36.20 4/15/70

Memorandum 70-33

Subject: Study 36.20 - Condemnation (The Right to Take Generally)

The Commission is now engaged in a study of the right to take aspect of condemnation law and procedure. This memorandum outlines the various matters that are included within the right to take study. It should provide you with an outline of the problems and some understanding of the inter-relationship of those problems.

Attached is a background research study (gold cover page) prepared by our research consultant (Hill, Farrer & Burrill of Los Angeles) in 1963. Also attached is what I consider to be the best chapter of the 1960 Continuing Education of the Bar book on condemnation--"California Condemnation Practice." You should read both of these items because they contain background information that will be essential to sound decision making.

1. THE DECLARED PUBLIC USES

You will recall that Civil Code Section 1001 states that the person in charge of a particular public use specified in Section 1238 of the Code of Civil Procedure may condemn property for that use. The Commission has determined to repeal Section 1001 of the Civil Code and Sections 1238-1238.7 of the Code of Civil Procedure and to substitute clear statements of the extent of condemnation authority of public entities, public utilities, and others. At future meetings, we will be considering specific problems of the delegation of condemnation authority. In this connection, you should note that the Commission's decision on this matter is consistent with the consultant's recommendation. See consultant's study (gold cover) (attached), recommending that Sections 1238 and 1238.1-1238.7 be repealed.

The Commission has approved provisions that would permit cities, counties, and school districts to condemn property necessary to carry out their functions. Similarly, the Commission has approved provisions that will give public utilities adequate condemnation authority. The Commission has considered the extent to which additional condemnation power is needed by special districts and has approved several clarifying amendments. The Commission has considered condemnation for state purposes and directed the staff to contact the Department of General Services for suggestions concerning the clarification of the statutes relating to state condemnation authority.

The major remaining task is to examine Sections 1238 and 1238.1 to 1238.7 of the Code of Civil Procedure and to determine which of the provisions of those sections must be restated in some appropriate code in order to retain existing condemnation authority. The Commission has determined that, as a general rule, private persons should have no condemnation authority and has asked the staff to check with the attorney in the Linggi case to determine how the case ultimately was resolved.

2. THE REQUIREMENT OF "NECESSITY"

A major policy decision in the right to take is the effect to be given to the condemnor's resolution that the taking is "necessary." If the staff can find time to prepare a memorandum on the subject, we will be considering "necessity" in detail at the May meeting. Hence, we will not attempt to outline the problem here.

Pending preparation of a staff memorandum on "necessity," we refer you to the research consultant's study (pages 8-12) and to the CEB chapter (green pages attached) (pages 150-165). We believe that this is the minimum amount of background material you should read and that it is essential that

you read the material. We can provide you with additional material upon request.

3. SPECIAL PROBLEMS OF PUBLIC USE

There are three special problems of public use that will need to be given careful consideration by the Commission. These are: (1) "Excess condemnation"--taking the entire parcel when only a portion is needed for the public improvement in order to avoid "excessive" severance damages; (2) "Future use"--taking property with the intent to devote it to a particular public use in the future in order to obtain the property best situated for that use at a lower price now; and (3) "Substitute condemnation"--taking property to exchange it for property needed for a public improvement. All of these types of takings present public use problems of some complexity, and excess condemnation is a controversial matter.

Another possible special problem of public use is "Protective condemnation"--a taking of more property than is physically needed to construct the improvement and thereafter selling the excess portion with restrictions to preserve the view, light, and air.

Some of these special public use problems have been discussed by the Commission but, since there has been a substantial turnover in Commission membership, the staff plans to prepare materials to present the problems anew as soon as we have our two additional staff members. Some of the problems are discussed briefly under "Defenses" on pages 139-142 of the CEB chapter (green, attached).

4. "MORE NECESSARY PUBLIC USE"

A complex problem--one that may be beyond solution--is: When can property already devoted to public use be taken for another public use?

The problem involves the relative priority to be given to different public entities and different public uses when they are in competition for the same property. The problem is discussed in the CEB chapter (pages 142-150, green). The staff is working on a memorandum on the problem for the June meeting.

5. PROPERTY THAT MAY BE TAKEN: EXEMPT PROPERTY

Somewhat related to the "more necessary public use" problem is the problem of exempt property. For example, there are limitations on the condemnation of cemetery property. Also, a question arises as to whether property owned by the state or public utility franchises may be taken for public use. The problem appears to be one of drafting an appropriate definition of "property" and drafting appropriate exemptions of particular types of property--such as cemetery property--from condemnation.

6. PROPERTY INTEREST THAT MAY BE ACQUIRED

You will recall that the Commission has determined that--as a general principle--a public entity is to be allowed to take whatever interest in property is necessary. No determination has been made as to who determines what interest is "necessary" for the public improvement.

7. EXTRATERRITORIAL CONDEMNATION

A problem that will be discussed at the May meeting is the extent to which the condemnor should be allowed to condemn property outside its territorial limits. This is essentially a problem of whether the statutes permit a particular condemnor to take property outside its territorial limits for a particular purpose.

8. JOINT EXERCISE OF CONDEMNATION POWER

The Commission has approved a provision authorizing joint exercise of condemnation power. This is essentially a problem of delegation of condemnation authority.

9. JOINT USE AND RELATED PROBLEMS

The exercise of the right of eminent domain to acquire joint use, use in common, connections, or crossings is most significant for railroads, power companies, and similar public utilities. However, the problem of joint use or use in common may exist, for example, in the case of facilities used for irrigation. There is a need for a reorganization and recodification of this aspect of the right to take even if no substantive changes were made.

10. PRELIMINARY LOCATION AND SURVEY

The right to take includes the right to enter upon and test property to determine whether it is suitable for acquisition for public use. A recommendation of the Commission on this problem has been submitted to the 1970 Legislature and the bill introduced to effectuate the recommendation has passed the Senate but is opposed by the Department of Public Works.

11. REMOVAL OR RELOCATION OF IMPROVEMENTS

The problem of the extent of the right to compel removal or relocation of structures--primarily utility facilities--is an aspect of the right to take. Professor Van Alstyne has long urged that this area of the law is in need of study and resolution in a rational manner. However, this may be one aspect of the right to take that we will not want to consider. When time permits, the staff will prepare a background memorandum for your consideration.

12. PROCEDURAL PROBLEMS

A significant contribution that might be made in this study is the development of good procedural provisions relating to the right to take. For example, related to the question of necessity is the question whether a public hearing should be required before a condemnation proceeding is commenced. Also, the form of the complaint, the time and manner of raising a public use or necessity question, and the procedure for disposing of those questions are important aspects of the right to take. These procedural problems should be considered as a part of this portion of the study even though we have a consultant working on the procedural aspects of the right to take. Perhaps we should ask him to give priority to this aspect of his study.

13. EFFECT OF DETERMINATION THAT NO RIGHT TO TAKE

A special procedural problem is: To what extent should the condemnee who defeats a condemnation proceeding on the ground that there is no right to take (either no public use, no statutory authority to take, no necessity, or not a more necessary public use) be awarded attorney's fees and other expenses he incurred in defeating the taking?

14. RIGHTS OF FORMER OWNER

Mr. Taylor spent more than a month thinking about and researching into what rights could be given to a former owner if property acquired for public use is to be offered for sale because it has become surplus or if such property is not devoted to the public use for which it was acquired within a specified time. Mr. Taylor never reduced anything to writing, but his conclusion was that the practical problems involved in giving the former owner any rights were so significant that it was unlikely that he could be

given any relief. The staff plans to begin work on a background study on this problem as soon as our two new men join our staff in June. We consider the problem to be important and one that should be given high priority. We are hopeful that we can develop something that is practical.

The above is a brief outline of the most significant problems we will be considering in the right to take aspect of condemnation law. Those problems that were not considered at the April meeting will be considered in great detail at subsequent meetings.

Respectfully submitted,

John H. DeMoully
Executive Secretary

#36.20 6/20/63

THE RIGHT TO TAKE IN EMINENT DOMAIN*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

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

THE RIGHT TO TAKE IN EMINENT DOMAIN

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THE RIGHT TO TAKE IN EMINENT DOMAIN

INTRODUCTION

Throughout much of the history of condemnation in this country, one of the most hotly contested and important subjects, if not the most important, was the right of a public or private condemnor to take the private (and sometimes public) property belonging to another. Today, however, this issue, while still causing strong emotional reactions on the part of a large segment of the public, has, from a legal standpoint, become a fairly clear-cut and well-resolved issue.

The right of a public body to take private property today, both nationwide and in California, can in relatively few cases be successfully challenged. The right to take, which is primarily a question of public use and necessity, is seldom defeated. Indeed, in discussing the entire question of public use, one notable law review article in 1949[1] was appropriately entitled "The Public Use Limitation on Eminent Domain--An Advance Requiem." Now, some fourteen years later, the prophecy has, for the most part, been borne out.

The "liberal" right to take that now exists is essentially a repeated movement in a pendulum swing that has been one of the foremost features of this entire subject. Originally, when the power of eminent domain began to be exercised in this country, the courts adopted a "narrow" view of public use.[2] However, the courts' restrictive attitude bowed to public acceptance and approval of these enterprises; indeed, the "narrowness" or "liberality" of the right to take is closely entwined with the value judgment of the public as to the particular proposed improvements. Soon, the

narrow approach gave way to one permitting a broad interpretation of the "public use" concept.[3] By the turn of the century, the broad interpretation of the public use concept was such as to enable an Idaho court[4] to state that:

> it is enough if the taking tends to enlarge resources, increase the industrial energies and promote the productive power of any considerable part of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, as such results indirectly contribute to the general prosperity of the whole community.

Today, the broad interpretation of the public use qualification of the Fifth Amendment of the United States Constitution has not only been upheld but encouraged by the Supreme Court.[5] In Berman v. Parker, the Supreme Court stated:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

While it is true that not all courts have equated esthetics with public use, nor have most courts gone so far as to permit the taking of private commercial property by a private condemnor with only incidental benefits to the public, the rationale of the court in Berman v. Parker prevails throughout most courts in the nation.[6]

The right to take in eminent domain has two restrictions--public use and necessity. There are other problems connected with this right, for

example, the right to take property already devoted to a public use and the propriety of a taking pursuant to eminent domain with or without popular approval. These latter subjects will be discussed, to some extent, but primary focus will be on the two main factors listed above.

THE PUBLIC USE CONCEPT IN EMINENT DOMAIN

There is only one constitutional limitation, assuming just compensation, to the exercise of the right of eminent domain and that is public use. This limitation is found both in the United States Constitution through the Fifth Amendment and the California Constitution through Article I, Section 14. As the court in People v. Chevalier[7] stated, the reason for the broad scope afforded the condemnor is that eminent domain is an inherent attribute of sovereignty. Indeed, even in the absence of constitutional sanction regarding the right to take, the "natural" law sanctioned the sovereign's right in this regard.[8] In fact, the only justiciable issue in eminent domain proceedings, aside from just compensation, is that of public use.

While no condemnor may take except for public use, the gamut of takings that fall within that definition is quite broad. These public uses are set out specifically in the Code of Civil Procedure (Section 1238 et seq.) and throughout various codes, and those enumerated have been liberally construed by the courts, doubts being resolved in favor of upholding the legislative purpose.[9]

California, like the federal government and most other states, has for some years adhered to a liberal construction of the term "public use" and today is in essential agreement with the broader test as set forth in Berman v. Parker.[10] Nonetheless, the courts in this state have been willing to "pierce the 'public use' veil" when the facts suggested that the proposed

use only benefited the public incidentally but was primarily for a private purpose. If private property is being taken and the public use is only a ruse or the public does not attain sufficient control over the proposed improvement, today California courts would void such an activity.

