#36.80 6/3/71

Memorandum 71-41

Subject: Study 36.80 - Condemnation (Procedural Problems Generally)

SUMMARY

The first installment of the background study by Mr. Matteoni covers generally procedural matters up to and including the answer in an eminent domain action. The major points made in the study are capsulized below. Nevertheless, you should read the study prior to the meeting so you will be prepared to make basic policy decisions. The points are discussed in this memorandum in a different order than in the study, but references are made to pertinent portions of the study.

ANALYSIS

Negotiations or Formal Offer as Prerequisite to Condemnation (pp. 3-12)

The study indicates that it is desirable to encourage condemnors to negotiate for purchase of the property before being able to resort to the power of eminent domain. This sort of requirement has been adopted as a policy by some California condemnors and is a statutory requirement in some other jurisdictions. It should also be noted that Section 301 of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, which applies to federally-aided California takings, contains the following policy guidelines for agency heads:

> (1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.
>
> (2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

> (3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. . . . The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

The substance of these provisions would be incorporated into the California law in two of the relocation assistance bills presently before the Legislature. (A.B. 533, S.B. 633.)

There are two aspects to making an attempt to purchase a prerequisite to an eminent domain proceeding: (1) a good faith attempt to negotiate and (2) a concrete offer to purchase.

Requiring the condemnor to negotiate in good faith, as in subdivision (1) of Section 301 above, is subject to the following criticisms:

(1) Proving failure to "negotiate" will be difficult.

(2) A negotiation requirement offers the condemnee opportunities for dilatory tactics.

(3) "Negotiation" often amounts to little more than informing the landowner of the condemnor's value estimate.

Requiring the condemnor to make a "concrete offer," as in subdivision (3) of Section 301 above, is not subject to the criticisms leveled at a negotiation requirement. Having the condemnor offer to purchase the property at fair market value as a condition precedent to condemnation is feasible, and the study offers sample provisions so drafted on pages 9-11. In addition, a negotiation requirement could be incorporated as a matter of policy, without making it a jurisdictional prerequisite.

If such a policy is adopted, at least three subsidiary considerations become involved:

(1) Suppose the property owner cannot be located or he does not receive the offer to purchase? Apparently the eminent domain proceeding should still be valid if the offer is properly served.

(2) Will the offer be deemed an admission against interest by the condemnor if the case goes to trial? Presently an offer of compromise is not admissible in California and most other jurisdictions. The policy is to encourage liberal offers by condemnors. It should be noted, however, that the Commission has previously rejected a similar policy with regard to a deposit of probable just condemnation made by the condemnor for immediate possession purposes: the Commission has determined to make the appraisal data upon which the deposit is based available for impeachment and to make the appraiser a competent witness. Cf. Eminent Domain Code Section 1268.10; People v. Cowan, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969).

(3) Should some system be adopted to assure adequate offers--condemnee to get fees and expenses of trial if the award substantially exceeds the offer? This possibility has been discussed in depth in connection with the study Professor Ayer prepared for the Commission.

It should be noted that, if an offer to purchase as a jurisdictional prerequisite is adopted, the mechanisms for appraisal and informing the property owner are already present in the Commission's proposed immediate possession scheme. See Eminent Domain Code Sections 1268.01 and 1268.02. This scheme could be generalized and made applicable to all takings.

Contents of Resolution of Necessity (pp. 15-18)

The study points out that there are two laws demanding consideration of environmental issues in planning public projects and queries whether the contents of the resolution of necessity should be altered to reflect these laws. The two laws cited are California Land Conservation Act of 1965 (Williamson Act) and Environmental Quality Act of 1970. The Williamson Act requires that land in an agricultural preserve be saved if other appropriate land is available for a public project. This requirement is not enforceable by a condemnee unless the particular condemnor is one whose resolution of necessity is not made conclusive by statute. Government Code Section 51294. The Environmental Quality Act of 1970 makes it state policy for all public entities to consider environmental factors in planning projects. No enforcement mechanisms are provided.

Examples of laws requiring public planners to give consideration to other than economic and engineering factors could be multiplied as has previously been indicated to the Commission. See Memorandum 71-20 (fraud exception to the resolution of necessity--considered at the April 1971 meeting). The policy question is whether these broader considerations should be incorporated into the resolution of necessity. The staff believes such an incorporation would be ill-advised: (1) the requirements are too numerous and constantly changing--the general requirements of public interest and necessity are sufficiently broad to encompass them; (2) to place the broader considerations in the resolution of necessity is to make them automatically nonjusticiable for the most part, which may well not have been the Legislature's intent, with the possible exception of the Williamson Act; and (3) since most environmental laws require broad

considerations in planning generally, they should be enforceable in the same way regardless whether the planning involves condemnation of land.

Delay or Abandonment Before Condemnation (pp. 12-15)

The study points out that, in California, the adoption of a resolution of necessity does not amount to a "taking" of the property. Consequently, a resolution may be adopted which effectively precludes development and beneficial utilization of property and may cause a marked decline in value, long before a suit is filed; indeed, a suit may never be filed. Similar effects may occur even absent a resolution of necessity, if it is known that a public project is imminent.

The study does not explore these problems in depth but offers several possible solutions:

(1) If there is unreasonable delay between filing a map indicating a public project and filing an action to take, the condemnee may be awarded additional damages. (Connecticut) (Is this the problem of the extent to which reduction in the value of the land caused by announcement of the project is to be reflected in the award?)

(2) There could be a time limitation for the filing of an action after adoption of a resolution. (The study indicates that this solution will be both unfair and ineffective; the staff does not necessarily agree.)

