

6/11/70

Memorandum 70-68

Subject: Study 36.40 - Condemnation (The Right to Take--Excess Condemnation)

Attached to this memorandum are two copies of a tentative recommendation relating to excess condemnation--physical and financial remnants. The staff has made substantive changes in accordance with the Commission's directions at the June 1970 meeting, as well as minor editorial changes in the preliminary portion of the recommendation.

You will recall that Sections 420 and 422 of the Comprehensive Statute were tentatively approved as submitted. The first sentence of subdivision (b) of Section 421 was revised to require the complaint to specifically refer to Section 421 where property was sought to be acquired pursuant to that section. The last sentence of subdivision (b) was revised to prohibit at the valuation trial reference to the fact that the public entity had previously (and unsuccessfully) sought to acquire the entire parcel under this section. We phrased the prohibition in this fashion because we believe that prohibiting reference "to the resolution, pleadings, or other papers on file in the action" could be both too narrow and too broad: Too narrow because a condemnee could still refer to the actions of the condemnor without specifically referring to a document evidencing such action; too broad because "papers on file" could include affidavits of valuation experts that should be permitted to be used for impeachment purposes. The language that we substituted, we believe, captures the essence of what was intended to be provided. Subdivision (e) was revised to amplify what is meant by "economically feasible." The Comment to subdivision (e) was also expanded in this regard, and the staff believes that the Comment alone would suffice to cover the problem.

We have sent you two copies of the recommendation so that you may make editorial suggestions on one copy. If you will return this copy to the staff at the next meeting, we will take these suggestions into consideration when we prepare the recommendation for distribution for comment. At the July 1970 meeting, we hope this recommendation can be approved for such distribution and the "Proposed Legislation" can be tentatively approved for inclusion in the Tentative Statute.

Respectfully submitted,

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#36.40

Revised 6/11/70

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION
TENTATIVE RECOMMENDATION
relating to
EXCESS CONDEMNATION--PHYSICAL AND FINANCIAL REMNANTS
PRELIMINARY STAFF DRAFT

CALIFORNIA LAW REVISION COMMISSION
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WARNING: This tentative recommendation has been prepared by the staff of the Law Revision Commission to effectuate the Commission's tentative decision to revise the statutes relating to the acquisition of financial and physical remnants of parcels acquired by eminent domain. The draft has not been considered by the Commission and therefore may not reflect the views of the Commission.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. For the most part, the Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

EXCESS CONDEMNATION--PHYSICAL AND FINANCIAL REMNANTS

BACKGROUND

In the broadest sense, "excess condemnation" includes any taking of property that is not to be actually devoted to the particular public work or improvement for which property is being acquired. In the more narrow sense usually intended by courts and legal writers, the term refers only to the taking of property which the condemnor intends, at the time of the taking, eventually to sell or otherwise dispose of to private persons. Excess takings of this latter type are generally recognized to fall within one of three categories, depending upon the situation of the land and the purpose of the condemnor: (1) "protective" condemnation, (2) "remnant" condemnation, and (3) "recoupment" condemnation. In protective condemnation, the condemnor acts to protect the utility, safety, or beauty of a public improvement by taking adjacent land, sometimes for resale to private persons on condition that future owners refrain from deleterious uses of the property. In remnant condemnation, the condemnor needs only a portion of a parcel for the improvement, but takes the entire parcel to avoid leaving a useless remainder or the payment of excessive severance damages. In recoupment condemnation, the condemnor takes land it considers to be "benefited" by the proposed improvement in an effort to recoup the value of such benefits through resale to private persons.

This recommendation relates only to the second of these categories: "remnant" or "remnant-elimination" condemnation. It does not deal with

"protective" condemnation as authorized in California by Section 14-1/2 of Article I of the Constitution* and various statutory provisions. Neither does it consider the theory or practice of "recoupment" condemnation--an activity generally denounced as unconstitutional for lack of the requisite public use, benefit, or purpose.