For example, in People v. Nahabedian[11] the defendant owner denied that the property was being acquired for freeway purposes, as alleged. Rather he contended that the property was being condemned purportedly for highway purposes but, in reality, the property was to be leased for a private auto park. The appellate court stated:

> There can be no doubt that both the court and counsel for respondent clearly understood that appellant's contention was that the "real purpose" of the condemner was to take part of appellant's property not for freeway purposes, but to lease it to Walt's Auto Park for private purposes, without any relation to the freeway project. Certainly, if such contentions could be proved, respondent could not acquire the portion of the property in question, because the latter is without authority in law to acquire the property of a citizen for private use (U. S. Const., Fifth and Fourteenth Amendments; Cal. Const., Art. I, § 14; People v. Chevalier, (Cal. App.) 331 P.2d 237; City & County of San Francisco v. Ross, 44 Cal.2d 52, 59 [279 P.2d 529]).

In City & County of San Francisco v. Ross,[12] a similar situation was before the Court. The issue there was whether the acquisition of property for immediate leasing to a private parking lot operator, without any controls over the rates to be charged or the operations of the lot, was a public purpose for which the right ot eminent domain could be exercised. The Supreme Court held that such a use was not a public purpose and stated:

> .It is the stringent controls maintained over the properties sold or leased to private parties which distinquishes the Berman case from the present case. Such controls are designed to assure that use of the property condemned will be in the public interest. In the present case these controls are lacking.
>
> The same reasoning is apparent in decisions in this state wherein the courts have attached significance to the control retained by governing bodies as indicative that public lands leased to private individuals were still serving a public purpose.

In requiring some control on the part of a public body over the use of the condemned land by a private person, the court in Ross was in accord with many cases throughout the country.[13]

Notwithstanding these recognized exceptions to the broad interpretation of the term public use, the California courts have permitted one condemnor to condemn property for the use of another governmental body although that latter governmental unit did not itself have the power to condemn for the particular purpose.[14] Moreover, urban renewal programs operating pursuant to the California Community Redevelopment Law have been constitutionally approved by California appellate courts as has urban renewal throughout the country.[15]

Finally, it should be noted that, though public use is a judicable issue, not only have the courts given a broad interpretation to the term, but the property owner who attempts to attack on the ground of lack of public use has an additional uphill fight. The court in County of San Mateo v. Bartole[16] made this clear when it noted that the resolutions of the condemning county:

> expressly state that the taking is for a public purpose (which purpose is authorized by Code Civ. Proc., § 1238, subd. 3, and by Gov. Code, § 25353), and these allegations are admitted in the answers. Such a resolution is prima facie evidence that the taking is in fact for a public purpose. The actions of public bodies, acting within the powers vested in them, are presumed to be proper. (Code Civ. Proc., § 1963, subd. 15; Lavine v. Jessup, 161 Cal.App.2d 59, 67 [326 P.2d 238].) The adoption of the resolution and its determination that the taking is for a public purpose being admitted, the burden shifts to the appellants to show facts indicating that the taking is in fact not for a public purpose, and they must affirmatively plead such facts; otherwise, their admission of the adoption of the resolution is equivalent to an admission that the taking is for the public purpose stated in the resolution.

> Facts constituting abuse of discretion, fraud on the landowners' rights, or arbitrary action, must be specifically alleged to attack the resolution of public interest and necessity. (People v. Lagiss, 160 Cal.App.2d 28, 33 [324 P.2d 926]; People ex rel. Department of Public Works v. Schultz Co., 123 Cal.App.2d 925, 941 [268 P.2d 117]; People v. Thomas, 108 Cal.App.2d 832, 836 [239 P.2d 914].) Similar allegations should be pleaded where property owners seek to raise the issue of "public use" in a case where the condemning body has specified the use as one which has been declared proper for eminent domain proceedings by the state. It is also true that the courts will not interfere unless the facts pleaded show that the use is clearly and manifestly of a private character. (Stratford Irrigation District v. Empire Water Co., 44 Cal.App.2d 61, 67 [111 P.2d 957].)
>
> People v. Chevalier, supra, recognizes this principle. In that case the answer alleged fraud, abuse of discretion and bad faith as to the motive for condemning, the necessity to condemn and the selection of the land sought to be condemned. But none of the allegations alleged taking for a private purpose or affirmatively impugned the taking for a public purpose. The court stated (p. 304): "There is no question, then, that the takings in the instant case are for a public use. Defendants did not allege fraud, bad faith, or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it." It cites with approval (p.306) the case of People v. Olsen, 109 Cal.App. 523, 531 [293 P. 645], which states: "The question as to whether the land was to be devoted to a public use as distinguished from a mere private service may, under adequate pleadings, become a proper issue for the judicial determination of the court. . . . To raise this issue it is necessary to specifically charge fraud, bad faith or an abuse of discretion. . . . " [Emphasis added.]

In light of the extremely broad constitutional interpretation given to the term public use, both in California and elsewhere, and in view of the fact that there appears to be little reason to narrow this judicial interpretation, a question arises as to whether extensive specificity as to the uses to which eminent domain may be exercised as set forth in Section 1238 of the Code of Civil Procedure is either necessary or proper. Sections 1238 and 1238.1-1238.7 purport to enumerate each of the purposes for which eminent domain may be exercised. Of course, other statutes throughout the

codes also set forth these rights and, in some cases, authority for condemning for particular purposes is set forth in other code sections but not listed under Section 1238.[17]

On the whole, it appears that Section 1238 and Sections 1238.1-1238.7 are superfluous and add little if anything to the interpretation of the public use concept. If the condemnor is given the right to condemn, then, there seems little justification for attempting to define in detail the scope of that right, particularly when such authority is contained in various and sundry enabling statutes. Moreover, if a condemnor takes property for a purpose unduly divorced from a purpose with which it is concerned, a court may strike down such a usurpation of power on the grounds of lack of necessity if it is a private condemnor or a condemnor presently not enjoying the conclusive presumption regarding necessity that attaches to most public condemnors. As to other condemnors, it is doubtful that they would take property that is not reasonably related to a purpose connected with their inherent powers or granted by enabling acts.

Most states, unlike California, do not find it necessary to devote four full pages of an eminent domain code to enumerate the purposes for which eminent domain may be exercised. Such proliferation is unwarranted particularly when one of the aims is to simplify the code wherever possible. Indeed, most states make no mention of the limitation of the right to condemn save a reference to the constitutional restriction that it be for a public use.[18] Other states, in one paragraph or two, simply list in general terms the purposes for which eminent domain may be exercised.[19]

The general reference in state statutes is exemplified by the Florida statute, which simply states:

> Whenever the right to take private property for public use without the consent of the owner is now, or may hereafter be conferred by the constitution or any general or local law of this state, upon the state or any of its bodies politic and corporate, upon any state, city, municipal or district authority, public body, officer or agent, upon the United States or upon any other person, those having such right may file [etc.] . . . .[20]

Such a reasonably simple authorization appears commendable. The question really is whether the eminent domain code should be simplified at the possible expense of requiring reference to the particular enabling statutes which already, by and large, duplicate the provisions of the code in this regard.

THE REQUIREMENT OF "NECESSITY"

The necessity and need for the condemnor to take the landowner's property for the particular public improvement, unlike the subject of public use, is a legislative rather than a constitutional limitation. To the extent that the legislature may limit the right of the property owner to challenge the necessity of the taking, the issue may be advanced by the property owner as a defense and as a means of defeating the proposed taking in the same manner as the defendant may urge the lack of public use. This right, however, is more apparent than real. The legislature, by statute and the courts by interpretation, have so narrowed the area for contesting the condemnor's actions that, today, few public condemnors need concern themselves with the propriety of the proposed taking insofar as its necessity may be urged in a condemnation trial; fewer landowners can reasonably expect to prevail on this question.

The legislature has deemed it wise to restrict and, in some instances, do away with judicial review of the condemnor's determination that the taking is necessary. It has essentially done this in Section 1241(2) which,

except for later amendments, has existed in the code since 1913. That provision reads:

> That the taking is necessary to such use; provided, when the board of a sanitary district or the board of directors of an irrigation district, of a transit district, of a rapid transit district, of a public utility district, of a county sanitation district, or of a water district or the legislative body of a county, city and county, or an incorporated city or town, or the governing board of a school district, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of property located outside of the territorial limits thereof.

In addition, the legislature has enacted various other enabling statutes permitting other condemnors to have benefit of the conclusive presumption regarding necessity.[21]

A careful reading of Section 1241(2) shows that certain condemnors do not have benefit of the conclusive presumption and, in this regard, might be noted that the majority position throughout the country is that necessity is not a judicial issue. The court in People v. Chevalier,[22] the leading case on the subject, noted that the majority rule is that necessity is entirely a legislative determination, even in the absence of a statute removing it from judicial review:

> The majority rule is summarized in the cited note as follows: "If a use is a public one, the necessity, propriety, or expediency of appropriating private property for that use is ordinarily not a subject of judicial cognizance. In general, courts have nothing to do with questions of necessity, propriety, or expediency in exercises of the power of eminent domain. They are not judicial questions." Continuing on page 72, it is further said: "Once it is judicially established that a use is public, it is within the exclusive province of the Legislature to pass upon the question of necessity for appropriating private property for that use, unless the question of necessity has been made a judicial one, either by the Constitution or by statute."

In fact, in the Chevalier case, the court held that the condemnors' finding of necessity cannot be overturned even upon a showing of fraud, bad faith, or abuse of discretion on the part of the condemnor. Emphasizing the rationale behind this thinking, the court in Chevalier stated:

> We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. To hold otherwise would not only thwart the legislative purpose in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement. We are therefore in accord with the view that where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's "motives or reasons for declaring that it is necessary to take the land are no concern of his." (County of Los Angeles v. Rindge Co., supra, 53 Cal. App. 166, 174 aff'd Rindge Co. v. County of Los Angeles, 262 U.S. 700 [43 S. Ct. 689, 67 L. Ed. 1186].) [Emphasis added.]

There are exceptions, of course, to this rigid rule. To begin with, there are certain condemnors whose declarations of necessity are only considered

prima facie rather than conclusive evidence of the necessity for the taking.[23] In People v. O'Connell Bros.,[24] the appellate court upheld the trial court's determination that the Department of Natural Resources had failed to show any present necessity for the taking of property for park purposes. In that case, a reading of the facts shows that the evidence was quite scanty on the point of whether or not the proposed improvement was presently necessary. Noting that there was a difference between the prima facie and conclusive right had by the condemnor in these instances, the court stated:

> Section 5006.1 of the Public Resources Code, as amended in 1959, provides: "The declaration of the director shall be prima facie evidence: (a) Of the public necessity of such proposed acquisition. (b) That such real or personal property or interest therein is necessary therefor. (c) That such proposed acquisition is planned or located in a manner which will be most compatible with the greatest public good and the least private injury." As originally enacted in 1947, this section provided that such evidence was "conclusive." After 12 years of experience, the Legislature apparently decided that it would be better to allow the courts the right to judicially review the proposed taking where it was for the purpose of a public park. No such change was made with respect to the condemning bodies specified in section 1241 of the Code of Civil Procedure, whose resolutions or ordinances are conclusive as to the issue of necessity. (Cf. People v. Chevalier, 52 Cal.2d 299, 307 [340 P.2d 598].)