(3) Statement in the resolution that condemnor intends to complete project within certain time. (New York; the Commission's scheme already incorporates such a feature--see Eminent Domain Code Section 401 (future use).)

(4) Any resolution of condemnation for which the property is no longer needed should be rescinded.

It is the staff's belief that the problem is more serious than the study appears to indicate. See the letter to the Commission attached as Exhibit I. Further, there has been continuing legislative concern with the problem, and the Legislature has expressly sent the problem to the Commission to resolve. See the news article attached as Exhibit II. There have been law review articles written, and the staff believes that there are solutions available other than those listed in the study. The staff suggests that consideration of this matter be deferred for separate in-depth consideration.

Judicial System for Condemnation (pp. 19-20)

The study assumes that the present judicial system for condemnation will be retained. It may be of interest to note that the New York Eminent Domain Commission is planning to recommend a judicial system for New York to replace the present administrative and quasi-judicial systems now used in New York.

Jury Trial (pp. 21-26)

The study recommends that the Commission leave the constitutionally authorized jury trial intact. The study points out that the institution of the jury trial in eminent domain proceedings has been severely criticized recently:

(1) Jurors are not equipped to handle the complex valuation determinations required.

(2) Jury trials consume an excessive amount of time.

(3) Jury trials raise the expense of condemnation. The study goes on to point out, however, that there are countervailing considerations:

(a) A jury should decide any question involving the expenditure of public funds. (The juror as taxpayer.)

(b) A jury should decide what fair market value really is. (The juror as homeowner or potential homebuyer.)

(c) Alternatives to jury trial are presently available--Public Utilities Commission, referees, arbitrators, judges.

(d) Innovations should be adopted cautiously; experimentation should be encouraged. (No specifics suggested.)

It should be noted that the State Bar Committee on Governmental Liability and Condemnation does not approve the abolition of eminent domain jury trials. The reasons given for this opposition are appended as Exhibit III.

A change in the present rules will require a constitutional amendment. There is presently a proposal for such an amendment before the Legislature. See Exhibit IV. This issue is being given thorough consideration at the current session of the Legislature.

Limitation on Expert Witnesses (pp. 21-26)

The study notes that one of the Los Angeles Superior Court reform suggestions is to provide that expert appraiser testimony in eminent domain cases be limited to two appraisers appointed by the court with provision for appointment of a third appraiser if a divergence exists in the two appraisals greater than ten percent; the costs of the appraisers to be borne by the condemning agency; the right of the property owner to give valuation testimony himself to be unaffected by these provisions.

The reason for this suggestion is that an "enormous expenditure of time" is "devoted to amassing of appraisers employed by the adversary

parties and often fulfilling the role of advocate as well as appraiser." Further, the number of appraisers is directly related to the wealth of the parties, putting property owners generally at a disadvantage against the condemning agency.

The study rejects this suggestion, pointing out that:

(1) It is counsel, rather than an appraiser, who guides the valuation of the property. As a consequence, the attorney will pursue independent investigation and get expert facts and opinion for cross-examination and rebuttal purposes. Thus, the two-appraiser system will not save money.

(2) Nonappraisal experts may still be called, e.g., foundational experts, persons familiar with rezoning possibilities, and the like. Thus, the two-appraiser system will not save court time.

The State Bar Committee on Governmental Liability and Condemnation likewise opposes the appraiser-limitation suggestion:

(1) The suggestion would remove the ability of litigants from presenting evidence in their own behalf and place the selection of witnesses in the judge, who does not have a sufficient expertise in the field of eminent domain.

(2) Due process requires that individual litigants should retain their fundamental right to present witnesses of their choice.

There is presently before the Legislature a bill to effectuate the reform proposal. See Exhibit V. The proposal has already been significantly amended. See Exhibit VI.

Jurisdiction (pp. 27-29)

Code of Civil Procedure Section 1243 provides:

> 1243. All proceedings under this title must be commenced in the superior court of the county in which the property sought to be taken is situated; . . . . All such proceedings must be commenced by filing a complaint and issuing a summons. . . .

The study finds that this jurisdictional provision is adequate but notes that the filing of the complaint, and not the issuance of summons, vests jurisdiction with the superior court. In the interest of clarity, the jurisdictional language should be segregated out of Section 1243, which deals predominantly with venue matters.

Despite the general superior court jurisdiction in eminent domain, it should be noted that, in some cases, the Public Utilities Commission has jurisdiction to determine just compensation. The Constitution Revision Commission recommended that the pertinent provision of the Constitution be revised, but the amendment was not approved by the people. See Exhibit VII. We are preparing a separate study on the relationship of the Public Utilities Commission and judicial eminent domain procedure.

Venue (pp. 29-35)

The study indicates that the present venue provisions, while inartfully drafted and duplicative, are nonetheless basically sound. The study recommends retention of the following scheme:

(1) Action may be commenced only in the county in which the property is located.

(2) If property lies in more than one county, any of the counties is proper.

(3) Subsequent proceedings involving the same property should be brought in the same county.

(4) Venue change should be on same grounds and in same manner as civil actions generally.

(5) In case several parcels are joined in the same action, they must all lie in the same county unless they have common owners.

Jurisdiction of Court to Decide Issues Incident to Proceedings (pp. 36-47)

While condemnation is a special proceeding of limited jurisdiction, the court has implied power to do all things and determine all issues incident to the proceedings. Some of the incidental matters that the court may decide are spelled out in Code of Civil Procedure Sections 1247 and 1247a. These matters include:

(1) Determination and regulation of the manner of enjoying the common use of the same property by different entities.

(2) Determination and regulation of the manner of making connections and crossings of rights of way.

(3) Determination and regulation of the place and manner of removing or relocating structures or improvements.

