, \_\_\_ Tex. \_\_\_, 362 S.W.2d 305 (1962).

For comprehensive reviews of decisions on immediate possession, see the Reports of the American Bar Association's Committee on Condemnation and Condemnation Procedure under the heading, "Condemnation Procedures - Right of Immediate Possession." 1963 REPORT at 143; 1964 REPORT at 112; 1965 REPORT at 137.

68. *Young v. Superior Court*, 216 Cal. 512, 15 P.2d 163 (1932).
69. 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1, B-10 (1961).

- 69a. Letter From Julius H. Selinger to California Law Revision Commission, Jan. 4, 1966.
70. Consumers Holding Co. v. County of Los Angeles, 204 Cal. App.2d 234, 22 Cal. Rptr. 106 (1962).
71. See County of Los Angeles v. Hunt, 198 Cal. 753, 247 Pac. 897 (1926).
72. E.g., A.B. 711, Reg. Sess. (1965). In part, the proposal would have added, as an element of compensation under Code of Civil Procedure Section 1248, "the value of all such improvements not on the property at the time of the service of summons that are being built, constructed or assembled for location on the property."
73. Letter From Leroy A. Broun to California Law Revision Commission, Jan. 21, 1966.
74. California Law Revision Commission, A Study of Problems Connected With the Date of Valuation in Eminent Domain Cases, (unpublished study, 1960).
75. Parks v. Boston, 15 Pick. 198, 32 Mass. \_\_\_\_ (1834).
76. See People v. Peninsula Title Guar. Co, 47 Cal.2d 29, 301 P.2d 101 (1956).
77. Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 107 P.2d 618 (1940).
78. For examples, see CONN. GEN. STAT. ANN. § 8-129 (Supp. 1964); ME. REV. STAT. ANN., Ch. 23, § 154 (1964); MASS. ANN. LAWS, Ch. 79, § 3 (1964); N.Y. H'WAY LAW § 30; OHIO REV. STAT. §§ 35.050-34.060 (1963); PA. STAT. ANN., Tit. 36, § 670-210 (1961); R.I. GEN. LAWS ANN. § 37-6-14 (1956).
79. 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958); see generally Dolan, Federal Condemnation Practice--General Aspects, 27 APPRAISAL J. 15 (1959).

80. See, e.g., ARIZ. REV. STAT. ANN. § 12-1116 (1956); COLO. REV. STAT. ANN. § 50-1-6(6) (1963); DEL. CODE ANN., Tit. 10, § 6110 (1953); HAWAII REV. LAWS § 8-26 (1955); NEV. REV. STAT. § 37.100 (1963); ORE. REV. STAT. § 35.0502.060 (1963); Pa. Eminent Domain Code (Act of June 22, 1964, P.L. No. 84), UTAH CODE ANN. § 78-34-9 (1953); VA. CODE ANN. § 25-46.8 (1964); WIS. STAT. ANN. § 32.12 (1964); WYO. STAT. ANN. § 1-805 (1957).
81. LAW REVISION STUDIES--NO. 1, Study and Act Relating to Vesting of Possession Before Payment in Eminent Domain Proceedings, 45 (U. Chi. Law School 1956). See ILL. REV. STAT. 1957, Ch. 47, §§ 2.1-2.10; Department of Pub. Works v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958).
82. 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1, B-11 (1961).
83. CAL. CONST., Art. I, § 14; CAL. CODE CIV. PROC. § 1243.4.
84. Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950).
85. Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083 (1902); Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902).
86. See the studies cited in note 1, supra.
87. See the text, infra at
88. Complete compilation of constitutional and statutory classifications existing in other states are contained in the studies cited in note 4, supra.
89. CAL. CODE CIV. PROC. § 1238.