Condemnors that only have a prima facie or no presumption in regard to necessity have at times been prevented from taking property based upon the lack of sufficient evidence justifying the necessity criteria. Thus, the court has held that, in the absence of a conclusive presumption, the failure of a condemnor to show present or prospective plans or to show that future needs have been properly anticipated prevents it from proceeding in condemnation.[25] Nonetheless, even in situations where the condemnor lacks a conclusive presumption regarding necessity, the landowner still has the burden of showing that the property which the condemnor proposes to take is

not reasonably suited or useful for the improvement;[26] and, when necessity is challenged on the proper location of the improvement in order for the condemnee to prevail, he must show that another site would involve an equal or greater public good and a lesser private injury.[27]

On the whole, it appears that, in the majority of condemnation actions, the condemnor has in its favor a conclusive presumption as to necessity, either based upon Section 1241(2) or upon specific enabling statutes. Other condemnors have a prima facie presumption. Assuming the legislative intent, as expressed in the Chevalier case, is proper (and it would appear to be so), it is advanced that there is little justification for not extending this privilege to all public condemnors. There does not seem to be any reason why some public condemnors should have this conclusive presumption in their favor and others not; particularly at the present time, as between those having this right and those not having it, there is no reasonable cause for a differentiation. The incongruity under the present law is exemplified by the fact that school districts presently have the advantage of a conclusive presumption regarding necessity but are unable to take immediate possession, whereas other condemnors are not favored with the conclusive presumption regarding necessity but have the right to take immediate possession. If a particular condemnor is considered responsible enough to have the right to take by immediate possession, there should be no reason why it should not have a conclusive presumption as to necessity; by the same token, if a condemnor is not considered "responsible" enough to have the right to immediate possession, there should be no justification for giving that condemnor the conclusive presumption.

It is suggested that the legislative intent as the court expressed it in Chevalier is sufficiently valid as to all takings by public condemnors

to allow a conclusive presumption in their favor. While this would not alter greatly the end result in present litigation, it would put it in a more logical posture without unduly infringing upon the right of the general public or of particular landowners.

While it would appear proper to extend this advantage to all public condemnors, as being arms of the legislature, the "right" need not be extended to private condemnors or public utilities as there is, it would seem, less of a check and balance regarding their actions and, therefore, less protection afforded the public. As to private condemnors and public utilities, it would be in conformity with the general rule in condemnation that the burden as to public use and necessity is greater than it is for governmental bodies.

MISCELLANEOUS MATTERS CONNECTED WITH THE RIGHT TO TAKE

Another matter germane to the right of a condemnor to take involves the question of whether certain condemnors may take property already devoted to or dedicated for other public uses. The eminent domain statutes, specifically Sections 1241(3) and 1240(3) of the Code of Civil Procedure[28] and other statutes set forth certain "more necessary" or greater public uses.[29] By and large, however, the issue as to whether one public use is more necessary than another is one to be decided by a court.[30] Since, on the whole, the questions involved here have apparently been reasonably worked out by the courts, it is not felt that there is any immediate need for legislative "reform" on this subject. The enumeration by the legislature in Sections 1241(3) and 1240(3) would appear to be a valid limitation upon the otherwise broad discretion of the courts, and the retention of this limitation is probably proper in that it enables the court to have some guideline for resolving "more necessary use" questions.

Finally, a problem that has arisen in recent years is the limitation upon a condemnor for taking property without a public hearing or other direct means of expression and approval by the community or property owners affected by the taking. This problem has become particularly acute in freeway takings where the choice of routes is, in the final analysis, left to the Highway Commission. Bills have been introduced recently in the legislature limiting this discretionary power of the Highway Commission and requiring an approval by the community affected.

This study does not purport to provide the answer. A resolution of this problem will require a great amount of study of the general difficulties encountered in public administration in general, particularly with reference to capital improvement programs. The problem also involves intricate questions of federal financing and the effect that legislation would have upon federal grants. Obviously, any further limitation upon condemnors in the selection of the situs of improvements would tend to retard rational and efficient public improvement programs. This detriment, of course, must be balanced against the right of the general populace to have an effective voice in governmental decisions. In the final analysis, this matter poses significant questions of political and social philosophy. Until answers to these questions can be provided, recommendations of the authors for statutory changes would be of little value.

FOOTNOTES

1. 58 Yale Law Journal 599 (1949).

2. See Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 B.U.L. Rev. 615 (1940); Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599, 602 (1949). Apparently, the courts also sought to exert their supremacy over the legislature by limiting the latter's power in the field of eminent domain. Ibid.; see Bloodgood v. Mohawk & H.R.R., 18 Wend. 9 60, 62 (N.Y. 1837)(concurring opinion).

3. Ibid.; Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L.J. 221, 226 (1931).

4. Potlach Lumber Co. v. Peterson, 12 Idaho 769, 785, 88 P. 426, 431 (1906).

5. 348 U.S. 26, 33 (1954).

6. The indirect benefit to the public might possibly induce some courts to sanction such action, but they would most likely have to be convinced that the only alternative was economic ruin to the community. See 2 P. Nichols, Eminent Domain 479-481, 560 (3d ed. 1964). See also People v. Salem, 20 Mich. 452 (1870); Lowell v. Boston, 111 Mass. 454, 461 (1873):

> The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary.

In cases where the question of "public use" is a close one, as it is under these conditions, the courts tend to be more liberal if the government rather than a private corporation with the power of condemnation exercises such a right. See, e.g., Talbot v. Hudson, 82 Mass. (16 Gray) 417 (1860). See also 2 P. Nichols, Eminent Domain 480-481 (3d ed. 1964).

7. 52 Cal.2d 299, 340 P.2d 598 (1959).

8. Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L.J. 221 (1939); Grant, The "Higher Law" Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67 (1931).

9. University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934).

10. Redevelopment Agency v. Hayes, 122 Cal. App.2d 777, 266 P.2d 105 (1954); Bauer v. County of Ventura, 46 Cal.2d 276, 289 P.2d 1 (1955). See generally California Condemnation Practice, Sparrow, Public Use and Necessity (Cal. Cont. Ed. Bar 1960).

11. 171 Cal. App.2d 302, 340 P.2d 1053 (1959).

12. 44 Cal.2d 52, 279 P.2d 529 (1955).

13. Opinion of the Governor, 76 R.I. 365, 70 A.2d 817 ( ); Village of Moyie Springs, Idaho v. Auroia Mfg. Co., 353 P.2d 767 ( ); Opinion to the Justices, 152 Me. 440, 131 A.2d 904 ( ); Hogue v. Port of Seattle, 341 P.2d 171 ( ); Skizas v. City of Detroit, 333 Mich. 44, 52 N.W.2d 589 ( ).

14. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959); Eden Memorial Park Ass'n v. Department of Public Works, 59 Cal.2d 412, 380 P.2d 390, 29 Cal. Rptr. 790 (1963).

15. Redevelopment Agency v. Hayes, 122 Cal. App.2d 777, 266 P.2d 105 (1954). See also In the Matter of Redevelopment Plan for Bunker Hill, Memorandum Decision (Los Angeles County No. 736840 (1961)) and cases collected therein.

16. 184 Cal. App.2d 422, 432-433, 7 Cal. Rptr. 569 (1960).

17. See, e.g., Community Redevelopment Enabling Statute, Health & Saf. Code § 33267. See generally 25 Ops. Cal. Atty. Gen. 67 (1955).

18. See, e.g., Mass. Ann. Laws, Ch. 79; Md. Ann. Code, Art. 33A; N.Y. Stats., Ch. 73; Pa. Stat. Ann., Tit. 26; Conn. Gen. Stat. Ann., Ch. 835.

19. See Ore. Rev. Stat., Ch. 281. On the other hand, those states that have adopted the California statute in toto naturally have the extensive enumeration. See, e.g., Ariz. Rev. Stat. Ann. § 12-1111.

20. Fla. Stat. Ann., Ch. 73.

21. See California Condemnation Practice, Sparrow, Public Use and Necessity §8.44 (Cal. Cont. Ed. Bar 1960).

22. 52 Cal.2d 299, 340 P.2d 598 (1959). See also People v. City of Los Angeles, 179 Cal. App.2d 558, 4 Cal. Rptr. 531 (1960). See Rindge Co. v. County of Los Angeles, 262 U.S. 700, 67 L.Ed. 1186 (1923). See also County of Los Angeles v. Bartlett, 203 Cal. App.2d 523, 21 Cal. Rptr. 776 (1962).

23. See California Condemnation Practice, Sparrow, Public Use and Necessity § 8.46 (Cal. Cont. Ed. Bar 1960).

24. 204 Cal. App.2d 34 (1962).

25. See, e.g., San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

26. City of Hawthorne v. Peebles, 166 Cal. App.2d 758, 763, 333 P.2d 442, 445 (1955).

27. Montebello v. Keay, 55 Cal. App.2d 839, 131 P.2d 834 (1942); California Cent. Ry. v. Hooper, 76 Cal. 404, 412-413, 18 P. 599, 603 (1888).

28. It would appear that Sections 1240(3) and 1241(3) are interchangeable. Both these sections have most of their provisions in common. In light of the ruling of the court in County of Marin v. Superior Court, 53 Cal.2d 633, 2 Cal. Rptr. 758 (1960), it might be desirable to combine these two sections into one.

29. See People v. City of Los Angeles, 179 Cal. App.2d 558, 4 Cal. Rptr. 531 (1960).

30. Marin County Water Co. v. County of Marin, 145 Cal. 586, 79 P. 282 (1904); County of Marin v. Superior Court, 53 Cal.2d 633, 2 Cal. Rptr. 758 (1960).

EXTRACT FROM California Condemnation Practice
(Cal. Cont. Ed. Bar 1960)

JOHN P. SPARROW*

8

Public Use and Necessity

*A.B., 1938, Harvard College; LL.B., 1941, Harvard Law School. Mr. Sparrow, who has served as a deputy district attorney of Alameda County and an Assistant United States Attorney, is an associate counsel of The Regents of the University of California and an instructor of law at San Francisco Law School.

III. Necessity

I. INTRODUCTION

A. [§8.1] The Power of Eminent Domain

The power of eminent domain is the power to take private property against the will of the owner and is an inherent attribute of sovereignty, which is vested in the people in their sovereign capacity, and in the legislature. *County of San Mateo v. Coburn* (1900) 130 C. 631, 634, 63 P. 78, 79; see *State v. Chevalier* (1959) 52 C.2d 299, 304, 340 P.2d 598, 601; C.C.P. §1237.

B. [§8.2] Delegation of the Power State Constitution provisions

The right of condemnation is usually derived by delegation through legislative enactments and "neither the state itself nor any subsidiary thereof may lawfully exercise such right in the absence of precedent legislative authority so to do." *State v. Superior Court* (1937) 10 C.2d 288, 295–96, 73 P.2d 1221, 1225.

The California constitution specifically provides for the exercise of the right of condemnation in two, and possibly three, constitutional enabling provisions:

(1) Art. I, §14½ authorizes the state, a county, or city to condemn a strip up to 200 feet wide about or along a park or street, and thereafter to sell the land with restrictions preserving the view, light, and air;

(2) Art. XV, §1 authorizes the state to condemn all frontages on navigable waters; and

(3) Art. IX, §9 empowers the Regents of the University of California to "take . . . either by purchase or by donation, or gift, . . . or *in any other manner, without restriction*, all real and personal property for the benefit of the university or incidentally to its conduct." [Emphasis added.]

C. Limitations Upon the Exercise of the Power

1. [§8.3] Constitutional

The sovereign's inherent power of eminent domain is absolute and unlimited and "constitutional provisions merely place limitations upon its exercise." *State v. Chevalier* (1959) 52 C.2d 299, 304, 340 P.2d 598, 601; *accord, Gilmer v. Lime Point* (1861) 18 C. 229, 250.

The California constitution (art. I, §14) provides: "Private property shall not be taken or damaged for public use without just compensation . . . ." This clause is held to prohibit a taking or damaging of private

property for private or nonpublic use with or without just compensation. See, *e.g.*, *Nickey v. Stearns Ranchos Co.* (1899) 126 C. 150, 58 P. 459.

2. [§8.4] Legislative provisions following from Cal Const Art. 1§14

In authorizing condemnation by the state and other political subdivisions, and even private persons as agents of the state under C.C. §1001, the legislature provides for the means of exercising the power of eminent domain as limited only by Cal. Const. art. I, §14, and the Fourteenth Amendment.