(4) Determination of the respective rights of different parties seeking to condemn the same property.

(5) Determination of all adverse or conflicting claims to the property sought to be condemned.

(6) Determination of the respective rights of different parties to the condemnation award.

The study recommends consolidating and redrafting these presently confused provisions. See recommended statute on pages 45-47 of the study. The staff wonders whether at least some of the provisions might not be repealed. The court's power to determine all issues incident to a condemnation proceeding is sufficiently broad to encompass at least the determinations of the respective rights of different parties to share in the award, of all adverse or conflicting claims to the property, and of the respective rights of different parties seeking to condemn the same property. Rather than broad statements that the court has

power to decide these issues, the procedures (whether before, after, or during trial) and standards for their determination should be specified by statute. See, e.g., Section 1246.1 (apportionment of award).

The other determinations a court may presently make--common use allocation, connections and crossings, and removal and relocation of structures--are less related to the eminent domain action per se and may profitably be specified as within the court's jurisdiction. Again, perhaps procedures and standards should be specified. A study on common use, connections, and crossings involving a public utility and perhaps the PUC is in preparation.

Rules of Practice (pp. 48-50)

Code of Civil Procedure Section 1256 provides the general rule that, except for special provisions relating to eminent domain, the prevailing rules for California civil practice generally control eminent domain proceedings. The study recommends no change in this provision other than rephrasing. See suggested language at bottom of page 54 of study.

Bifurcation of Preliminary Issues From Issue of Valuation (pp. 51-56)

The study suggests that it may be desirable to allow preliminary questions of fact decided by the judge to be severed from the jury valuation determination. The reasons given are that it may minimize appraisal expense of exploring alternate theories of value and will shorten jury trial time. If such a provision is adopted, the decisions on these issues should be not appealable until the conclusion of the trial to avoid multiplication of appeals.

The study indicates that present practice provisions for severance of issues are inadequate, and eminent domain should have its own special practice rule. This rule would be permissive rather than mandatory. It should be noted that, if the Commission's pleading bill is enacted, there will be adequate

authority for the court to sever issues in an eminent domain proceeding:

Code of Civil Procedure Section 1048:

> (b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, always preserving the right of trial by jury required by the constitution or a statute of this state or of the United States.

Under this statute, will there be sufficient control of the issues severable in an eminent domain proceeding? Compare draft statute on pages 5-56 of the study. Perhaps the more specific statute would be desirable for eminent domain cases.

Commencement of an Eminent Domain Proceeding (p. 57)

Present law provides that a proceeding is commenced by filing a complaint and issuing summons. The study finds the reference to "issuing summons" unnecessary and recommends that eminent domain proceedings be commenced by filing a complaint alone.

Contents of Complaint (pp. 58-76)(Recommended Statutes, pp. 70-72 and 75-76)

A condemnation complaint is required by Code of Civil Procedure Section 1244 to contain five parts:

(1) Name of the plaintiff.

(2) Names of all persons possessing interests in the property or a statement that they are unknown.

(3) A statement of the plaintiff's right to condemn.

(4) A map showing location, route, and termini (only if a right of way is being acquired).

(5) A description of the land or interest sought and whether the take is total or partial.

The study recommends retention of this basic scheme with several modifications.

The study recommends a terminology change: "petition" replacing complaint, "eminent domain" replacing condemnation, "petitioner" replacing condemnor, and "respondent" replacing condemnee. The reasons given are that present terminology implies that fault is somehow involved and petition terminology is appropriate to a special proceeding such as eminent domain.

The study suggests no changes in the requirements that parties be named other than to delete an unnecessary provision specifying that a county board of supervisors may be named when condemning for sewerage on behalf of an unincorporated town (see Memorandum 71-39) and to consolidate provisions specifying what persons must be named as defendants, including decedents and their heirs.

The study recommends a broad expansion of the statement of the plaintiff's right to condemn. Presently the plaintiff need only indicate that it has

the right to condemn under the Code of Civil Procedure and make general allegations of public use and necessity. The study suggests that the property owner instead be provided with some understanding of why his property is being taken. To this end, the complaint should indicate both the public use for which the property is being taken and should contain a synopsis of, or incorporate, the resolution of necessity. (Under the Commission's proposed Section 311, the resolution contains a general description of the proposed projects, authorizing statutes, description of the parcels sought and their relationship to the project, and declarations of the finding of public interest and necessity for the taking.) It should be noted that, if the contents of the resolution are incorporated in the complaint, then the complaint need not set out a description of the property sought, for the resolution already incorporates such a description.

The study further recommends generalizing the provision now applicable only to takings for rights of way: If only a portion of the property is being condemned, a map showing the boundaries of the entire parcel and indicating the part to be taken should be attached to the complaint.

Joining Several Parcels in a Single Complaint (pp. 62-64)

Present law permits a plaintiff to place all parcels of land or other interests sought to be condemned for a single public project within the same proceeding. The study criticizes this rule--it is confusing not only to property owners but also to the court and requires eventual severance in any case by the time of settlement or trial. The burden of filing individual complaints is not great, and the court can usually consolidate actions for trial where to do so will be helpful. Existing law allows consolidation where part of defendant's land was being put to one public use and part was being put to another; this rule should be retained in any statutory revision.

Amending the Complaint (p. 64)

The complaint may be amended as in other civil actions. Where the complaint is amended to reduce the size of the take, however, the study indicates that there may be a partial abandonment, requiring payment of costs and attorney's fees. Some attention will have to be devoted to this problem in order to make abandonment by amendment procedurally consistent with other types of abandonment, direct and implied.