90. CAL. CIVIL CODE § 1001. In general, this section provides that any person, "as an agent of the State," may acquire property by eminent domain proceedings for any of the uses mentioned in Title 7 of Part 3 of the Code of Civil Procedure.
91. *Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083 (1902). See also *Yeshiva Torath Emeth Academy v. University of So. Cal.*, 208 Cal. App.2d 618, 25 Cal. Rptr. 422 (1962); *People v. Oken*, 159 Cal. App.2d 456, 325 P.2d 58 (1958).
92. See PUB. UTIL. CODE § 1001; *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).
93. *Producers Transp. Co. v. Railroad Conn'n*, 176 Cal. 499, 169 Pac. 59 (1917), aff'd, 251 U.S. 228 (1920)(holding that such acquisition necessarily constituted the "public utility property" within the jurisdiction of the Public Utilities Commission.).
94. See *Linggi v. Garovotti*, 45 Cal.2d 20 , 286 P.2d 15 (1955).
95. CAL. CONST., Art. I, § 14, CAL. CODE CIV. PROC. § 1243.4.
96. CAL. CODE CIV. PROC. § 1243.5(b)(2).
97. See, e.g., *State v. Superior Court*, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962).
98. See SEC'Y OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 34 (1918).
99. These arguments are set forth in *State v. Superior Court*, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962).
100. *San Francisco Unified School Dist. v. Hong Mow*, 123 Cal. App.2d 668, 267 Pac.2d 349 (1954). Following this decision, the section was amended to prevent appeal of an order for possession after judgment in condemnations by school districts. Cal. Stats. 1955, Ch. 929, § 1, p. 1557. That special provision was eliminated in the general revision of the section in 1961.

101. Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950).
102. Ibid.; State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962).
103. CAL. CODE CIV. PROC. § 1243.5.
104. E.g., County of Los Angeles v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964).
105. Housing Authority v. Superior Court, 18 Cal.2d 336, 115 P.2d 468 (1941). Although the 1961 revision changed the word "may" to "shall," the courts still hold that an order for possession pending appeal is discretionary with the trial court. See County of Los Angeles v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964).
106. Orange County Water Dist. v. Bennett, 156 Cal. App.2d 745, 320 P.2d 536 (1958).
107. Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962).
108. 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1, B-14 (1961).
109. ILL. REV. STAT. 1957, Ch. 47 § 2.1.
110. ILL. REV. STAT. 1957, Ch. 47, § 2.2.
111. Dept. of Pub. Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958).
112. McCandless v. United States, 298 U.S. 342, 348 (1936).

113. *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959).
114. See *Berman v. Parker*, 348 U.S. 26 (1954); cf. *City & County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955).
115. See *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959); *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955); see also CALIFORNIA CONDEMNATION PRACTICE, Sparrow, Public Use and Necessity, 133 (Cal. Cont. Ed. Bar 1960).
116. Federal Rule 71A (h). See Dolan, Federal Condemnation Practice - General Aspects, 27 APPRAISAL J. 15, 18 (1959).
117. CAL. CODE CIV. PROC § 1243.5(a).
118. CAL. CODE CIV. PROC. § 1243.7.
119. See CALIFORNIA CONDEMNATION PRACTICE, Martin, Rights After Immediate Possession, 208 (Cal. Cont. Ed. Bar 1960).
120. See the text, infra at
121. *State v. Yelle*, 46 Wash.2d 166, 279 P.2d 645 (1955).
122. *Bugbee v. Superior Court*, 34 Ariz. 38, 267 Pac. 420 (1928).
123. *Yellowstone Pipe Line Co. v. Drummond*, 77 Idaho 36, 287 P.2d 288 (1955).
124. *State v. Yelle*, 46 Wash.2d 166, 175, 279 P.2d 645, (1955).
125. 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-14 (1961).
126. HIGHWAY RESEARCH BOARD, SPECIAL REPORT 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1958).
127. ILL. REV. STAT. 1957, Ch. 47, §§ 2.1-2.10.
128. Code of Civil Procedure Section 1243.5(c) provides, in part:

The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

129. The "Railroad Commission" referred to in this section is now the Public Utilities Commission. CAL. CONST., Art. XII, § 22.
130. Proceedings under the Public Utilities Code are expressly made alternative to proceedings under the Code of Civil Procedure. CAL. PUB. UTIL. CODE §§ 1217, 1421. See *Citizens Utilities Co. v. Superior Court*, 59 Cal.2d 805, 31 Cal. Rptr. 316 (1963). The Code of Civil Procedure provides, in turn, that: "Nothing herein contained shall be construed to repeal any law of this state giving jurisdiction to the State Railroad Commission to ascertain the just compensation which must be paid in eminent domain proceedings." CAL. CODE CIV. PROC. § 1243.