The legislature may also impose additional general or specific limitations on the exercise of the power. Thus, a condemnor may exercise the right of condemnation "only in behalf of those public uses which the Legislature has authorized, and in the mode and with the limitations prescribed in the statute which confers the authority." *Lindsay I. Co. v. Mehrtens* (1893) 97 C. 676, 678, 32 P. 802.

In C.C.P. §1241, the legislature has imposed three general limitations on the exercise of the right of condemnation: (1) the use for which the property is to be taken must have been declared a public use by the legislature; (2) the property to be taken must be necessary to the proposed public use; and (3) if the property is already appropriated to a public use, the proposed public use must be more necessary than the existing public use.

The legislature has imposed a fourth general limitation: whenever land (C.C.P. §1242) or rights of way (C.C.P. §1240(6)) are to be taken, that the property must be located in the manner which will be most compatible with the greatest public good and the least private injury.

Other specific legislative limitations on the exercise of the right of condemnation may be found in the particular enabling statute of the condemnor.

D. [§8.5] Public Use and Necessity Are Not Jury Questions

Both the issue of public use (as it includes public versus private use and public versus more public use) and the issue of necessity (as it includes necessity of the particular property to the proposed public use and proper location of the proposed public use) are issues of fact. However, because these issues appear in a condemnation proceeding, a special proceeding not included in the common law actions triable by jury under Cal. Const. art. I, §7, and not included in the actions in which

issues of fact are tried and determined by jury under C.C.P. §592, they are tried by the court. *Vallejo etc. R.R. v. Reed Orchard Co.* (1915) 169 C. 545, 556, 147 P. 238, 243–44; *Housing Authority v. Forbes* (1942) 51 C.A.2d 1, 8–9, 124 P.2d 194, 198–99 (necessity); C.C.P. §§1247, 1247a (more necessary public use).

II. PUBLIC USE

A. [§8.6] Constitutional and Statutory Requirements

Private property can be taken under the eminent domain power only for a public use. Cal. Const. art. I, §14; U.S. Const. Amend. XIV; see §8.3.

If the exercise of the right of condemnation has been provided for by the legislature rather than by a constitutional enabling provision (§8.2), the public use for which the property is to be taken must be "a use authorized by law" (C.C.P. §1241(1)), which is one of "those public uses which the legislature has authorized." *Lindsay I. Co. v. Mehrtens* (1893) 97 C. 676, 678, 32 P. 802; see §8.4.

B. [§8.7] A Judicial Issue

Since the constitutional requirement that the taking be for a public use is a constitutional limitation upon the power of eminent domain, whether a particular proposed use is a public use, even though designated a public use by the legislature, is always open to a final adjudication in condemnation proceedings. *State v. Chevalier* (1959) 52 C.2d 299, 304, 340 P.2d 598, 601.

Within the judicial issue of public use the property owner may challenge the legislative declaration itself (see §8.8), or he may question the condemnor's intention to devote the property to the public use for which it is sought (see §§8.9–8.12), or he may question the condemnor's intention to devote the property to the proposed public use within a reasonable time (see §8.13). See *State v. Chevalier, supra.*

C. [§8.8] Legislative Declarations

The legislature has declared that numerous uses are public uses. The principal uses so declared are in C.C.P. §§1238, 1238.1–38.7, but there are other declared public uses throughout the various codes.

Although the legislature's declaration that a particular use is a public use is not necessarily binding or conclusive upon the courts, this declaration of legislative policy will be recognized by the courts unless clearly erroneous and without reasonable foundation. *Housing Author-*

ity v. Dockweiler (1939) 14 C.2d 437, 449–50, 94 P.2d 794, 801. Doubts are to be resolved in favor of the legislative declaration. *University of So. California v. Robbins* (1934) 1 C.A.2d 523, 525–26, 37 P.2d 163, 164.

In determining what uses are public, the older cases adopted a narrow test of whether the community as a whole would use or have the right to use the property after it was condemned. See discussion in *Redevelopment Agency v. Hayes* (1954) 122 C.A.2d 777, 789–90, 266 P.2d 105, 114. The modern cases adopt a broader test of whether condemnation of the property will promote "the general interest in its relation to any legitimate object of government" regardless of actual use or right of use in the community. *Bauer v. County of Ventura* (1955) 45 C.2d 276, 284, 289 P.2d 1, 6.

This broad, public utility or benefit test was adopted very early in California (*Gilmer v. Lime Point* (1861) 18 C. 229, 255) and has been consistently followed despite statements implying approval of the narrow test (*Gravelly Ford Co. v. Pope & Talbot Co.* (1918) 36 C.A. 556, 563, 178 P. 150, 153). *Redevelopment Agency v. Hayes, supra* at 802–03, 266 P.2d at 121–22. In *Redevelopment Agency v. Hayes, supra* at 797, 266 P.2d at 118, the public benefit or utility test of public use appears to have been further broadened into a test of "compelling community economic need" in order to include condemnation under legislation on slum clearance and redevelopment.

Under the public benefit or utility test the fact that (after condemnation in the general interest) the use of the property will involve a private benefit is immaterial. *Housing Authority v. Dockweiler, supra* at 460, 94 P.2d at 806. If the public benefit is, however, only incidental to the private benefit, the proposed use is no longer a public use. *City & County of San Francisco v. Ross* (1955) 44 C.2d 52, 279 P.2d 529. The fact that only one class of persons in the community will be entitled to use the property is also immaterial. *Redevelopment Agency v. Hayes, supra* at 808, 266 P.2d at 125. The only requirement is that all who are capable of enjoying the use will have an equal right to do so. *San Joaquin etc. Irr. Co. v. Stevinson* (1912) 164 C. 221, 229, 128 P. 924, 927.

D. Defenses

1. [§8.9] In General

In addition to directly challenging the legislature's designation of a public use as erroneous and without reasonable foundation (§8.8), the property owner may defend upon the ground that the condemnor

does not intend to apply some or all of the property to the proposed public use. This defense raises an issue of public use and not, as frequently but mistakenly assumed, one of necessity. *State v. Chevalier* (1959) 52 C.2d 299, 305, 340 P.2d 598, 601–02; *State v. Nahabedian* (1959) 171 C.A.2d 302, 340 P.2d 1053. This distinction is important because public use is always a justiciable question, whereas necessity may not be. See §§8.33, 8.39–8.46.

This defense requires affirmative allegations indicating "fraud, bad faith, or abuse of discretion in the sense that the condemnor does not actually intend to use the property as it resolved to use it." *State v. Chevalier, supra* at 304, 340 P.2d at 601; *accord, State v. Nahabedian, supra;* see §§ 8.29, 8.31.

2. [§8.10] Excess Condemnation

A defense that only a portion of the property is to be used for a public purpose raises a problem of the constitutionality of statutes expressly authorizing the acquisition of an entire parcel, when only a portion is actually required for a proposed public use. This problem is referred to as one of excess condemnation. For example, Str. & H. C. §104.1 provides that the Department of Public Works may take an entire parcel for highway purposes if the unneeded portion would be left in such condition as to be of little value to the owner or give rise to claims involving severance or other damage. The Reclamation Board is given the same power. Wat. C. §8590.1.

The constitutionality of these and similar California statutes has not been determined. Validity was assumed in *State v. Thomas* (1952) 108 C.A.2d 832, 836, 239 P.2d 914, 917 (the court erroneously assumed excess condemnation was a question of necessity rather than public use). The possibility of a constitutional question was alluded to but not decided because not properly before the court in *State v. Lagiss* (1958) 160 C.A.2d 28, 35, 324 P.2d 926, 931.

A slightly different rationale for excess condemnation is found in C.C.P. §1266 providing that if the taking of a part would require the condemnor to pay an amount "*equal* to the fair and reasonable value of the whole," upon the adoption of a resolution providing for the taking of the whole, the taking shall be deemed necessary for the public use. [Emphasis added.] The issue is a justiciable one and the condemnor must show the relative amounts to be equal or substantially so. *City of La Mesa v. Tweed & Cambrell Mill* (1956) 146 C.A.2d 762, 778–79,

304 P.2d 803, 813 (indicating that a differential of 17% in the relative amounts does not satisfy the requirement of substantial equality).

3. [§8.11] Private Use

Public use in a particular case depends upon the facts and circumstances of that case. *Lindsay I. Co. v. Mehrtens* (1893) 97 C. 676, 32 P. 802. It may be shown that the manner in which the condemnor intends to use the property is such that a private rather than a public purpose will be served. *Black Rock etc. Dist. v. Summit etc. Co.* (1943) 56 C.A.2d 513, 133 P.2d 58; *Stratford Irr. Dist. v. Empire Water Co.* (1941) 44 C.A.2d 61, 111 P.2d 957. For example, although the legislature has declared that off-street parking is a public use, it may be shown that the condemnor proposes to lease the property to private persons without retaining any control over rates charged or manner of operation. *City & County of San Francisco v. Ross* (1955) 44 C.2d 52, 279 P.2d 529. In the same manner, although the legislature has declared that redevelopment of slum or blighted areas is a public use, it may be shown that the condemnor intends to sell the property to private persons without restrictions protecting the redevelopment of the property. See *Redevelopment Agency v. Hayes* (1954) 122 C.A.2d 777, 803, 266 P.2d 105, 123.

However, the fact that the condemnor intends to lease or to sell the property to private persons does not make the taking any the less a taking for public use, provided the taking is for a public use and the lease or sale is made with restrictions protecting the public use for which the property is condemned. *Redevelopment Agency v. Hayes, supra; see City & County of San Francisco v. Ross, supra.*

If a private individual exercises the right of condemnation, as an agent of the state under C.C. §1001, a stronger showing that the general interest will be served probably is required than if the condemnor were a public or quasi-public agency. See *Linggi v. Carovotti* (1955) 45 C.2d 20, 27, 286 P.2d 15, 20; Note, 44 CALIF. L. REV. 785 (1956).

4. [§8.12] Different Public Use

When property already devoted to or held for a public use is required for a particular highway project, Str. & H. C. §104.2 authorizes the Highway Commission to condemn property not needed for the highway in order to exchange this condemned property for the property needed but already devoted to another public use. Consent of the other public user is required. Although the validity of this section has not

been questioned in any reported case, condemnation under this section does raise a question of public use.

5. [§8.13] Future Public Use

Although admitting that the condemnor intends to devote the property to a public use, the property owner may defend upon the ground that the condemnor has no intention of devoting the property to the public use within a reasonable period of time. See *Kern Co. High School Dist. v. McDonald* (1919) 180 C. 7, 14, 179 P. 180, 184. A typical example would be a condemnor who anticipating unknown future requirements seeks to condemn property in areas expected to rise markedly in value. This condemnation would force the property owner to sell at the current market value and, thus, deprive him of the additional compensation he would receive had the condemnation been delayed until the property was actually needed by the condemnor.

The concept of reasonable immediacy of public use appears to be implicit in the constitutional and statutory requirement that the taking be for a public use, rather than one of the three aspects of the issue of necessity set forth in *State v. Chevalier* (1959) 52 C.2d 299, 307, 340 P.2d 598, 602. See 2 Nichols, EMINENT DOMAIN §7.223[2] (3d ed. 1950); §8.30.

The Highway Commission is expressly authorized to acquire real property for future needs. Str. & H. C. §104.6. No reported case has been found in which the validity of this section has been questioned.