Verification of, and Allegation of Value in, the Complaint (pp. 64-68)

The study considers two suggestions made by the State Bar Committee (Southern Section) to add to existing requirements for the complaint the following features:

(1) The plaintiff should make allegations of value, damage, and benefits in the complaint.

(2) The plaintiff should be required to verify the complaint.

The study notes that the complaints of public entities are already deemed verified by statute and call for verified answers. See Code of Civil Procedure Section 446.

The study also notes that present law is one-sidedly in favor of condemnors, for condemnors need not allege the value of property to be condemned in the complaint whereas condemnees are required to allege the value in their answers. Compare Code of Civil Procedure Section 1244 with Section 1246. It would seem logically that it is the plaintiff who should allege value as well as damage and benefits it may cause. The plaintiff holds an appraisal on the property sought before it commences negotiations and thus will easily be able to fulfill the value-allegation requirement. The consequence of such a requirement, however, may well be that condemnors file complaints alleging the lowest possible value (with the serendipitous result of higher fees to condemnee's attorneys). The study concludes that, rather than have the plaintiff allege value, it may be better to have neither party alleging value.

Summons and Service (pp. 77-81)(see Recommended Statute on p. 80)

Upon filing a complaint, the clerk of court issues a summons. The summons is similar to that issued in other civil actions but tailored to fit the needs of eminent domain. The summons is served as in other civil actions.

The study recommends no changes in this procedure and suggests that the summons be streamlined to contain information necessary to enable the condemnee to respond.

Lis Pendens (pp. 82-83)(see Recommended Statute on pp. 82-83)

When an action is pending that will affect title to real property, a notice of the pendency of the action should be filed with the county recorder for the purpose of warning subsequent purchasers and encumbrancers. The study recommends that failure to file notice should not affect the validity of the proceeding except as to bona fide purchasers. Language to this effect is set out in the study.

Condemnee's Responsive Pleading (pp. 84-88)(see Comprehensive Statute §§ 2400, 2401)

Although the code presently authorizes an answer as the proper responsive pleading to an eminent domain complaint, demurrers are used to attack the right to take, and cross-complaints are available between codefendants and against the condemnor for damages related to the property sought. Persons not named in the complaint, but who nonetheless claim an interest in the property, may intervene and file answers as defendants.

The study recommends continuation of this system with several significant modifications. Rather than by demurrer, challenges to the condemnor's right to take are to be raised by a preliminary objection to the complaint. See Eminent Domain Code, proposed Section 2401. (See discussion of this section on p. 88.) Evidently, this is the practical effect of present demurrer procedures,

for the study indicates that "formalizing" this procedure is desirable. The study also suggests that only certain defendants be allowed to raise preliminary objections.

The study recommends that the response to the condemnation complaint (petition) be designated "notice of appearance," which would signify the defendant's intention to litigate the issue of just compensation. The notice would be analogous to the present answer, but it would delete the requirement of pleading value and damage. The notice should be verified since the defendant will be alleging his interest in the property. See the consultant's discussion of Comprehensive Statute Section 2400 on pp. 86-87.

The study recommends that cross-complaints between defendants be eliminated. Where several named defendants assert conflicting interests in the same property, they are required to serve copies of their responsive pleadings upon each other. Where several unnamed defendants assert conflicting interests in the same property, the plaintiff should serve copies of their responsive pleadings on the named defendants. "The avoidance of numerous cross complaints and pleadings is an advantage."

The study would leave unchanged the rule that a defendant may cross-complain against the plaintiff for damages to his property not part of the eminent domain proceeding. This is consistent with the Commission's pleading recommendation.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

Memo 71-41 EXHIBIT I

WEBBER - JACKSON, INC.
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August 17, 1970

California Law Revision Commission
Condemnation Section
School of Law
Stanford University
Stanford, California 94305

Attention: John H. DeMoully

Gentlemen:

I have received notice of your Commission meeting in San Francisco on September 3-5, 1970; unfortunately, I will be out of the State at that time and cannot attend.

There are a number of studies which you are discussing and which I am most interested. However, for a considerable time I have been most concerned about one area of condemnation law in which I have found, in my practice, what I believe to be the most gross inequity in the field. It would perhaps be most appropriately classified under your studies on "taking" issues.

I have in mind that situation in which a public agency makes a public announcement of a proposed taking and then takes years in which its announcement is implemented by the actual taking. I have had numerous situations come across my desk in which the public announcement serves to lock in the property owner--he can find no buyer for his property from that point on and usually cannot find a tenant of any quality or duration--if any at all. Time and again, I have had property owners suffer severe financial losses because of this "blight" condition of their property.

It has been my suggestion in the past that once a public agency takes it upon itself to make a public announcement of a project area, it should be compelled to immediately undertake the necessary steps for acquisition, including the filing of condemnation suits; if the agency fails to do that, the property owner should have a cause of action on a theory related to the concept that the public announcement was a "taking" and therefore in the nature of an inverse condemnation. The trial court would have the discretion to determine whether there has been a general public announcement, whether the area of taking had been defined and whether the public

agency had moved with sufficient dispatch to acquire.

In my opinion, based on considerable and almost exclusive practice in this field, I believe this area to have induced more hardship and greater inequities than many of the more refined details of procedure with which the Commission has concerned itself. I would urge the Commission to afford some attention to this problem.

Sincerely,

Robert S. Webber

RSW/dt

Memorandum 71-41

EXHIBIT II

COPY FROM PASADENA, CALIFORNIA STAR NEWS MAY 26, 1970

CONDEMNATION BILL KILLED BY ASSEMBLY GROUP

SACRAMENTO (AP)--The Assembly Judiciary Committee has killed legislation which would have forced government agencies to complete the purchase of any land they condemn within 18 months.