Notwithstanding statutory language to the contrary, the procedures of the Public Utilities Code have no application to the taking of property other than property owned by a public utility. *S. H. Chase Lumber Co. v. Railroad Comm'n*, 212 Cal. 691, 300 Pac. 12 (1931).

131. See, e.g., *Citizens Utilities Co. v. Superior Court*, 59 Cal.2d 805, 31 Cal. Rptr. 316 (1963)(dealing with date of valuation, subsequent improvements, valuation method, and other problems).
132. This language was deleted from Code of Civil Procedure Section 1242 in 1963 and added to Government Code Sections 815-821.8. See A Study Relating to Sovereign Immunity, 5 CAL. LAW REVISION COMM'N 1, 111 (1963). See also *City of Los Angeles v. Schweitzer*, 200 Cal. App.2d 448, 19 Cal. Rptr. 429 (1962).
133. *San Francisco & S.J.V. Ry. v. Gould*, 122 Cal. 601, 55 Pac. 411 (1898).
134. *Jacobsen v. Superior Court*, 192 Cal. 319, 219 Pac. 986 (1923).
135. *People v. Neider*, 55 Cal.2d 832, 361 P.2d 916 (1961).

136. *Montgomery v. Tutt*, 11 Cal. 190 (1858); *Sullivan v. Superior Court*, 185 Cal. 133, 195 Pac. 161 (1921).
137. See, e.g., CAL. CODE CIV. PROC. §§ 380, 1166(a).
138. *Marblehead Land Co. v. Los Angeles County*, 276 Fed. 305 (S.D. Cal. 1921).
139. *Rafferty v. Kirkpatrick*, 29 Cal. App.2d 503, 88 P.2d 147 (1938).
140. CAL. CODE CIV. PROC. § 1254, as amended by Cal. Stats. 1897, Ch. 127, § 1, p. 186; deleted by Cal. Stats. 1903, Ch. 98, § 1, p. 109.

As it last appeared in the Code, the language read:

[S]aid [Superior] court, on application of said plaintiff, shall issue a writ of assistance of the same force as writs of assistance are issued in other cases in which writs of assistance are issuable, which said writ shall be executed by the Sheriff of the county wherein the said land and premises may be situated, without delay.

141. See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1 (1961).
142. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS (Report A-26, 1965).
143. Section 8B of Chapter 79 of the General Laws of Massachusetts, added by Chapter 633 of the Massachusetts Acts of 1964, provides:

Section 8B. No person in possession of property which has been taken under the provisions of this chapter shall be required to vacate any portion of such property which is being used by him as a dwelling place or place of business at the time the order of taking is made until four months after notice of such taking has been given to him in accordance with the provisions of section seven C.

144. STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION, HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS, at 122-124 (Comm. Print 1964) [hereinafter cited as SELECT SUBCOMM. STUDY].