E. Condemnation for a More Necessary Public Use

1. Basic Provisions

a. [§8.14] *General Rule*

Property already *appropriated* to a public use may be taken only for a more necessary public use. C.C.P. §§1240(3), 1241(3). The term "property" for the purposes of C.C.P. §1240(3) and §1241(3) includes land belonging to the state, a county, or city. *State v. City of Los Angeles* (1960) 179 C.A.2d———, ——— ———, 4 C.R. 531, 535–36 (rejecting dicta in *Marin County W. Co. v. County of Marin* (1904) 145 C. 586, 79 P. 282). *Compare* C.C.P. §1240(3), *with* §1240(2).

b. [§8.15] *Public Property Not Appropriated to a Public Use*

Public property *not* appropriated to a public use is in the same category as privately owned property (*Deseret etc. Co. v. State* (1914) 167 C. 147, 151, 138 P. 981, 983), and, therefore, may be taken for a public

use by anyone possessing the right of condemnation without the necessity of showing a more necessary public use. C.C.P. §1240(2) (state, county, or city land); *cf.* C.C.P. §1240(3); *Marin County W. Co. v. County of Marin* (1904) 145 C. 586, 79 P. 282.

c. [§8.16] *What Constitutes Appropriation to a Public Use?*

Appropriation to a public use is not synonymous with ownership by a public entity. Thus, C.C.P. §1240 and §1241 expressly contemplate that property may be appropriated to a public use even though it is *owned* by a private individual or corporation. Conversely, ownership of property by a public entity does not necessarily mean it is appropriated to a public use. Hence, land in the 16th and 36th sections which the federal government gave to the state for the "support of the common schools" is land which the state owns, but it is *not* appropriated to a public use as an actual site for schools. *Deseret etc. Co. v. State* (1914) 167 C. 147, 138 P. 981.

Deseret indicates that "appropriation" is synonymous with "devoted to," so that "appropriation to" a public use means "devoted to" such use. *Deseret etc. Co. v. State, supra* at 151, 138 P. at 983; *accord, East Bay Mun. Util. Dist. v. Lodi* (1932) 120 C.A. 740, 755, 8 P.2d 532, 538; *Pacific Power Co. v. State* (1916) 32 C.A. 175, 179, 162 P. 643, 645.

Appropriation to or devotion to a public use does not necessarily mean that the property must actually be in use for a public purpose. Property acquired by a condemnor for a public use and "held in reasonable anticipation of its future needs, with a *bona fide* intention of using it for such purpose within a reasonable time" is appropriated to a public use. *East Bay Mun. Util. Dist. v. Lodi, supra* at 756, 8 P.2d at 538; *see* §8.19.

d. [§8.17] *Differences Between C.C.P. §1240 and §1241*

Code of Civil Procedure §1240 states what property can be taken by condemnation and appears to be an enabling provision. Section 1241 sets forth the facts that must appear before condemnation will be allowed and appears to be a procedural provision. The two sections have many, but not all, provisions in common.

In designating uses deemed more necessary than any public uses to which property already may be appropriated by a private individual or corporation, §1240 includes, in addition to the state, a county, or city, uses for three public districts: joint highway, irrigation, and municipal water; and §1241 includes these three public districts, plus transit, rapid transit, public utility, and water districts. In addition to a county

or city, §1240 renders only property appropriated to the use of a municipal water district exempt from condemnation by any other county, city, or municipal water district; whereas, §1241 adds five more such districts: irrigation, public utility, water, transit, and rapid transit. Finally, §1241(3) contains provisions not found in §1240 making a public use by a county, city, or one of the five designated public districts superior to that by a private individual or corporation in the same territorial area.

Although C.C.P. §1240 appears to be enabling and §1241 procedural, a recent case assumes that the sections are interchangeable. *County of Marin v. Superior Court* (1960) 53 C.2d 633, 2 C.R. 758 (involving exemption of county roads from condemnation by a municipal water district).

2. Exempt Property

a. [§8.18] *Property Appropriated to and Used for Enumerated Public Purposes*

Property already appropriated to the use of a county, city, or one of the following public districts—municipal water, irrigation, transit, rapid transit, public utility, or water—is exempt from condemnation by *another* county, city, or one of the designated public districts. C.C.P. §§1240(3), 1241(3); *County of Marin v. Superior Court* (1960) 53 C.2d 633, 2 C.R. 758. A private or public condemnor other than those designated may take such property by showing a more necessary public use. See *East Bay M. U. Dist. v. Railroad Com.* (1924) 194 C. 603, 623, 229 P. 949, 956.

Exemption from condemnation under §1240(3) and §1241(3) is dependent on appropriation of property to the use of and use by a county, city, or designated public district rather than on *ownership* of the property by these designated public agencies. Hence, the fact that such property may be owned by a private corporation is not a bar to the exemption. *Mono Power Co. v. City of Los Angeles* (9th Cir. 1922) 284 F. 784, 795. Conversely, exemption does not extend to property owned by the state, other public agencies, and private corporations, unless the property is appropriated to and used for the public purposes designated in C.C.P. §1240(3) and §1241(3).

b. [§8.19] *Distinguishing Use From Appropriation to Use*

Under C.C.P. §1240(3) and §1241(3) "appropriated to" a public use is to be distinguished from "used" for a public use and both must be

present before the exemption provisions apply. See §8.18. Since "appropriated to" a public use is synonymous with "devoted to" such use (see §8.16), "used" might be expected to mean that the property be in actual physical use for the particular public purpose at the time of the proposed second condemnation.

In *East Bay Mun. Util. Dist. v. Lodi* (1932) 120 C.A. 740, 750, 8 P.2d 532, 536, the court indicated, without deciding that "used" is not to be construed so narrowly, ". . . but means property reasonably necessary for use, and which the circumstances reasonably show will be actually used within a reasonable length of time."

3. Public Uses and Public Agencies Declared More Necessary Than Others

a. [§8.20] *Specific Declarations in Absolute Terms*

Provisions in various codes, other than the Code of Civil Procedure, may constitute declarations that particular public uses or agencies are more necessary than any other public uses or agencies because the specific statutory provision controls over the general provisions of the Code of Civil Procedure. See *County of Marin v. Superior Court* (1960) 53 C.2d 633, 2 C.R. 758. Use of property for toll-bridge purposes and any use under the Property Acquisition Law are expressly declared to be more necessary than *any* public use to which it may already be devoted. Str. & H. C. §30401; Govt C. §15856.

b. [§8.21] *Specific Declarations in Relative Terms*

Some uses are declared relatively more necessary than others, depending upon whether a public use is administered by *private* as distinguished from *public* corporations. Thus, a public street or highway is declared to be a more necessary use than any other public use to which property already may be appropriated by *private* individuals or corporations. C.C.P. §§1240(3), 1241(3); see *City of Los Angeles v. Zeller* (1917) 176 C. 194, 199, 167 P. 849, 851.

c. [§8.22] *Implied Declarations*

By implication some public uses are declared to be more necessary than others. Implied declarations take various forms:

(1) Certain condemnors must obtain the consent of the existing public user as a condition precedent to condemnation of property already devoted to a public use. Thus the existing use is by implication more

necessary than the second use. Health & S. C. §§33277 (redevelopment agency), 34325 (housing authority); Pub. Res. C. §§11263–64 (resort district).

(2) Consent of the legislature is required as a condition precedent to condemnation. Welf. & I. C. §6503 (public street or road for railway or other purposes, through lands of state hospital); Fish & G. C. §1349 (Wildlife Conservation Board condemnation of farm lands).

(3) Declarations that property devoted to a particular public use may be taken apparently without having to show a more necessary use. Str. & H. C. §103.5 (State Highway Commission may condemn "any property dedicated to park purposes" upon adoption of resolution determining that it is necessary to do so for state highway purposes). This specific provision controls over the general provisions of C.C.P. §1240(3), and it is not necessary to show that a state highway use is in fact more necessary than city park use. *State v. City of Los Angeles* (1960) 179 C.A.2d———, 4 C.R. 531.

(4) Prohibitions against the condemnation of property devoted to a particular public use. Wat. C. App. §39–2(8) (water conservation district cannot acquire property used or dedicated to cemetery purposes); Wat. C. App. §35–5(5) (metropolitan water district cannot condemn water or water rights stored behind any flood control dam). See generally water agency acts and flood control districts listed in §8.53; most contain provisions prohibiting condemnation of publicly owned water rights or property held for storage or distribution of water for public use.

d. [§8.23] *Public Uses Set Forth in C.C.P. §1241(3)*

Property owned by private individuals or corporations, whether or not already devoted to a public use, may be taken by a county, city, or an enumerated public district in order to supply any of the following:

(1) Water or electricity for power, light, or heat to itself or its inhabitants;

(2) Any other public utility (*Query:* is such supply limited to that for water or electricity?); and

(3) For any other public use (*Query:* must a more necessary use be shown or does this constitute a legislative declaration that these public uses are more necessary?).

This provision apparently was included to make a public use by a county, city, or an enumerated public district, superior to any public use in the same territorial area by a private individual or corporation.

4. Second Use Not Involving a Taking of the First

a. [§8.24] *Common Use*

Property appropriated to a public use by a private individual or corporation may be taken by the state, a county, city, or an enumerated public district, without showing a more necessary use if the two uses are reasonably capable of being exercised in common. C.C.P. §1240(3); *City of Oakland v. Schenck* (1925) 197 C. 456, 241 P. 545; *City of Los Angeles v. Zeller* (1917) 176 C. 194, 199–200, 167 P. 849, 851. Since the second use can reasonably be enjoyed in common with the first there is no "taking." Although there is no necessity of showing a more necessary use, the condemnor must show that the second use will not in fact substantially interfere with the first.

Except as limited by other statutes, the court in the condemnation proceedings is empowered to adopt a plan for the relocation of property already appropriated to a public use. *County of Marin v. Superior Court* (1960) 53 C.2d 633, 642, 2 C.R. 758, 764; C.C.P. §1247a.

b. [§8.25] *Change of Agency Administering Public Use*

Exemption from condemnation under C.C.P. §1240(3) and §1241(3) (§8.18) apparently applies only to a *taking* for another use. *East Bay M. U. Dist. v. Railroad Com.* (1924) 194 C. 603, 619–23, 229 P. 949, 955–56 (alternative holding); see *City of San Diego v. Cuyamaca Water Co.* (1930) 209 C. 152, 166, 287 P. 496, 502 (dictum). If another county, city, or an enumerated public district seeks to acquire property to provide the same public use to the same or to a larger territorial area, no "taking" is involved so long as the county, city, or an enumerated public district already being served is included within the larger area. See *East Bay M. U. Dist. v. Railroad Com., supra.* Thus, if the change is not in the use but only in the agency administering it, the exemption from condemnation provisions may not apply. See *East Bay M. U. Dist. v. Railroad Com., ibid.*

5. [§8.26] Determinations Open to the Court

The issue of a more necessary public use and uses reasonably being exercised in common are questions that are open to the court's determination. See *Marin County W. Co. v. County of Marin* (1904) 145 C. 586, 79 P. 282 (relative necessity of public uses); *Los Angeles v. Los Angeles Pacific Co.* (1916) 31 C.A. 100, 115, 159 P. 992, 998 (possibility of common use); C.C.P. §§1241(3), 1247, 1247a.

Although a statutory declaration of more necessary public use precludes judicial inquiry into whether as a fact the enumerated use is

more necessary, the possibility of the two public uses being exercised in common may be a justiciable issue. See *Reclamation Dist. v. Superior Court* (1907) 151 C. 263, 90 P. 545; *Turlock Irr. Dist. v. Sierra etc. P. Co.* (1924) 69 C.A. 150, 155, 230 P. 671, 673; *Waterford I. Dist. v. Turlock I. Dist.* (1920) 50 C.A. 215, 194 P. 757.