The land actually needed for a public improvement often consists of only a portion of various individual parcels. This is most often the case where the location and physical extent of the project are determined by engineering and functional considerations. For example, condemnation of only the portions actually required for the construction of a new street or highway often would leave a string of relatively small, odd-shaped strips and wedges in private ownership. These "physical" remnants would be virtually useless in private hands; but, if the entire parcels were condemned, the condemnor could often consolidate the remnants and return them to private ownership in usable condition. Occasionally, remnants of appreciable size would be rendered economically useless if only the portion of the parcel needed for the public improvement were acquired. This situation arises, for example, where a large portion of a parcel is landlocked or waterlocked by a highway or water project. Condemnation of these "financial" remnants permits the condemnor to avoid having to pay severance damages substantially equal to market value and, at the same time, acquiring substantially less than the entire parcel. Nonetheless, providing the proper scope and a means of implementing an appropriate authority to condemn such physical or financial remnants has not proven to be an easy matter for either courts

* The Constitution Revision Commission has recommended the repeal of Section 14 1/2 as unnecessary.

or legislatures.¹

Generally speaking, California's condemnors with any substantial need therefor have been granted specific statutory authority to engage in remnant condemnation.² These statutes vary from agency to agency, often with little or no apparent reason for the difference.³ All, however, clearly authorize takings of physical remnants and takings of this sort rarely cause the courts much difficulty.⁴

Moreover, the California Supreme Court has recently held that statutory authority for remnant condemnation may include authority to condemn "financial" remnants. In People v. Superior Court, commonly known as the

1. The material presented here only highlights the most critical aspects of the relevant background. For a more complete presentation of this background, the reader is referred to the background study prepared for the Commission. See Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 So. Cal. L. Rev. 421 (1969). See also Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L. J. 571 (1969).

2. E.g., Code Civ. Proc. § 1266 (city and county highway authorities); Sts. & Hwys. Code § 104.1 (Department of Public Works); Water Code § 254 (Department of Water Resources), § 43533 (water districts).

3. For example, the remnant-condemnation authority of the following adjoining flood control and water districts varies with no apparent justification. Compare San Diego County (Water Code App. § 105-6(12)) and Orange County (Water Code App. § 36-16.1); Alameda County (Water Code App. 55-28.1) and Santa Clara County (Water Code App. § 60-6.1).

4. E.g., Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1952).

Rodoni case,⁵ The California Supreme Court upheld a remnant taking for the single purpose of "avoid[ing] a substantial risk of excessive severance or consequential damages." The Department of Public Works condemned 0.65 acres of a parcel which exceeded 54 acres in size for the construction of a freeway through farmland in Madera County. In doing so, however, the Department had to cut across the only access road to the parcel, rendering it landlocked and presumably of little economic value. Fearing that it would have to pay severance damages for the remainder equal to its original market value, the Department sought to condemn the 54-acre remainder under Section 104.1 of the Streets and Highways Code. That section authorizes the taking of an entire parcel in the course of state highway construction whenever "the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage"

6

According to the majority opinion:

Although a parcel of 54 landlocked acres is not a physical remnant, it is a financial remnant: its value as a landlocked parcel is such that severance damages might equal its value There is no reason to restrict . . . [remnant takings to] parcels negligible in size and to refuse to apply it to parcels negligible in value.

In the present case the entire parcel can probably be condemned for little more than the cost of taking the part needed for the highway and paying damages for the remainder. It is sound economy for the state to take the entire parcel to minimize ultimate costs.

Under these circumstances excess condemnation is constitutional.

5. Roy and Thelma Rodoni were owners of the parcels in question, and the initial stages of the litigation were conducted under their names. See *People v. Rodoni*, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). When the Rodonis' contentions were upheld by the trial court, the condemnor petitioned for a writ of mandate ordering that court to proceed with the trial of the original complaint or in the alternative for a writ of prohibition forbidding the court from proceeding in accordance with its original order. *People v. Superior Court*, 68 Cal.2d 206, 210, 436 P.2d 342, 345, 65 Cal. Rptr. 342, 345 (1968).

6. *Id.* at 212-213, 436 P.2d at 346-347, 65 Cal. Rptr. at 346-347.

The Rodoni decision necessitates substantial revision of California
remnant-condemnation statutes. According to the court:

[These statutes] may reasonably be interpreted to authorize only those excess condemnations that are for valid public uses; namely, condemnation of remnants [citations omitted] or condemnations that avoid a substantial risk of excessive severance or consequential damages.

Certain provisions of the statutes referred to appear clearly to violate the Rodoni constitutional standards, as where authority to take depends only on a mere assertion of severance damage claims or a mere showing of damage to the remainder. Other provisions appear to fail within the Rodoni criteria, as where the condemnor may take only remainders that are of little or no value to the owner or are in such damaged condition as to require payment of compensation equal to the value of the entire parcel, but may fall short of the full scope of remnant-condemnation powers now recognized by the California Supreme Court. In any case, all of these provisions are in need of revision to achieve uniformity and to eliminate purposeless differences among the powers of various condemnors.