Assemblyman Alan Sieroty, D-Beverly Hills, cited examples Monday where buildings had been under condemnation order 20 years and a case in which a family with seven children could neither sell their two-bedroom home nor get a building permit to enlarge it because of a long-standing freeway condemnation notice.

"Probably the worst offender in this area is the division of highways," Sieroty said.

"This is one of those perenniel bills," said Assemblyman John Foran, D-San Francisco, "and it creates serious problems, as many as it solves," he added.

Committee chairman James A. Hayes, R-Long Beach, urged Sieroty to resubmit his proposal as a topic for review by the state's Law Revision Commission.

Memorandum 71-41

EXHIBIT III

RESOLUTION FOR PRESERVATION OF CONSTITUTIONAL RIGHT TO JURY TRIAL

WHEREAS, there is currently a proposal by the Special Judicial Reform Committee of the Superior Court of Los Angeles County and also there is pending in the legislature proposed constitutional and statutory changes abolishing jury trials in civil cases as well as in the fields of eminent domain and motor vehicle cases, the State Bar Committee on Governmental Liability and Condemnation does hereby urge the legislature and the State Bar of California to consider the following facts before abolishing a vital procedural safeguard:

1. Based on statistics compiled by the Los Angeles Superior Court system, the following observations ought to be made:

A. Less than 1 percent of all civil cases filed ultimately go to jury trial.

B. Of the total civil cases tried, less than 20 percent are civil jury trials.

C. Less than 40 percent of all jury trials are civil jury trials.

2. The citizen participation in the judicial system by jury service fosters confidence in the judicial system and therefore our system of government in its entirety.[1]

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[1] Noteworthy is the comment of De Toqueville in "De La Democratie En Amerique":

> "...Now the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.
>
> "In whatever manner the jury be applied, it cannot fail to exercise a powerful influence upon the national character; but this influence is prodigiously increased when it is introduced into civil causes. The jury, and more especially the jury in civil cases, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all cases with a respect for the thing judged, and with the notion of right. If these two elements be removed, the love of independence is reduced to a mere destructive passion. It teaches men to practise equity, every man learns to judge his neighbour as he would himself be judged; and this is especially true of the jury in civil causes, for, while the number of persons who have reason to apprehend a criminal prosecution is small, every one is liable to have a civil action brought against him. The jury teaches everyman not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which political virtue cannot exist. It invests each citizen with a kind of magistracy, it makes them all feel the duties which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society."

3. The principle of separation of powers (checks and balances) makes it inadvisable to give unlimited power to the judiciary in civil cases. The proposed amendment would give the judiciary more power than contemplated by the framers of the Constitution. Mandatory unilateral decision by one individual judge would mean that every factual decision would be affected by the bias, mnemonic and intellectual limitations of one person. Furthermore, such a factual decision could not be appealed. The judge's determination of the factual matter would be final.

4. If jury trials were abolished, judges would be subject to greater pressure by the press, members of the Bar and individual litigants relative to cases over which the judge was presiding. Thus, a valuable insulatory protection of the judiciary would be lost.

5. Litigants have traditionally grown to expect that they will have the right to have a jury of their fellow citizens determine their recovery. This traditional concept of procedural rights will be violated.

6. Juries provide an especially valuable function in providing insulated adjudication in civil conflicts between government and citizens. We tend to forget that many civil lawsuits are between the individual citizen and one or more branches of the government. It is now proposed that a trial of the individual citizen by fellow citizens (jurors) be abolished in favor of a government official (the judge) as fact finder. This will destroy an important insulating quality of the system to the ultimate errosion of public confidence in the system.

7. The jury system has worked well in civil trials. While we have heard much about the abuse of jury selection, practically all of the publicized incidents of protracted jury selection and abuse of the jury selection process have been in criminal cases. There is no comparable abuse in civil cases.

8. The prospect of a jury trial often prompts a case to settle which otherwise would not settle. The elimination of jury trials would eliminate this source of settlement pressure.

9. The elimination of jury trials may well increase civil litigation. Litigants, no longer having to bear the expense of the jury in the event that they lose the case, would have less incentive to settle in cases of doubtful record. A partial nullification of Code of Civil Procedure sections 997 and 998 would result. These sections provide that litigants who fail to obtain a more favorable judgment than the statutory offer of settlement must bear trial costs regardless of the outcome of the case. Unreasonable litigants may tend to ignore reasonable settlement offers, knowing that Code of Civil Procedure sections 997 and 998 would not have a significant monetary effect on their decision.

10. The property owner in the condemnation case is also a taxpayer who pays his taxes and supports the entire system of government, including the judicial system. The elimination of jury trials would deprive the very taxpayer who pays the bills from having the right to have his case tried by the jury. It accordingly deprives the bill-paying taxpayer of an important remedy to which he is otherwise entitled.

NOW, THEREFORE, the State Bar Committee on Governmental

Liability and Condemnation resolves that:

I. Civil juries are a valuable part of government by the people of themselves and should be preserved and fostered.

II. The real problem in the congestion of the courts is with the processing of criminal cases. Massive congestion resulting from criminal cases has already made the civil litigant a second-class citizen. Because of criminal cases, the civil litigant is presently penalized by the delay of bringing his case to trial and obtaining judicial review in appellate courts. The abolition of jury trials in civil cases would serve to further degrade the status of the civil litigant.

III. A copy of this Resolution shall be forwarded to the State Bar of California, whose Board of Governors is hereby respectfully requested to support the civil jury system in any future or pending legislative committee hearings on this subject.

ADOPTED this 1st day of April, 1971.