F. Pleading

1. Complaint

a. [§8.27] *Public Use*

The complaint must contain a "statement of the right of the plaintiff." C.C.P. §1244(3). This statement apparently requires an allegation that: (1) the use for which the property is sought to be condemned has been declared a public use by the legislature (*Linggi v. Carovotti* (1955) 45 C.2d 20, 26–27, 286 P.2d 15, 19–20, where private person condemned property under C.C. §1001 for a use specified in C.C.P. §1238(8)); and (2) the condemnor intends to devote the property to the proposed public use (*Black Rock etc. Dist. v. Summit etc. Co.* (1943) 56 C.A.2d 513, 517, 133 P.2d 58, 61). These two requirements are satisfied by general allegation. *Linggi v. Carovotti, supra.* Since courts often speak of the eminent domain power as being inherent in the state—with Cal. Const. art. I, §14 being a limitation on an inherent power and with the statutory provisions being means of controlling the exercise of the power—it should seem in theory that the state would have the right to condemn property without alleging statutory authorization. However, as a practical matter, it is not the state as an abstract entity that condemns property but a specific agency or subdivision of the state. Although the state may have the right to condemn property for a public use if there were no statutory enactments on the subject, a private individual condemning property under C.C. §1001 for a use specified in C.C.P. §1238, or a municipal corporation, or even a direct arm of the state itself should allege those legislative declarations under which its actions are taken.

b. [§8.28] *More Necessary Public Use*

If the property already is appropriated to a public use, the condemnor must allege that the taking is for a more necessary public use than that to which the property is already appropriated. Otherwise the complaint is demurrable. *Woodland School Dist. v. Woodland Cemetery Assn.* (1959) 174 C.A.2d 243, 344 P.2d 326.

2. Answer

a. [§8.29] *Public Use*

If the property owner seeks to attack the legislative declaration that a particular use is a public use as clearly erroneous and without reasonable foundation, he must raise this issue in his answer.

A common challenge is that the condemnor does not intend to use the property sought for the proposed public use. A general denial of the allegation that the property is intended to be used for public purposes is not sufficient to raise this issue of public use. *State v. Milton* (1939) 35 C.A.2d 549, 96 P.2d 159; *County of San Mateo v. Bartole* (1960) 184 C.A.2d _____, _____ C.R. _____; see §§8.9, 8.31. The owner must specifically allege the condemnor's fraud, bad faith, or abuse of discretion in the sense that the condemnor does not actually intend to use the property as it resolved to use it. *State v. Olsen* (1930) 109 C.A. 523, 531, 293 P. 645, 648; see *State v. Chevalier* (1959) 52 C.2d 299, 304, 340 P.2d 593, 601. Under *Chevalier*, affirmative allegations of how or in what manner the proposed use will not be public are required. Similarly, in order to raise an issue of excess condemnation the property owner must allege facts indicating the condemnor's fraud, bad faith, or abuse of discretion. *L. A. County Flood Control Dist. v. Jan* (1957) 154 C.A.2d 389, 316 P.2d 25.

b. [§8.30] *More Necessary Public Use*

A general denial appears to be sufficient to controvert the condemnor's allegation of more necessary public use. See C.C.P. §437; 2 Witkin, CALIFORNIA PROCEDURE §§519–21 (1954).

G. Burden of Proof

1. [§8.31] Public Use

Since the legislative declaration of public use is entitled to great weight in condemnation proceedings (see §8.8), the property owner challenging a specific legislative declaration in his answer has the burden of proving the error of and unreasonable foundation for the legislative declaration. See *County of San Mateo v. Coburn* (1900) 130 C. 631, 635, 63 P. 78, 79.

Under the basic rule that the burden of coming forward and the burden of persuasion follow the burden of pleading, the plaintiff must prove the elements of his cause of action and the defendant must prove new matter raised by way of affirmative defense. Witkin, CALIFORNIA EVIDENCE §56(a) (1958).

Applying this rule to the issue of public use in a particular case does not resolve the problem. The condemnor must allege that it intends to devote the property sought to the proposed public use, which indicates that it would have the burden of proof. See C.C.P. §1981. On the other hand, the property owner must affirmatively allege facts indicating fraud, bad faith, or abuse of discretion in that the condemnor does not actually intend to devote the property to the proposed public use (see §§8.9, 8.29) which indicates that the burden of proof would be on him. See C.C.P. §1869.

If both parties have satisfied their burden of pleading, it appears that the public condemnor need only introduce the condemnation resolution in evidence in order to establish a prima facie case and, thus, put the burden of coming forward on the property owner. Under these circumstances, the burden of persuasion to establish fraud, bad faith, or abuse of discretion would be on the property owner. See *State v. Lagiss* (1958) 160 C.A.2d 28, 324 P.2d 926.

If both parties have satisfied their burden of pleading, a private condemnor, acting under C.C. §1001, would probably have to make a stronger showing of his intention to devote the property to the proposed public use than a public or quasi-public condemnor, as he must do on the issue of the general interest to be served. See §8.11.

2. [§8.32] More Necessary Public Use

If the property already is appropriated to a public use, the condemnor has the burden of proving that the proposed use is a more necessary public use than the existing public use and that the proposed use is inconsistent with the continuance of the existing use. *Los Angeles v. Los Angeles Pacific Co.* (1916) 31 C.A. 100, 115, 159 P. 992, 998. If the property's existing appropriation to a public use is disputed, the burden is on the existing user to prove that the property is devoted to a public use. *Los Angeles v. Los Angeles Pacific Co., supra.*

III. NECESSITY

A. [§8.33] Statutory Requirements

Although "damages sustained by reason of an adjudication that there is no necessity for taking the property" are included among the damages for which a condemnor must give security in order to take immediate possession under the California constitution (art. I, §14), necessity is not a constitutional limitation on the exercise of the right of

condemnation. *State v. Chevalier* (1959) 52 C.2d 299, 304–05, 340 P.2d 598, 601.

The legislature has, however, limited the exercise of the right of condemnation to the taking of property that "is necessary to such ['authorized by law'] use" (C.C.P. §1241(2)), and to the taking of land or rights of way when the proposed public use is located in a manner which will be "most compatible with the greatest public good and least private injury" (C.C.P. §1242 on land and §1240(6) on rights of way). If the property to be taken is not land or rights of way, the legislature has not limited the right of condemnation by requiring a proper location of the proposed public use.

B. Meaning of Necessity

1. [§8.34] **In General**

Necessity has three aspects: the necessity for making the proposed public improvement; the necessity for taking particular property or a particular interest in property (C.C.P. §1241(2)); and the proper location of the public improvement (C.C.P. §§1242, 1240(6)). See *State v. Chevalier* (1959) 52 C.2d 299, 307, 340 P.2d 598, 603; C.C.P. §1241(2) (first proviso).

2. [§8.35] **The Necessity for Making the Proposed Public Improvement**

In the first aspect of necessity, the condemnor's wisdom in deciding to make the particular public improvement as a necessary public improvement is questioned. This is a political or legislative question, not open to judicial review. See §§8.39, 8.40.

Thus, if the legislature defines sewer purposes as a public use and the condemnor decides to condemn property for a particular sewer, the property owner cannot question the installation of the particular sewer as unnecessary in condemnation proceedings, but may question only the acquisition of particular property as unnecessary for the sewer project. *City of Pasadena v. Stimson* (1891) 91 C. 238, 253, 27 P. 604, 607; *Castro Point Co. v. Anglo-Pacific Co.* (1917) 33 C.A. 418, 423, 165 P. 544, 546; see §§8.36–8.37.

3. Necessity for Taking Particular Property or a Particular Interest

a. [§8.36] *Particular Property*

This aspect of necessity is usually referred to as the issue of necessity. The meaning of this issue is unclear because on one side the issue

merges into the issue of public use and on the other side into the issue of proper location.

Thus, allegations that more of the owner's property is sought than is necessary to effectuate the proposed public improvement or that the particular property is not presently necessary for the proposed public improvement raise the issue of public use rather than the issue of necessity. See *State v. Chevalier* (1959) 52 C.2d 299, 340 P.2d 598; §§8.10, 8.13.

In *Chevalier* (*supra* at 307, 340 P.2d at 603) the Court described this aspect of necessity as "the necessity for taking particular property, rather than other property . . . ." If the property owner attempts to raise this issue of necessity by alleging that the condemnor already has *other* property or could obtain *other* property on which it can make the proposed public improvement, the condemnor will probably reply that the other property is less advantageous for the proposed public improvement and the issue is then a question of proper location. See §8.38. Thus the definition of the *Chevalier* case, by introducing the comparison with *other* property, appears to lead directly into the question of proper location and fails to define the necessity for taking the particular property.

In *City of Hawthorne v. Peebles* (1959) 166 C.A.2d 758, 763, 333 P.2d 442, 445, the court defined the necessity for taking particular property: "necessity does not signify impossibility of constructing the improvement . . . without taking the land in question, but merely requires that the land be reasonably suitable and useful for the improvement." *Accord, Rialto Irrigating Dist. v. Brandon* (1894) 103 C. 384, 37 P. 484. By limiting the question of the necessity for taking particular property to consideration of the suitability and usefulness of the property to the proposed public use, the court has defined the issue in what appear to be the only terms which do not include the issue of public use or proper location. Under the *Hawthorne* definition, evidence on necessity would be limited to evidence showing that the particular property will or will not be suitable and desirable for the construction and use of the proposed public improvement.

b. [§8.37] *Particular Interest*

When the issue of necessity involves a question of the necessity for taking a particular interest in the property, the meaning of the legislative limitation is clear. Except as provided in C.C.P. §1239(1), (2), and (4), or in any other statute, the taking of an estate greater than an

easement is not necessary to a proposed public improvement. C.C.P. §1239(2); *Highland Realty Co. v. City of San Rafael* (1956) 46 C.2d 669, 298 P.2d 15. The statutory exceptions are so extensive, however, that they come close to abrogating the general rule.

Code of Civil Procedure §1239(3) authorizes a condemnor to take a fee simple estate for the following uses: public buildings or grounds, permanent buildings, reservoirs, dams, depository for mine tailings, and protection of water-bearing land from drought.

Upon adoption of a resolution finding that the taking of a fee is necessary, a municipal corporation is authorized to take a fee for road, railroad, or utility purposes; a reclamation board is authorized to take a fee for its purposes; and a county, city, mutual water system, municipal water district "or other political subdivision, regardless of the use" is authorized to take a fee simple. C.C.P. §1239(2) and (4).

Under Str. & H. C. §104 the Highway Commission is authorized to take a fee that it considers necessary for highway and related purposes.

4. [§8.38] Proper Location of the Proposed Public Improvement

When land or rights of way are to be condemned, the proposed public improvement must be located in a manner most compatible with the greatest public good and least private injury. C.C.P. §§1242, 1240(6). This is the issue of proper location, which has also been described as "the necessity for adopting a particular plan" for a given public improvement. *State v. Chevalier* (1959) 52 C.2d 299, 307, 340 P.2d 598, 603.

Proper location and the necessity for taking particular property, as two aspects of the larger issue of necessity, "are frequently termed the question of necessity." *Id.* at 304, 340 P.2d at 601; *accord, City of Hawthorne v. Peebles* (1959) 166 C.A.2d 758, 763, 333 P.2d 442, 445.

This issue is essentially a comparison between two or more sites in which the condemnor has chosen the property owner's site, the property owner wants the condemnor to choose another site, and each claims that his proposed site is most compatible with the greatest public good and the least private injury.

Since proper location is based upon two factors, public good and private injury, the condemnor's choice is correct or proper, unless another site would involve an equal or greater public good and a lesser private injury. A lesser public good can never be counterbalanced by a lesser private injury to equal a more proper location. *Montebello etc. School Dist. v. Keay* (1942) 55 C.A.2d 839, 131 P.2d 384. Nor can

equal public good and equal private injury combine to make the condemnor's choice an improper location. *California Cent. Ry. v. Hooper* (1888) 76 C. 404, 412–13, 18 P. 599, 603.

C. Necessity and Proper Location as Legislative or Judicial Questions

1. [§8.39] Necessity and Proper Location Within Legislative Control

The legislature's control over the right of condemnation is absolute and unlimited, except as proscribed by the constitution or by statute. See §§8.3, 8.4.

Since the constitution does not require that the proposed public improvement be necessary, or that the property be necessary to the proposed public improvement, or that the public improvement be properly located, these questions are not constitutional limitations upon the exercise of the power of eminent domain. See §8.33.