145. Hearings on S. 1201 and S. 1681 Before the Subcommittee on Inter-governmental Relations of the Senate Committee on Government Operations, 89th Cong., 1st Sess. (1965)[hereinafter cited as HEARINGS].
146. HEARINGS at 34.
147. HEARINGS at 120, 149, 172 (General Services Administration--"Subsection (3)(6) provides a minimum time limitation of 180 days after receipt of written notice prior to date of vacation. GSA endeavors to give the maximum notice possible under the circumstances to property owners. Generally this exceeds the minimum proposed by this subsection, but it may be less."); 181, 183, 206 (Boston Redevelopment Authority--"At the present time property owners are given from 6 months' to 2 1/2 years' notice that their properties are to be acquired except where land is acquired under the 'early land' provisions of the urban renewal program. However, at no time is a property owner required to surrender possession in less than 180 days. On the average owners and tenants are notified they must move between 9 and 12 months in advance of the date the authority seeks possession of the property."); 236, 261 (Providence Redevelopment Agency--"The 180-day written notice, as set forth in section 101(2)(6), appears to be reasonable for many people who will vacate the property voluntarily within the 180-day period. The condemning authority can within this period begin the demolition of structures or the proposed improvements for the project."); 270, 281, 294 (National Association of Real Estate Boards--"While we are in accord with the 180-day notice provision in subparagraph (6), we would

urge the adoption of the provisions of section 8 of S. 1681, relating to the provision of an adequate supply of housing for potential displacees. Certainly land acquisition should not proceed if there is not an adequate supply of standard housing available for relocatees, and the experience of local redevelopment agencies under the urban renewal program could be utilized for this purpose." ).

148. HEARING at 236.

149. HEARING at 188.

150. Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 107 P.2d 618 (1940).

151. 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958); ILL. ANN. STAT., Ch. 47, § 2.6 (Cum. Supp. 1964); TENN. CODE ANN. § 23-1526 (Cum. Supp. 1964).

152. Letter From John M. Morrison, Deputy Attorney General, to California Law Revision Commission, Feb. 11, 1966.

153. U.S. Dep't of Commerce, Bureau of Public Roads, Instructional Memorandum 21-9-65 (Sept. 13, 1965).

154. Section 2.6 of Chapter 47 of the Illinois Revised Statutes of 1957 provides in part:

The petitioner shall pay, in addition to the just compensation finally adjudged in the proceeding, interest at the rate of six per cent (6%) per annum upon:

\* \* \* \* \*

(b) Any portion of the amount preliminarily found by the court to be just compensation and deposited by the petitioner, to which any interested party is entitled, if such interested party applied for authority to withdraw such portion in accordance of Section 4 of this Act, and upon objection by the petitioner (other than on grounds that an appeal under Section 2(b) of this Act is pending or contemplated), such authority was denied; interest to be paid to such party from the date of the petitioner's deposit to the date of payment to such party.

165. 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-9, B-47 (1961).
166. See *United States v. Sunset Cemetery Co.*, 132 F.2d 163 (7th Cir. 1942). For a comparative survey of abandonment provisions in the several states, see Annotation, Liability, Upon Abandonment of Eminent Domain Proceedings, for Loss or Expenses Incurred by Property Owner, or for Interest on Award or Judgment, 92 A.L.R.2d 355 (1963).
167. 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-48 (1961).
168. See *City of Los Angeles v. Abbott*, 217 Cal. 184, 17 P.2d 993 (1932).
169. When the condemnation proceeding is abandoned, Subsection 1255a provides that the condemnee is entitled to recover his "costs and disbursements, which include all necessary expenses incurred in preparing for trial and during trial and reasonable attorney fees." An ambiguous proviso provides, however, "that said costs and disbursements shall not include expenses incurred in preparing for trial where the action is dismissed 40 days or more prior to the time set for the pretrial conference in the action or, if no pretrial conference is set; the time set for the trial of the action." Under this language, it has been held that attorney's fees may be required although they pertain to legal services rendered even before the action is filed. *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964). The 40-day limitation, on the other hand, applies to all other expenses, including

appraisers' fees. *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 369 P.2d 7 (1962). The unfairness of this limitation, especially in immediate possession cases, is apparent. In most instances, the property owner's appraisals should be made before the property is changed in condition. Accordingly, the last clause of subdivision (c) of Section 1255a ~~should be deleted~~. As a parallel change, Section 1255a should be amended to codify the requirement that expenses incurred in preparing for trial and during trial may be recovered in case of abandonment only to the extent such expenses are "reasonable." This would make uniform the rule that now applies to the recovery of attorney fees, and should afford adequate protection to the condemnor.