7. Id. at 212, 436 P.2d at 346, 65 Cal. Rptr. at 346.

8. Sts. & Hwys. Code § 104.1 (Department of Public Works), § 943.1 (county highway authorities); Water Code § 254 (Department of Water Resources), § 8590.1 (Reclamation Board), § 11575.2 (Department of Water Resources), § 43533 (water districts).

9. Water Code App. § 28-16 5/8 (Los Angeles County Flood Control District), § 36-16.1 (Orange County Flood Control District), § 48-9.2 (Riverside County Flood Control and Water Conservation District), § 49-6.1 (San Luis Obispo County Flood Control and Water Conservation District), § 51-3.4 (Santa Barbara County Water Agency), § 60-6.1 (Santa Clara County Flood Control and Water Conservation District), § 74-5(12.1) (Santa Barbara County Flood Control and Water Conservation District); see also Water Code App. § 28-16 3/4 (Los Angeles County Flood Control District).

10. Sts. & Hwys. Code § 104.1 (Department of Public Works), § 943.1 (county highway authorities); Water Code § 254 (Department of Water Resources), § 8590.1 (Reclamation Board), § 11575.2 (Department of Water Resources), § 43533 (water districts).

11. Code Civ. Proc. § 1266 (city and county highway authorities); Water Code App. § 105-6(12) (San Diego County Flood Control District).

In the Rodoni decision, the Court explicitly recognized the two problems that have most often been thought to inhere in a broad authority to engage in remnant-elimination condemnation: (1) the possibility that the power will be used coercively by the condemnor in all partial taking cases and (2) the sub rosa opportunity afforded condemning agencies to engage in "recoupment" condemnation. With respect to the first matter, the court concluded:

We also hold, however, that it [the trial court] must refuse to condemn the property if it finds that the taking is not justified to avoid excessive severance or consequential damages. The latter holding will assure that any excess taking will be for a public use and preclude the department from using the power of excess condemnation as a weapon to secure favorable settlements.

The Court dismissed the question of "recoupment" as follows:

Nor does section 104.1 authorize excess condemnation for recoupment purposes, as the term is used in those cases that disfavor it. The statute does not authorize the state to condemn for the sole purpose of taking lands enhanced by the improvement in order to recoup that increase in value or for the sole purpose of developing the area adjacent to the improvement for a profit. [Citation omitted.] The department's purpose is to avoid the windfall to the condemnee and the substantial loss to the state that results when severance damages to a severed parcel are equal to its value.

RECOMMENDATION

The authority to acquire physical or financial remnants can be of substantial benefit both to public entities and their taxpaying citizens and to the owners of such property. The Commission concludes, therefore, that public entities should be given such authority but that a procedure should be provided to assure that the authority will not be abused.

Accordingly, the Commission recommends:

1. Uniform statutory provisions, covering all public entities, should be enacted to replace the numerous and diverse statutes that now provide specific authority to engage in remnant condemnation. Both the number and diversity of these statutes lack any justification. There appears to be no need to include nongovernmental condemnors (essentially public utilities), however, since most of their takings are of less than fee interests.

2. Public entities should be given express statutory authority to acquire both physical and financial remnants by voluntary transactions, to dispose of the remnants, and to credit the proceeds therefrom to the fund available for the acquisition of property being acquired for the public project. Inasmuch as this authority would only permit voluntary acquisitions, it could hardly be detrimental to either side. On the contrary, it could substantially benefit both the public entity and the property owner. The process of appraising, negotiating, and--if necessary--litigating the elements of severance damage in a partial taking case often proves considerably more difficult and costly than determining and paying the fair market value of the entire parcel. Authority to acquire the entire parcel permits both sides to avoid this expense. In addition, this authority will be of assistance in cases where the property owner otherwise would be left with property for

which he has no use and would himself have to bear the cost of disposition of the property.