Therefore, unless the legislature imposes these limitations by statute, these three questions are within the legislature's absolute and unlimited control over the exercise of the right of condemnation and, as such, are questions of a political or legislative nature not subject to judicial review. *State v. Chevalier* (1959) 52 C.2d 299, 304–06, 340 P.2d 598, 601–02; see *Sherman v. Buick* (1867) 32 C. 241, 253.

2. Effect of Statutory Law Upon Necessity and Proper Location

a. [§8.40] *Necessity and Proper Location Made Judicial Questions by Statute*

In 1872, the legislature limited the exercise of the right of condemnation by enacting C.C.P. §§1241(2), 1242, and 1240(6). These statutes make "necessary to such ['authorized by law'] use" a judicial question in the taking of all property and location "in a manner . . . most compatible with the greatest public good and least private injury" a judicial question in the taking of land or rights of way. *City of Pasadena v. Stimson* (1891) 91 C. 238, 253–56, 27 P. 604, 607–08; *California Cent. Ry. v. Hooper* (1888) 76 C. 404, 412–13, 18 P. 599, 603; *Eel R. & Eureka R.R. v. Field* (1885) 67 C. 429, 7 P. 814; see *State v. Chevalier* (1959) 52 C.2d 299, 306, 340 P.2d 598, 602. The 1872 statutes did not make the necessity of the proposed public improvement a judicial question. Therefore, this question remains a legislative question not subject to judicial review. *City of Pasadena v. Stimson, supra.*

The legislature has, however, returned necessity and proper location to nonjusticiable questions in many cases by the exceptions that follow in §§8.41–8.46.

b. Subsequent Statutory Exceptions

(1) [§8.41] Under Public Improvement Acts

Although this development of necessity and proper location from legislative questions (§8.39) to judicial questions by statute (§8.40) appears clear, the case law was confused by cases arising under public improvement acts.

Under a statutory procedure common to these acts, the property owner was given notice and an opportunity to be heard before the condemnor, as a condition precedent to condemnation. The courts held that after notice and hearing, the property owner could not "collaterally attack" the condemnor's judicial determination of necessity and proper location in the subsequent condemnation proceeding. *County of San Mateo v. Coburn* (1900) 130 C. 631, 635-36, 63 P. 78, 79; *County of Siskiyou v. Gamlich* (1895) 110 C. 94, 100, 42 P. 468, 470.

Confusion arose because, although clearly holding that necessity and proper location were legislative questions not subject to judicial review in condemnation proceedings, the courts failed to limit this holding to condemnation proceedings following the "intermediate action taken before suit by any board or tribunal acting in a judicial capacity" under the public improvement acts. *County of Siskiyou v. Gamlich, supra.*

(2) [§8.42] Under C.C.P. §1241(2)

In 1913, the legislature added the provisos to C.C.P. §1241(2). Under the first proviso, when the legislative body of a county or city, by resolution or ordinance adopted by vote of two-thirds of all its members, finds and determines that the "public interest and necessity require" the proposed public improvement and the particular property "is necessary therefor, such resolution or ordinance shall be conclusive evidence" of (1) the necessity of the proposed improvement, (2) the necessity of the particular property to the proposed improvement, and (3) the proper location of the proposed improvement. Under the second proviso, the resolution is conclusive evidence of necessity and proper location only in a taking of property within the legislative body's territorial limits. Since the necessity of the proposed improvement is a legislative question and is not made a judicial question under C.C.P. §§1241(2), 1242, or 1240(6) (*see* §§8.39-8.40), this legislative declaration and other legislative declarations (§8.44) of conclusive evidence of the necessity of the proposed improvement are mere surplusage, the result of an overabundance of legislative caution.

Since 1913, the legislature has added the resolutions of the following public agencies to the proviso to C.C.P. §1241(2): irrigation, public utility, and water districts (1935); school districts (1949); transit districts (1955); and rapid transit districts (1957).

The legislature has thus specifically excepted certain condemnors from the 1872 general enactments making necessity and proper location judicial questions, but necessity and proper location remain judicial questions under the 1872 statutes. See *State v. Chevalier* (1959) 52 C.2d 299, 307, 340 P.2d 598, 603. Therefore, if the resolution of an excepted condemnor fails to conform to the requirements of the proviso or concerns property outside the condemnor's territorial limits, the condemnor loses the benefit of the conclusive evidence proviso; necessity and proper location (as judicial questions under the 1872 statutes) are justiciable questions in the condemnation proceeding. *City of Hawthorne v. Peebles* (1959) 166 C.A.2d 758, 333 P.2d 442.

The constitutionality of this proviso has been upheld against an assertion that the failure to give the property owner notice and a hearing on necessity and proper location before the condemnor or a hearing on necessity or proper location in the condemnation proceeding makes the condemnation an unconstitutional taking without due process of law. *Bindge Co. v. County of Los Angeles* (1923) 262 U.S. 700, *affirming County of Los Angeles v. Bindge Co.* (1921) 53 C.A. 166, 200 P. 27; *City of Oakland v. Parker* (1924) 70 C.A. 295, 233 P. 68.

If the resolution of a condemnor is conclusive evidence of necessity and proper location under C.C.P. §1241(2), the property owner cannot make these questions justiciable by allegations in his answer of fraud, bad faith, or abuse of discretion. *State v. Chevalier, supra* at 305–07, 340 P.2d at 601–03 (expressly disapproving of language in a long line of District Courts of Appeal cases culminating in *State v. Lagiss* (1958) 160 C.A.2d 28, 324 P.2d 926); see C.C.P. §1837 ("Conclusive . . . evidence is that which the law does not permit to be contradicted."). *But see* Note, 48 CALIF. L. REV. 164 (1960).

After arriving at this holding by first reviewing the statutory, rather than constitutional, development of the issue of necessity, the Court explained its holding upon the additional ground that:

> To hold otherwise would not only thwart the legislative purpose in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement.

State v. Chevalier, supra at 307, 340 P.2d at 603. Thus the Court showed its awareness not only of the intention of the legislature but also of the practical need for uniformity in condemning properties for a single public improvement and for expediency.

(3) [§8.43] Under C.C.P. §1239

Under C.C.P. §1239(2) the resolution of a reclamation board finding that the taking of either a fee simple or an easement is necessary for its purposes is conclusive evidence that a taking of the fee simple or easement is necessary.

Under C.C.P. §1239(4) the resolutions of a county, city, mutual water system, municipal water district "or other political subdivisions, regardless of the use," determining that the taking of a fee simple is necessary, are conclusive evidence of the necessity for the taking of the fee simple.

If the condemnor's resolution is conclusive evidence of the necessity for taking the particular interest, the property owner cannot make the question of the necessity for taking the particular interest justiciable by alleging in his answer the condemnor's fraud, bad faith, or abuse of discretion. See *State v. Chevalier* (1959) 52 C.2d 299, 340 P.2d 598; C.C.P. §1837; §8.42.

(4) [§8.44] Under Enabling Acts

The legislature has declared that the declarations, ordinances, or resolutions of necessity of the following public agencies are conclusive evidence of (1) the necessity of the proposed public improvement, (2) the necessity of the particular property to the proposed public improvement, and (3) the proper location of the proposed public improvement:

Central Valley Project	Wat. C. §§11581–82
Highway Comm.	Sts. & H. C. §§102–03, 820.5
Housing Comm. (appears to be conclusive evidence only of (1) and (2))	Health & S. C. §§34875–76, 34878
Joint Highway Dist.	Sts. & H. C. §25052
L.A. Metropolitan Auth.	Pub. Util. C. App. §4.7 (West's 1959 Supp.)
Park & Playground Act of 1909 (appears to be conclusive evidence only of (1))	Govt. C. §§38080–81
Parking Dist.	Sts. & H. C. §§35273.1, 35401.5
Reclamation Board	Wat. C. §§8594–95

Recreational Harbor Dist.	Harb. & N. C. §§6590, 6593, 6598
Regents of Univer. of Cal. (⅔ vote required)	Ed. C. §§23151–52
San Mateo County Flood Control Dist. (⅔ vote required and resolution does not appear to be condition precedent)	Wat. C. App. §87-3(8)
State Public Works Board	Govt. C. §15855
Street Improvement Act of 1911 (conclusive evidence only of "necessity")	Str. & H. C. §§6021, 6121
Street Opening Act of 1903 (appears to be conclusive evidence of only (1) and (3))	Str. & H. C. §4189
Toll Bridge Auth.	Str. & H. C. §30404

Unlike C.C.P. §1241(2) most of these statutes make the adoption of a resolution of necessity a condition precedent to condemnation proceedings and do not specify voting requirements for adoption or territorial limitations upon the taking. Thus, if the condemnor fails to adopt a resolution or adopts a defective resolution, not only will necessity and proper location be justiciable (§8.40), but also the condemnor will lose the right to seek condemnation under its enabling act.

If a resolution is conclusive evidence of necessity and proper location, the property owner cannot make these questions justiciable by allegations in the answer of fraud, bad faith, or abuse of discretion. *State v. Chevalier* (1959) 52 C.2d 299, 305–06, 340 P.2d 598, 601–02; see C.C.P. §1837; §8.42.

These enabling statutes are in obvious conflict with C.C.P. §1978 providing that "no evidence is by law made conclusive or unanswerable, unless so declared by this Code." However, the enabling statutes were enacted after the 1872 enactment of §1978, so that the general provision of §1978 undoubtedly has been superseded by the later, specific enabling statutes.

(5) [§8.45] Under Enabling Acts Incorporating C.C.P. §1241(2)

In the enabling acts of many public agencies, the legislature has granted to their boards the powers and rights with respect to the taking of property for public use as are conferred by general law on the legis-

lative body of a county or a city. Since resolutions of necessity by the legislative body of counties and cities are conclusive evidence of all three aspects of necessity under the proviso to C.C.P. §1241(2), it appears that the resolutions of these public agencies will be conclusive evidence of all three aspects of necessity in the same manner and to the same extent under the proviso to C.C.P. §1241(2). See §8.42. However, since this conclusion is the result of an incorporation of C.C.P. §1241(2) into the enabling acts by a nonspecific reference rather than a direct legislative grant, the question arises whether C.C.P. §1978, providing that "no evidence is by law made conclusive or unanswerable, unless so declared by this Code," prevents this incorporation of §1241(2) into the enabling acts of the following public agencies:

Water Conservation and Flood Control Agencies and Districts, cited to Wat. C. App.):

American River §37–23	Santa Cruz County §77–24
Antelope Valley etc. §98–61(7)	Sierra County §91–3(f)
Lassen-Modoc County §93–3(f)	Siskiyou County §89–3(f)
Mendocino County §54–3(f)	Sonoma County §53–3(f)
Morrison Creek §71–3(f)	Tehama County §82–3(f)
Plumas County §88–3(f)	Yolo County §65–3(f)

County Water Auth. Act	Wat. C. App. §45–5(5)
Harbor Impr. Dist.	Harb. & N. C. §5900.4
Joint Municipal Sewage Disp. Dist.	Health & S. C. §§5740.01, 5740.06
Municipal Util. Dist.	Pub. Util. C. §12703
Port Dist.	Harb. & N. C. §6296
Regional Park Dist.	Pub. Res. C. §5542
Regional Sewage Disp. Dist.	Health & S. C. §§5991, 5998
Vallejo	Wat. C. App. §67–23

Under Str. & H. C. §27166, Bridge and Highway Districts are granted "the same rights, powers and privileges as the State of California" in condemnation proceedings. *Query:* what does this grant include?

(6) [§8.46] Under Enabling Acts Incorporating Code of Civil Procedure

Since the legislature has merely empowered the following public agencies to condemn in accordance with the eminent domain provisions

of the Code of Civil Procedure and C.C.P. §1978 provides that "no evidence is by law made conclusive or unanswerable, unless so declared by this Code," the resolutions of necessity of the following public agencies probably will not be conclusive evidence of necessity and proper location under the proviso to C.C.P. §1241(2). This conclusion is also supported by the fact that the resolutions of many of these public agencies are declared to be prima facie evidence of the necessity for taking the particular interest in the property. §8.53.