CHAIRMAN

Memo 71-41 EXHIBIT IV

SENATE CONSTITUTIONAL AMENDMENT No. 36

Introduced by Senator Song

March 18, 1971

REFERRED TO COMMITTEE ON JUDICIARY

Senate Constitutional Amendment No. 36—A resolution to propose to the people of the State of California an amendment to the Constitution of the state, by amending Section 14 of Article I thereof, relating to eminent domain.

LEGISLATIVE COUNSEL'S DIGEST

SCA 36, as introduced, Song (Jud.). Eminent domain.

Amends Sec. 14, Art. I, Cal. Const.

Deletes requirement that just compensation in action in eminent domain be ascertained by a jury.

Vote—⅔; Appropriation—No; Fiscal Committee—No.

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 1971 Regular Session commencing on the fourth day of January, 1971, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the state be amended by amending Section 14 of Article I thereof, to read:

SEC. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by ~~a jury, unless a jury be waived, as in other civil cases~~ in a court of record, as shall be prescribed by law; *provided*, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, munici-

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

O

Memo 71-41 EXHIBIT V

SENATE BILL No. 615

Introduced by Senator Song

March 16, 1971

REFERRED TO COMMITTEE ON JUDICIARY

An act to amend Sections 1255a and 1266.2 of, and to add Section 1267 to, the Code of Civil Procedure, relating to eminent domain.

LEGISLATIVE COUNSEL'S DIGEST

SB 615, as introduced, Song (Jud.). Eminent domain.

Amends Secs. 1255a and 1266.2, and adds Sec. 1267, C.C.P.

Provides that only court shall appoint experts to determine value of the property in condemnation cases before it; and, in this connection, shall appoint two such experts, but if they disagree on the value by 10 percent or more, it shall appoint a third expert. Requires fees of such experts to be paid by condemning entity or agency. States that bill does not limit number of witnesses, other than such experts, which a party may call.

Makes related changes.

Vote—Majority; Appropriation—No; Fiscal Committee—Yes.

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

SECTION 1. Section 1255a of the Code of Civil Procedure is amended to read:

1255a. (a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment. Failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.

(b) The court may, upon motion made within 30 days after such abandonment, set aside the abandonment if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judg-

ment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action and (2) reasonable attorney fees; ~~appraisal fees.~~ and fees for the services of ~~other~~ experts *other than persons giving evidence on the value of the property as described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code,* where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services rendered before or after the filing of the complaint. In case of a partial abandonment, recoverable costs and disbursements shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken. Recoverable costs and disbursements, including expenses and fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. Upon judgment of dismissal on motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

(d) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain, the court shall order the plaintiff to deliver possession of such property or such portion thereof to the parties entitled to the possession thereof and shall make such provision as shall be just for the payment of damages arising out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is the earlier.

SEC. 2. Section 1266.2 of the Code of Civil Procedure is amended to read:

1266.2. In any action or proceeding for the purpose of condemning property where the court ~~may appoint appraisers, referees, commissioners, or other persons for the purpose of determining the value of such property and fixing the compensation thereof, and may fix their fees or compensation~~ *appoints experts described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code*, the court ~~may~~ *shall* set such fees or compensation in an amount as determined by

the court to be reasonable, but such fees shall not exceed similar fees for similar services in the community where such services are rendered.

SEC. 3. Section 1267 is added to the Code of Civil Procedure, to read:

1267. (a) Notwithstanding any other provision of law to the contrary, only the court shall appoint experts described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code in condemnation cases before it, as provided in subdivision (b).

(b) The court shall appoint two experts described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code. However, if such two experts disagree on the value of the property to the extent of 10 percent or more, the court shall appoint a third such expert.

(c) The fees of such experts shall be paid by the condemning entity or agency.

(d) Nothing in this section shall be construed as limiting the number of witnesses, other than such experts described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code, which a party may call in such condemnation cases.

O

Memo 71-41 EXHIBIT VI

AMENDED IN SENATE MAY 25, 1971

SENATE BILL No. 615

Introduced by Senator Song

March 18, 1971

REFERRED TO COMMITTEE ON JUDICIARY

An act to amend Sections 1255a and 1266.2 of, and to add Section 1267 to, the Code of Civil Procedure, relating to eminent domain.

LEGISLATIVE COUNSEL'S DIGEST

SB 615, as amended, Song (Jud.). Eminent domain.

Amends Secs. 1255a and 1266.2, and adds Sec. 1267, C.C.P.

Provides that ~~only court shall appoint experts~~ *each party in a condemnation case shall only have one expert witness* to determine value of the property ~~in condemnation cases before it,~~, and ~~, in this connection, shall appoint two such experts, but~~ if they disagree on the value by 10 percent or more, ~~it shall~~ *the court may* appoint a third expert. Requires fees of ~~such experts~~ *a court appointed expert* to be paid by condemning entity or agency. States that bill does not limit number of witnesses, other than such experts, which a party may call.

Makes related changes.

Vote—Majority; Appropriation—No; Fiscal Committee—Yes.

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

SECTION 1. Section 1255a of the Code of Civil Procedure is amended to read:

1255a. (a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment. Failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.

(b) The court may, upon motion made within 30 days after such abandonment, set aside the abandonment if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action and (2) reasonable attorney fees, *fee for appraisal,* and fees for the services of *other* experts ~~other than persons giving evidence on the value of the property as described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code~~, where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services rendered before or after the filing of the complaint. In case of a partial abandonment, recoverable costs and disbursements shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken. Recoverable costs and disbursements, including expenses and fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. Upon judgment of dismissal on motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

(d) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain, the court shall order the plaintiff to deliver possession of such property or such portion thereof to the parties entitled to the possession thereof and shall make such provision as shall be just for the payment of damages arising out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is the earlier.