170. CAL. CODE CIV. PROC. § 1264.7.
171. CAL. COURT RULES, Rule 2. *City of Los Angeles v. Aitken*, 32 Cal. App.2d 524, 90 P.2d 377 (1939). The 30-day period is computed from the filing of the remittitur, and if payment is not made or deposited within that 30-day period the proceeding may be dismissed. *County of Los Angeles v. Bartlett*, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963).
172. CAL. CODE CIV. PROC. § 659 (motion for new trial), § 663a (motion to vacate or set aside the judgment); *Pool v. Butler*, 141 Cal. 46, 74 Pac. 444 (1903).
173. *County of Los Angeles v. Lorbeer*, 158 Cal. App.2d 804, 323 P.2d 542 (1958).
174. *City of Los Angeles v. Agardy*, 1 Cal.2d 76, 33 P.2d 834 (1934).
175. *City of Laguna Beach v. Am. Legion Post No. 222*, 140 Cal. App. 382, 35 P.2d 341 (1937).

176. *Brookes v. City of Oakland*, 160 Cal. 423, 117 Pac. 433 (1911).
177. See Howell, The Work of the 1937 Legislature - Procedure, 11 SO. CAL. L. REV. 2, 32 (1937).
178. The most widely used assessment procedure acts in California are the Improvement Act of 1911 (STS. & HWYS. CODE §§ 5000-6794) and the Municipal Improvement Act of 1913 (STS. & HWYS. CODE §§ 10000-10609). Both acts provide for the issuance of bonds pursuant to the Improvement Bond Act of 1915 (STS. & HWYS. CODE §§ 8500-8851) or the Improvement Act of 1911. Assessments also may be levied under various other acts, including CAL. STS. & HWYS. CODE §§ 4000-4143 (Street Opening Act of 1903), §§ 4500-4677 (Street Opening Bond Act of 1911), §§ 8000-8062 (Change of Grade Act of 1909), §§ 18000-18191 (Street Lighting Act of 1919), §§ 18300-18440 (Street Lighting Act of 1931), §§ 18600-18781 (Municipal Lighting Maintenance District Act of 1927), §§ 19000-19312 (Highway Lighting District Act), §§ 22000-22202 (Tree Planting Act of 1931), §§ 26000-26260 (Boulevard Districts), §§ 31500-31933 (Vehicle Parking District Law of 1943), §§ 35100-35707 (Parking District Law of 1951).
179. See, e.g., *City of Sacramento v. Citizens Util. Co.*, 239 Cal. App.2d 103 (1966).
180. *Southern Pub. Utility Dist. v. Silva*, 47 Cal.2d 163, 301 P.2d 841 (1956).
181. See *People v. Thompson*, 5 Cal. App.2d 655, 43 P.2d 600 (1935)(questioning the constitutionality of the section and giving it a highly restrictive interpretation).

182. These policy considerations have led to the following recommendation as a basis for Federal legislation:

In no event should the head of a federal agency either advance the time of condemnation, or defer the condemnation and the deposit of funds in court for the use of the owner, in order to compel an agreement on the price to be paid for the property. If an agency head cannot reach an agreement with the owner, after negotiations have continued for a reasonable time, he should promptly institute condemnation proceedings and, at the same time or as soon thereafter as practicable, file a declaration of taking and deposit funds with the court in accordance with the [Federal Declaration of Taking Act]. SELECT SUBCOMM. STUDY at 148.

183. REPORT OF EMINENT DOMAIN REVISION COMMISSION OF NEW JERSEY 19 (1965).
- 184.. Pennsylvania Eminent Domain Code (Act of June 22, 1964, P.L. 84) § 407(b).
185. Letter From Terry C. Smith, Deputy County Counsel, to California Law Revision Commission, Dec. 15, 1965.
186. See, e.g., People v. Neider, 55 Cal.2d 832, 361 P.2d 916 (1961); People v. Dittmer, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961); People v. Salem Dev. Co., 216 Cal. App.2d 652, 31 Cal. Rptr. 193 (1963).