Water, Flood Control, and Water Conservation Agencies and Districts, (cited to Wat. C. App.):

- Alameda County §55-5(13)
- Amador County §95-3.4
- Contra Costa County §80-10
- El Dorado County §96-8
- Los Angeles County §28-16
- Mojave §97-14
- Monterey County §52-6
- Nevada County §90-7
- Orange County §36-15
- Santa Barbara County §51-3.4
- Shasta County §83-65
- Solano County §64-3.4
- Yuba-Bear R. Basin §93-8

County Recreation Dist.	Pub. Res. C. §5439
Drainage Dist. Act of 1903	Wat. C. App. §8-16
Drainage Dist. Act of 1919	Wat. C. App. §31-22
Kings R. Conserv. Dist.	Wat. C. App. §59-28(12)
Knights Landing Ridge Drainage Dist.	Wat. C. App. §21-5
Protection Dist. Act of 1907	Wat. C. App. §11-15
Regional Shore Line Dist.	Pub. Res. C. §5748
Resort Dist.	Pub. Res. C. §11265
Sacramento R. Levee Dist.	Wat. C. App. §26-5
S. F. Harbor Comm.	Harb. & N. C. §3135
Storm Water Dist. Act of 1909	Wat. C. App. §13-8
Private Wharves & Piers	Harb. & N. C. §4009
Water Conserv. Act of 1931	Wat. C. App. §39-26
Water Storage & Conserv. Dist.	Wat. C. App. §44-29

D. Pleading

1. Complaint

a. [§8.47] *In General*

Since the necessity for taking particular property and proper location of the proposed public improvement are not constitutional limitations

upon the exercise of the right of eminent domain (§8.3), unless required by statute, allegations of necessity and proper location are not required in the complaint.

Code of Civil Procedure §1244, setting forth the essentials of a complaint in condemnation proceedings, does not specifically require allegations of necessity and proper location.

b. [§8.48] *Necessity*

The provision of C.C.P. §1241 that "before property can be taken, it must appear: . . . 2. That the taking is necessary to such ['authorized by law'] use" must be "construed in conjunction with section 1244, and a statement of necessity is an essential element of the complaint." *Linggi v. Garovotti* (1955) 45 C.2d 20, 27, 286 P.2d 15, 19–20; *accord, Central Pac. Ry. v. Feldman* (1907) 152 C. 303, 308, 92 P. 849, 851; *Rialto Irrigating Dist. v. Brandon* (1894) 103 C. 384, 37 P. 484; *Black Rock etc. Dist. v. Summit etc. Co.* (1943) 56 C.A.2d 513, 517, 133 P.2d 58, 61. "However, a general allegation of necessity is sufficient." *Linggi v. Garovotti, supra; accord, Rialto Irrigating Dist. v. Brandon, supra; Northern Light etc. Co. v. Stacher* (1910) 13 C.A. 404, 408, 109 P. 896, 903.

c. [§8.49] *Proper Location*

Because the proper location requirements of C.C.P. §1242 and §1240(6) are not construed in conjunction with §1244, the condemnor is not required to plead proper location of the proposed public improvement. *San Francisco & S.J.V. Ry. v. Leviston* (1901) 134 C. 412, 66 P. 473; *Los Altos School Dist. v. Watson* (1955) 133 C.A.2d 447, 449, 284 P.2d 513, 515–16; *Montebello etc. School Dist. v. Keay* (1942) 55 C.A.2d 839, 841, 131 P.2d 384, 386.

d. [§8.50] *Resolutions*

While as a general rule passage of a resolution authorizing condemnation need not be alleged in the complaint (*Kern Co. High School Dist. v. McDonald* (1919) 180 C. 7, 10, 179 P. 180, 182), it is good practice to do so and probably mandatory where the statute requires adoption as a condition precedent to condemnation proceedings. See §8.44. The resolution should contain appropriate findings and determinations as to necessity and proper location, and a certified copy should be appended to the complaint as an exhibit to satisfy the statement of necessity required under *Linggi v. Garovotti* (1955) 45 C.2d 20, 286 P.2d 15. See RIGHT OF WAY MANUAL 333–34 (3d ed. 1959); RIGHT OF WAY FORM BOOK, Forms RW-23, RW-23A (3d ed. 1959); §2.1.

The failure of the condemnor to allege the passage of a valid resolution or any resolution on location is immaterial. *Los Altos School Dist. v. Watson* (1955) 133 C.A.2d 447, 284 P.2d 513.

From the point of view of the condemnor, there is some advantage to be gained in pleading necessity and proper location if it has adopted a resolution so finding, and the resolution by statute is made conclusive evidence. By pleading the resolution the condemnor effectively limits the possible issues to public use and just compensation. *Cf. County of San Mateo v. Bartole* (1960) 184 C.A.2d _____, _____ C.R. _____. Even if the condemnor's resolution is not conclusive evidence of necessity and proper location, there nevertheless may be an advantage in adopting a resolution to this effect and appending a certified copy of the resolution to the complaint, because it would have like effect as the original (C.C.P. §§1893, 1918(5)), and would thus constitute "prima facie evidence of the facts stated therein" (C.C.P. §1920).

2. Answer

a. [§8.51] *Necessity*

The property owner's general or special denial is probably sufficient to controvert the condemnor's general allegations of necessity. See *Montebello etc. School Dist. v. Keay* (1942) 55 C.A.2d 839, 842, 131 P. 384, 386; C.C.P. §437.

b. [§8.52] *Proper Location*

If the condemnor's resolution is not conclusive evidence of proper location, the property owner should consider raising this issue. If the condemnor's resolution would be conclusive evidence of proper location, it would be a waste of time to attempt to raise the issue in the answer, unless there is reason to believe no resolution or a defective resolution was adopted. *State v. Chevalier* (1959) 52 C.2d 299, 340 P.2d 593.

If the property owner wants to raise the issue of proper location, he must plead the issue as an affirmative defense in his answer. *Los Altos School Dist. v. Watson* (1955) 133 C.A.2d 447, 284 P.2d 513; *Montebello etc. School Dist. v. Keay* (1942) 55 C.A.2d 839, 131 P.2d 384; see *City of Pasadena v. Stimson* (1891) 91 C. 238, 255, 27 P. 604, 608.

Allegations that the condemnor has or can obtain less advantageous land or rights of way, which would cause less private injury, obviously do not raise an issue of proper location. *Eel R. & Eureka R.R. v. Field* (1885) 67 C. 429, 7 P. 814; *Montebello etc. School Dist v. Keay, supra.*

Nor does an allegation that another route would be equally good and convenient for the condemnor and the property owner raise an issue of proper location. *California Cent. Ry. v. Hooper* (1888) 76 C. 404, 412–13, 18 P. 599, 603.

Therefore, it appears that the property owner can only raise the issue of proper location by setting forth facts indicating that other equally good or more advantageous land or rights of way are available, which would cause less private injury.

E. Proof

1. Presumptions

a. [§8.53] *Prima Facie*

The location of a proposed public improvement "should, in the absence of evidence to the contrary, be presumed correct and lawful . . . . [F]or certainly it must be presumed that the state or its agent has made the best choice for the public . . . ." *City of Pasadena v. Stimson* (1891) 91 C. 238, 255, 27 P. 604, 608; *Los Altos School Dist. v. Watson* (1955) 133 C.A.2d 447, 449, 284 P.2d 513, 515–16.

In addition to this judicial prima facie presumption of proper location, the legislature has declared that the resolutions finding necessity and proper location by the Adjutant General for armory purposes and the State Park Commission are prima facie evidence of necessity and proper location. Mil. & V. C. §438; Pub. Res. C. §§5006, 5006.1. Under the Sacramento County Water Agency Act, resolutions of the agency are prima facie evidence of necessity. Wat. C. App. §66-3.4.

Resolutions on the estate to be taken by the following special water, flood control, and water conservation agencies and districts are prima facie evidence of the necessity for taking the particular interest in the property (cited to Wat. C. App.):

Alameda County §55-5(13)
Amador County §95-3.4
Contra Costa County §63-5(13)
Contra Costa County §69-7
Contra Costa County §80-10
Del Norte County §72-7
El Dorado County §96-8
Humboldt County §47-7
Lake County §62-5(12)
Los Angeles County §28-16¾
Marin County §68-5
Mariposa County §85-3.4
Mojave County §97-14
Napa County §61-6
Placer County §81-3.4
Riverside County §48-9(9)
Sacramento County §66-3.4
San Benito County §70-8
San Joaquin County §79-5
San Luis Obispo County §49-6

San Mateo County §87-3(8)	Solano County §64-3.4
Santa Barbara County §51-3.4	Sutter County §86-3.4
Santa Barbara County §74-5(12)	Ventura County §46-7(8)
Santa Clara County §60-6	Yuba-Bear R. Basin §93-8
Shasta County §83-67	Yuba County §84-3.4

b. [§8.54] *Conclusive*

The legislature has declared that the resolutions on the necessity for taking particular property or a particular interest and proper location of many public bodies are conclusive evidence on these questions. See §§8.41-8.46. After adoption of a conclusive evidence resolution, these questions cannot be raised by answer in the condemnation proceedings. *State v. Chevalier* (1959) 52 C.2d 299, 340 P.2d 598; C.C.P. §1837; see §8.42.

2. Burden

a. [§8.55] *Necessity*

The burden of proof, as the burden of pleading, falls on the condemnor to prove the necessity of taking the particular property or particular interest. *Central Pac. Ry. v. Feldman* (1907) 152 C. 303, 311, 92 P. 849, 852; *Montebello etc. School Dist. v. Keay* (1942) 55 C.A.2d 839, 131 P.2d 384; *Northern Light etc. Co. v. Stacher* (1910) 13 C.A. 404, 408, 109 P. 896, 903.

A statutory prima facie presumption of necessity shifts the burden of going forward to the property owner. Witkin, CALIFORNIA EVIDENCE §§53-55 (1958); see C.C.P. §1833; §8.53.

b. [§8.56] *Proper Location*

The burden of proof, as the burden of pleading, falls on the property owner to prove improper location. *City of Pasadena v. Stimson* (1891) 91 C. 238, 255, 27 P. 604, 608; *Los Altos School Dist. v. Watson* (1955) 133 C.A.2d 447, 449, 284 P.2d 513, 516.

3. Quantum

a. [§8.57] *Necessity*

The condemnor is required to prove necessity by a preponderance of the evidence. *Linggi v. Garovotti* (1955) 45 C.2d 20, 27, 286 P.2d 15, 20 (dictum); see *Spring Valley W. W. v. Drinkhouse* (1891) 92 C. 528, 532, 28 P. 681, 682.

A private condemnor, acting under C.C. §1001, is required to make a "somewhat stronger showing of those requirements . . . than if the

condemnor were a public or quasi public entity." *Linggi v. Garovotti, supra.*

If the condemnor's resolution is prima facie evidence of necessity, in order to sustain his burden of going forward and to contradict and overcome the presumption, the property owner would have to produce sufficient evidence that the particular property or particular interest was not necessary to the proposed public improvement to meet the prima facie evidence. See Witkin, CALIFORNIA EVIDENCE §§53–55 (1958); C.C.P. §1833.

b. [§8.58] *Proper Location*

In order to sustain his burden of proof and contradict and overcome the prima facie presumption of proper location (§8.53), the property owner must produce clear and convincing evidence that the selected location is incompatible with the greatest public good and least private injury, rather than a mere preponderance of evidence. *City of Pasadena v. Stimson* (1891) 91 C. 238, 256, 27 P. 604, 608; *Housing Authority v. Forbes* (1942) 51 C.A.2d 1, 9, 124 P.2d 194, 198–99; see C.C.P. §1833.