SEC. 2. Section 1266.2 of the Code of Civil Procedure is amended to read:

1266.2. In any action or proceeding for the purpose of condemning property where the court appoints ~~experts~~ *an expert* described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code, the court shall set such ~~fees~~ *fee* or compensation in an amount as determined by the court to be reasonable, but such ~~fees~~ *fee* shall not exceed similar fees for

similar services in the community where such services are rendered.

SEC. 3. Section 1267 is added to the Code of Civil Procedure, to read:

1267. (a) Notwithstanding any other provision of law to ~~the contrary, only the court shall appoint experts described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code in condemnation cases before it, as provided in subdivision (b).~~

~~(b) The court shall appoint two experts described in paragraph (1) of subdivision (c) of Section 813 of the Evidence Code. However, if such two experts disagree on the value of the property to the extent of 10 percent or more, the court shall appoint a third such expert.~~

~~(c) The fees of such experts shall be paid by the condemning entity or agency.~~ *the contrary, each party to a condemnation case is permitted only one expert of the kind described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code.*

(b) If the witnesses in subdivision (a) testify to appraisals differing by more than 10 percent, the court may appoint an expert of the kind described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code.

(c) The fee of an expert appointed by the court shall be paid by the condemning entity or agency.

(d) Nothing in this section shall be construed as limiting the number of witnesses, other than such experts described in paragraph (1) of subdivision (a) of Section 813 of the Evidence Code, which a party may call in such condemnation cases.

O

Memo 71-41 EXHIBIT VII

CONSTITUTION REVISION COMMISSION

"Proposed Revision of the California Constitution"(1968)

Proposed Constitution

Section 4

Sec. 4. The Legislature may provide that on request of condemnor and condemnee the Commission fix just compensation for public utility property taken by eminent domain.

Existing Constitution

Section 23a

Sec. 23. The Railroad Commission shall have and exercise such power and jurisdiction as shall be conferred upon it by the Legislature to fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings by the State or any county, city and county, incorporated city or town, municipal water district, irrigation district or other public corporation or district, and the right of the Legislature to confer such powers upon the Railroad Commission is hereby declared to be plenary and to be unlimited by any provision of this Constitution. All acts of the Legislature heretofore adopted which are in accordance herewith are hereby confirmed and declared valid.

Comment: Both proposed Section 4 and the existing provisions authorize legislation permitting determination by the PUC of just compensation for utility property taken by eminent domain.

Statutes enacted pursuant to existing Section 23a restrict the option of seeking PUC determination of value to the condemning authority. In the interest of fairness the proposed Section requires that PUC determination be undertaken only where both condemnor and condemnee agree.

Specification of the various condemning authorities is deleted as superfluous.

April 13, 1971

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

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

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

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

TABLE OF CONTENTS

Section 1: INTRODUCTION TO STUDY

A. [§1.1] Scope

The following is the first installment of a study of certain portions of California's general condemnation procedure law, undertaken for the California Law Revision Commission. This segment is concerned with the commencement of an action in eminent domain: jurisdiction and venue, rules of practice, complaint and summons, lis pendens, and answer.

B. [§1.2] Viewpoint

The writer is a condemnor's attorney, attempting to study the procedure of instituting an eminent domain action from both plaintiff's and defendant's viewpoints.

The intent is to be practical rather than theoretical, and to speak more from experience than a survey of the law of other jurisdictions. Nonetheless, some of the condemnation procedures of other jurisdictions are given consideration for the suggestions they may offer.

But more often, it is California's own case law that points to rewording or change in its statutes. And, when this study recommends new language, that language itself is to serve the purpose of raising questions. Only after critique and Commission review of this study can there emerge a set of procedural laws which may be inserted in the Commission's proposed Eminent Domain Comprehensive Statute.

Section 2: PROCEDURE PRIOR TO COMMENCEMENT OF PROCEEDINGS

A. [§2.1] Introduction

Once the location of a proposed public project is established, the entity which has proposed the project usually becomes involved in two subsequent activities before legal proceedings are commenced in court. First, there is an attempt to purchase the property directly. The property sought is appraised and negotiations are undertaken. Second, either at the same time or soon thereafter, a resolution of condemnation is enacted by condemnor's governing body to establish legislatively: the necessity for the project, the proper location of the project, and the need to acquire the particular property sought for the project. The resolution also authorizes the institution of eminent domain proceedings, if necessary, to acquire the property.

This section of the study is concerned with those two actions, giving particular attention to the question whether negotiations to purchase or a formal offer should be a prerequisite to filing an action in eminent domain. Incidental attention is given to whether there ought to be a preliminary finding, within the framework presently set forth in the Environmental Quality Act of 1970 and the Williamson Act, that the project does not cause an adverse ecological impact.

B. Necessity of Attempt to Purchase

1. [§2.2] Generally

The Southern Section of the State Bar Committee on Governmental Liability and Condemnation (January 10, 1970) reported:

> In general, it was believed that an offer to purchase should be a condition precedent to the institution of an eminent domain proceeding. Although various methods could be employed to accomplish such a purpose, study should be given to requiring that an offer be a requisite element of an eminent domain complaint. Where, because of unusual time circumstances, it is effectively impossible for the condemnor to make an offer to purchase before suit is filed, the defendants should not be required to file an answer or any other pleading until a reasonable time after such an offer is made.

Further, the California Law Revision Commission, since undertaking its study of eminent domain law, has received several letters from practitioners making substantially the same comment.

There are two aspects to making an attempt to purchase a prerequisite to an eminent domain proceeding: (1) a good faith attempt to negotiate, and (2) the jurisdictional offer.