3. A public entity should be authorized to condemn the remainder, or a portion of the remainder, of a larger parcel of property if it is a true physical remnant or if the taking poses a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the value of the entire parcel. The Rodoni decision held that "condemnations that avoid a substantial risk of excessive severance or consequential damages may constitutionally be authorized." However, it is difficult to determine what the court meant to include within the term "excessive severance or consequential damage." The Court seemed to make clear that total parcel takings are not justified merely (1) to avoid the cost and inconvenience of litigating damages; (2) to preclude the payment of damages, including damages substantial in amount, in appropriate cases; (3) to coerce the condemnee to accept a lesser value for the property actually needed for the project; or (4) to afford to the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property. The statutory test should make it clear that, in general, a usable and generally saleable piece of property is neither a physical nor financial remnant even though its "highest and best use" has been downgraded by its severance or a controversy exists as to its best use or value after severance. However, if it is totally landlocked, reduced beneath minimum zoning size, rendered unusable for any of its plausible applications, or made to be of significant value to only one or a few persons (e.g., adjoining landowners), it should be considered a "remnant" irrespective of its size.

4. The resolution, ordinance, or declaration authorizing the taking of a remainder, or portion of a remainder, should be given the effect of a

presumption affecting the burden of producing evidence (Evidence Code Sections 603, 604). The basic burden of proof to establish the facts that bring the case within the statutory authorization should be left with the condemnor.

5. The condemnee should be permitted to contest the "excess" taking upon the grounds that the condemnor has a reasonable and economically feasible means of avoiding the leaving of a remnant that is either unusable or valueless.¹² If the court should find that such a practicable "physical solution" is available, the remainder, or portion of the remainder, sought to be taken should be deleted from the proceeding.

6. Finally, existing procedures should be clarified by specifying that either party may obtain a judicial determination of the right-to-take issue in excess takings before the valuation trial.

12. For example, condemnees should be permitted to avoid the taking of the entire parcel where the condemnor, through the taking of access easements or the construction of access roads or structures, could economically reduce or eliminate the damage to the remainder. The condemnation of property by a public agency to provide access to a parcel landlocked by its own project would be a valid taking for a public use, and separate proposals have been prepared by the Law Revision Commission to make California's statutory authority for such takings explicit and uniform.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following legislation:*

* The Commission is presently engaged in the task of preparing a comprehensive statute relating to eminent domain. For convenience, the legislation proposed here is numbered with reference to that statute. It should also be noted that the repealed sections do not include the many uncodified sections dealing with special districts. The latter sections will be dealt with at a future time.

Division 4. The Right to Take

Chapter 7. Excess Condemnation

§ 420. Voluntary acquisition of physical or financial remnants

420. Whenever a part of a larger parcel of property is to be acquired by a public entity for public use and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little value to its owner or to give rise to a claim for severance or other damages, the public entity may acquire the remainder, or portion of the remainder, by any means expressly consented to by the owner.

Comment. Section 420 provides a broad authorization for public entities to acquire physical or "financial" remnants of property by voluntary transactions, including condemnation proceedings initiated with the consent of the owner. Compare Section 421 and the Comment to that section relating to the condemnation of remnants. The language of this section is similar to that contained in former Sections 104.1 and 943.1 of the Streets and Highways Code and Sections 254, 8590.1, 11575.2, and 43533 of the Water Code [all to be repealed]. Inasmuch as

exercise of the authority conferred by this section depends upon the consent and concurrence of the property owner, the language of the section is broadly drawn to authorize acquisition whenever the remnant would have little value to its owner (rather than little market value or value to another owner) or would give rise to a "claim" for "damages" (rather than raise a "substantial risk" that the entity will be required to pay an amount substantially equivalent to the amount that would be required to be paid for the entire parcel). Compare Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). This section does not specify the procedure to be followed by the entity in disposing of the property so acquired. That matter is provided for by Section 422. See Section 422 and Comment thereto.

The Right to Take

§ 421. Condemnation of physical or financial remnants

421. (a) Whenever a part of a larger parcel of property is to be taken by a public entity through condemnation proceedings and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little market value or to give rise to a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the entire parcel, the entity may take such remainder, or portion of the remainder, in accordance with this section.

(b) The resolution, ordinance, or declaration authorizing the taking of a remainder, or a portion of a remainder, under this section and the complaint filed pursuant to such authority shall specifically refer to this section. It shall be presumed from the adoption of the resolution, ordinance, or declaration that the taking of the remainder, or portion of the remainder, is justified under this section. This presumption is a presumption affecting the burden of producing evidence. Upon trial of the issue of compensation no reference shall be made to the fact that the public entity previously sought to invoke this section to acquire the remainder, or portion of the remainder.

(c) If the condemnee desires to contest the taking under this section, he shall specifically raise the issue in his answer. Upon motion of either the condemnor or the condemnee, made not later than 20 days prior to the day set for trial of the issue of compensation, the court shall determine whether the remainder, or portion of the remainder, may be taken under this section. If the condemnee does not specifically raise the issue in his answer, or if a motion to have this issue heard is not timely made, the right to contest the taking under this section shall be deemed waived.

(d) The determination whether the remainder, or portion of the remainder, may be taken under this section, shall be made before trial of the issue of compensation. If the court's determination is in favor of the condemnee, the remainder, or portion of the remainder, shall be deleted from the proceeding.

(e) The court shall not permit a taking under this section if the condemnee proves that the public entity has a reasonable, practicable, and economically feasible means of avoiding or substantially reducing the damages that might cause the taking of the remainder, or portion of the remainder, to be justified under subdivision (a). To be "economically feasible," the cost of the means proposed plus any additional compensation must not exceed an amount substantially equivalent to the amount that would be required to be paid for the entire parcel.

(f) Nothing in this section affects (1) the privilege of the entity to abandon the proceeding or abandon the proceeding as to particular property, or (2) the consequence of any such abandonment.

Comment. Section 421 provides a uniform standard and a uniform procedure for determining whether property may be taken to eliminate physical and financial "remnants." With respect to physical remnants, see Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1915). As to the concept of "financial remnants," see Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); People v. Jarvis, 274 Adv. Cal. App. 243, Cal. Rptr. (1969); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). See generally 2 Nichols, Eminent Domain § 7.5122 (3d ed. 1963); Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571 (1969); Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 So. Cal. L. Rev. 421 (1969). This section supersedes Section 1266 of the Code of Civil Procedure, Section 104.1 and 943.1 of the Streets and Highways Code,

Sections 254, 8590.1, 11575.2, and 43533 of the Water Code, and various sections of special district laws.

Subdivision (a). It should be noted preliminarily that the terms "larger parcel" and "entire parcel" are not synonymous. "Larger parcel" refers to the original, contiguous, unified parcel held by the condemnee. See Code of Civil Procedure Section 1248(2); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967). "Entire parcel" refers to the entire parcel sought to be acquired by the condemnor; this includes the part taken for the improvement itself and the remainder, or portion of the remainder sought to be acquired under this section. The term "portion of the remainder" is used in various subdivisions of this section to allow for the case in which a taking affecting a parcel leaves more than one remnant (e.g., the complete severance of a ranch by a highway). In certain cases, the taking of only one remnant (i.e., "a portion of the remainder") might be justified. The term does not mean or refer to artificially contrived "zones" of damage or benefit sometimes used in appraisers' analyses.

Subdivision (a) undertakes to provide a common sense rule to be applied by the court in determining whether physical remnants (those of "little market value") or financial remnants (those raising a "substantial risk" that assessed damages will be "substantially equivalent" to value) may be taken. The test is essentially that stated as a matter of constitutional law in Dep't of Public Works v. Superior Court, *supra*, except that the confusing concept of "excessive" damages is not used and "sound economy" alone, or an estimate as to "sound economy" on the part of the condemnor, is not made a basis for total-parcel takings. As the Supreme Court made clear in that decision, such takings are not justified (1) to avoid the cost and inconvenience of litigating damages; (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases; (3) to coerce the condemnee to accept whatever value the condemnor offers for the property actually needed for the project; or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public work or improvement. In general, a usable and generally salable piece of property is neither a physical nor financial remnant even though its "highest and best use" has been downgraded by its severance or a serious controversy exists as to its best use or value

after severance. See, e.g., La Mesa v. Tweed & Gambrell Planing Mill, supra; State Highway Commission v. Chapman, 446 P.2d 709 (Mont. 1968). However, if it is totally "landlocked" and no physical solution is practical, or reduced beneath minimum zoning size and there is no reasonable probability of a zoning change, or rendered unusable for any of its plausible applications, or made to be of significant value to only one or a few persons (e.g., adjoining landowners), it is a "remnant" irrespective of its size. See, e.g., Dep't of Public Works v. Superior Court, supra; State v. Buck, 226 A.2d 840 (N.J. 1968). The test provided by subdivision (a) is the objective one of marketability and market value generally of the remainder, rather than "value to its owner" as specified in Section 420 (which authorizes the purchase of remnants) and certain superseded provisions such as former Section 104.1 of the Streets and Highways Code. See State Highway Commission v. Chapman, supra. The term "substantial risk" and the concept of "substantial" equivalence of damages and value are taken directly from Dep't of Public Works v. Superior Court, supra. Obviously, those general terms are only guides to the exercise of judgment on the part of the court. They are intended to serve as such, rather than to indicate with precision the requisite range of probability or the closeness of arithmetical amounts.

Subdivision (b). Although this subdivision requires a specific reference in both the resolution and the complaint to Section 421 as the statutory basis for the proposed taking, it does not require either the recitation or the pleading of the facts that may bring the case within the purview of the section. See People v. Jarvis, supra. The resolution (or ordinance or declaration) is given the effect of raising a presumption that the taking is justified under this section. Thus, in the absence of a contest of that issue, the subdivision permits a finding and judgment that the remainder be taken. However, the presumption is specified to be one affecting the burden of producing evidence (see Evidence Code Sections 603, 604), rather than one affecting the burden of proof (see Evidence Code Sections 605, 606). Accordingly, the burden of proving the facts that bring the case within the section is left with the plaintiff (i.e., the condemnor). See People v. Van Garden, 226 Cal. App.2d 634, 38 Cal. Rptr. 265 (1964); People v. O'Connell Bros., 204 Cal. App. 34, 21 Cal. Rptr. 890 (1962). In this respect, the subdivision eliminates any greater effect that might be attributed to the resolution (compare People v. Chevalier, 52 Cal.2d 299, 340 P.2d 603 (1959)) or that might be drawn from a legislative (see Los Angeles County v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964)) or administrative (see San Mateo County v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)) determination or declaration as to "public use."

The subdivision forbids reference in the valuation trial to the fact that the condemnor sought to take under this section. Whether specific evidence introduced at the preliminary hearing may be used for impeachment or other purposes at the valuation trial should be determined under the usual rules of evidence (see below). However, subdivision (b) makes clear that it is improper to refer to the resolution, pleadings, or other papers on file to show that the condemnor previously sought to invoke this section to take the entire parcel. For a somewhat analogous provision, see Code of Civil Procedure Section 1243.5(e) (amount deposited or withdrawn in immediate possession cases).

Subdivisions (c) and (d). Remnant-elimination condemnation inevitably raises the problem of requiring both condemnor and condemnee to assume one position as to the right-to-take issue and an opposing position in the valuation trial. Thus, to defeat the taking, the property owner logically contends that the remainder is usable and valuable, but to obtain maximum severance damages, his contention is the converse. To sustain the taking, the condemnor emphasizes the severity of the damage to the remainder, but if the right-to-take issue is lost, its position in the partial-taking valuation trial is reversed. Under decisional law, the right-to-take issue as to remnants has been disposed of at various stages. See, e.g., Dep't of Public Works v. Superior Court, supra (mandamus as to preliminary adverse decision by trial court); People v. Nyrin, supra (appeal from condemnation judgment as to post-verdict motion to delete remnant); People v. Jarvis, supra (appeal from condemnation judgment as to belated pre-trial motion to add remnant); La Mesa v. Tweed & Gambrell Planing Mill, supra (appeal from condemnation judgment following a valuation trial apparently based on an alternative of partial or total taking).

To obviate this procedural confusion and jousting, subdivision (c) makes clear that either party is entitled to demand a determination by the trial court of the right-to-take issue before the valuation trial. Moreover, failure to make such demand shall be deemed a waiver of this issue. Subdivisions (c) and (d) make no change in existing law as to the appellate remedies (appeal from final judgment of condemnation, prohibition, mandamus) that may be available as to the trial court's determination. However, these subdivisions do not contemplate that results of the valuation trial as to values, damages, or benefits may be invoked either in post-verdict proceedings in the trial court or on appeal to disparage a determination of the right-to-take issue made before the valuation trial. Such a determination is necessarily based on matters made to appear at the time it is made and it should be judged accordingly.

The preliminary hearing will be concluded and a determination reached prior to the trial of issue of compensation. The extent to which evidence introduced at a preliminary hearing can be introduced at the valuation trial should be determined under the provisions of the Evidence Code.

Subdivision (e). This subdivision permits the condemnee to contest a taking under this section upon the grounds that a "physical solution" could be provided by the condemnor as an alternative to either a total taking or a partial taking that would leave an unusable or unmarketable

remainder. In at least a few cases, the condemnee may be able to demonstrate that, given construction of the public improvement in the manner proposed, the public entity is able to provide substitute access or take other steps that would be feasible under the circumstances of the particular case. If he can do so, subdivision (e) prevents acquisition of the remainder. Clearly, in almost every case, some physical solution would be possible. Subdivision (e), however, requires that the solution also be "reasonable, practicable, and economically feasible." To be "economically feasible," the proposed solution must, at a minimum, reduce the overall cost to the condemnor of the taking. Thus, the cost of the solution plus compensation paid for the part taken plus any remaining damages must never exceed the amount that would be required to be paid if the entire parcel were taken. The court should, moreover, consider questions of maintenance, hardship to third persons, potential dangers, and so on, in determining whether the solution is also "reasonable and practicable."

Subdivision (f). Subdivision (f) makes clear that the procedure provided by this section has no bearing upon the privilege to abandon or the consequences of abandonment. The subdivision makes no change in existing law. See Section 1255a and People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).

The Right to Take

§ 422. Disposal of acquired physical or financial remnants

§ 422. Subject to any applicable limitations imposed by law, a public entity may sell, lease, exchange, or otherwise dispose of property taken under Section 420 or Section 421 and may credit the proceeds to the fund or funds available for acquisition of the property being acquired for the public work or improvement.

Comment. Section 422 authorizes the entity to dispose of property acquired under Sections 420 and 421. However, it does not specify or provide the procedure to be followed. Accordingly, such procedure is left to be governed by statutory provisions applicable to the particular entity or agency.

Sec. . Section 1266 of the Code of Civil Procedure is repealed.

~~1266.--Whenever land is to be condemned by a county or city for the establishment of any street or highway, including express highways and freeways, and the taking of a part of a parcel of land by such condemning authority would leave the remainder thereof in such size or shape or condition as to require such condemnor to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the governing body of the city or county may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that such condemning authority acquire the whole of such parcel.~~

Comment. Section 1266 is superseded by Section 421 of the Comprehensive Statute.

CODE OF CIVIL PROCEDURE § 1266.1

Sec. . Section 1266.1 of the Code of Civil Procedure is repealed.

~~1266.1.--A-county-or-a-city-may-acquire-land-by-gift-or-purchase
from-the-owner-thereof-for-any-of-the-purposes-enumerated-in-Section
1266-of-this-code.~~

Comment. Section 1266.1 is superseded by Section 420 of the Comprehensive Statute.

Sec. . Section 104.1 of the Streets and Highways Code is repealed.

~~104.1. --Wherever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes.~~

Comment. Section 104.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

Sec. . Section 943.1 of the Streets and Highways Code is repealed.

~~943.1.--Whenever a part of a parcel of land is to be taken for county-highway purposes and the remainder of such parcel is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damages, the county may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for county-highway purposes.~~

Comment. Section 943.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

Sec. . Section 254 of the Water Code is repealed.

~~254.--Whenever-a-part-of-a-parcel-of-land-is-to-be-taken-for
state-dam-or-water-purposes-and-the-remainder-is-to-be-left-in-such
shape-or-condition-as-to-be-of-little-value-to-its-owner,-or-to
give-rise-to-claims-or-litigation-concerning-severance-or-other
damage,-the-department-may-acquire-the-whole-parcel-and-may-sell
the-remainder-or-may-exchange-the-same-for-other-property-needed
for-state-dam-or-water-purposes.~~

Comment. Section 254 is superseded by Sections 420 through 422 of
the Comprehensive Statute.

Sec. . Section 8590.1 of the Water Code is repealed.

~~8590.1.--Wherever a part of a parcel of land is to be taken for purposes as set forth in Section 8590 of this code and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the board may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for purposes as set forth in Section 8590 of this code.~~

Comment. Section 8590.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

Sec. . Section 11575.2 of the Water Code is repealed.

~~11575.2---Whenever-a-part-of-a-parcel-of-land-is-to-be-taken
for-state-water-development-purposes-and-the-remainder-is-to-be
left-in-such-shape-or-condition-as-to-be-of-little-value-to-its
owner,-or-to-give-rise-to-claims-or-litigation-concerning-sever-
ance-or-other-damage,-the-department-may-acquire-the-whole-par-
cel-and-shall-sell-the-remainder-or-shall-exchange-the-same-for
other-property-needed-for-state-water-development-purposes.~~

Comment. Section 11575.2 is superseded by Sections 420 through 422 of
the Comprehensive Statute.