2. [§2.3] An Offer Is Not A Statement of Fact or Admission

In cases where condemnors make a written offer, it is not unusual that such offers read like a determination of fair market value rather than an offer of compromise. However, California cases do not generally interpret either the initial offer or discussion of price as a statement which can be construed as an admission against interest.

San Joaquin v. Galletti (1967) 252 CA2d 840, 61 CR 62; Santa Cruz v. Wood (1967) 252 CA2d 52, 60 CR 26; Redevelopment Agency v. Maynard (1966) 244 CA2d 260, 266, 53 CR 42; and People v. Glen Arms Estate, Inc. (1964) 230 CA 841, 41 CR 303. (A related question, whether the complaint should contain an allegation of value, is discussed below in §7.4.)

3. [§2.4] Attempt to Purchase

Several states, either directly or by implication, require the condemnor to negotiate with the property owner prior to instituting proceedings. New Jersey, for example, says that proceedings may be commenced when the public agency "cannot acquire such land by agreement with the owner." N.J.S. §20:1-1. However, that statute offers a catchall that appears to dilute the requirement by allowing disagreement "by reason of any other cause," after a list of specific causes, to constitute an excuse.

Idaho simply includes in its statute, describing the contents of the complaint, which incidentally is patterned after California Code of Civil Procedure §1244, an additional item of content:

> In all cases where the owner of the land sought to be taken resides in the county in which said lands are situated, a statement that plaintiff has sought, in good faith, to purchase the lands so sought to be taken, or settled with the owner for the damages which might result to his property from the taking thereof, and was unable to make any reasonable bargain therefor, or settlement of such damages; but in all other cases, these facts need not be alleged in the complaint, or proved. Idaho Stat. §7-707(6).

In State ex rel. Rich v. Blair (1961) 83 Idaho 475, 265 P2d 216, the making of an offer to the owner by letter was not sufficient to meet this requirement.

Wisconsin provides for a more detailed negotiation procedure, making the condemnor first "cause . . . an appraisal to be made of the property proposed to be acquired." Wis. Stats. §32.05(2). And then, before making a jurisdictional offer, "the condemnor shall attempt to negotiate personally with the owner or one of the owners or his personal representative for the property sought to be taken for the purchase of the same." Wis. Stats. §32.05(2a). Under this statute, only statements falling outside the scope of negotiations may be considered independent admissions against interest. Connor v. Michigan-Wisconsin Pipe Line (1962) 15 Wis.2d 614, 113 NW2d 121.

The Report of Eminent Domain Revision Commission of New Jersey 16-17 (April 15, 1965), made the following observations and recommendations:

> Complaints have been made to the Commission that negotiations for acquisition are frequently conducted in an arbitrary manner. The owner is advised merely of the dollar amount of the offer, but is given no information, even if he requests, as to the manner of ascertaining the amount so offered. It is believed that such treatment of a property owner is improper. The Commission is of the opinion that if fair offers are made based upon appropriate data disclosed to the owner, many acquisitions will be completed amicably, without subjecting the authority and the owner to the expense and delay of litigation.
>
> The Commission, therefore, recommends that no proceedings for the taking of property shall be instituted until bona fide negotiations (including a reasonable

> disclosure of the basis of the offer) have failed. No offer so made shall be evidential in the cause. Should the final award exceed the amount of the offer by more than 25%, the condemnee shall be paid, in addition to his award, his reasonable attorney and expert fees (to be fixed by the court), but not in excess of 10% of the award. Some members recommend that to meet the problem of excessive demands by property owners, a like penalty be imposed if the eventual award be similarly less than the amount requested.
>
> Undoubtedly, situations will arise which make negotiations impossible or impractical, such as when an owner lacks capacity to convey, is unknown, or resides out of the state. Upon a disclosure of those facts to the court, negotiations may be omitted.

New Jersey, however, has not enacted a statute as extensive as the above recommendation.

California, although presently not insisting by statute, upon negotiations prior to the commencement of proceedings, has had special acts which contained such a mandate. For example, the Act of March 27, 1876, relative to the San Francisco Water Works, commanded a board of commissioners "to enter into negotiation" with the owners of any land and water right, for the purchase of such land and water right, before taking any step toward condemnation. In Mahoney v. Supervisors of S. F. (1879) 53 C 383, it was held that where the record did not show that a majority of the commissioners agreed among themselves on a price to offer, or that the property owners ever offered to sell at any price, there was no "negotiation" as authorized by the Act. The question involved in this case underscores a criticism of statutes which make a good faith attempt to negotiate a prerequisite to condemnation proceedings.

Orrin L. Helstad, in A Survey and Critique of Highway Condemnation Law and Litigation in the United States 168 (1966), in a then current review of eighteen cases throughout the nation, found:

> Nevertheless, it seems to the writer that the alleged failure to negotiate was used largely as a dilatory tactic in those cases where the issue was raised and that the requirement of negotiation hardly deserves to be made jurisdictional. The landowner almost never succeeded in proving failure to negotiate. Moreover, under the policy of fixed price offers now used by many condemnors, negotiation amounts to little more than informing the landowner of the offer and explaining it to him.

4. [§2.5] Jurisdictional Offer

Wisconsin Eminent Domain Law, abovementioned, makes provision for a "jurisdictional offer to purchase." A notice must be sent to the owner or one of the owners and to the mortgagee or one of the mortgagees of each mortgage of record: generally describing the nature of the project and declaring the condemnor intends to use the property sought for such public purpose, describing the property, stating the proposed date of occupancy, stating the amount of compensation offered, itemized as to the items of damage, and stating that the appraisal on which the offer is based is available for inspection. Wis. Stats. §32.05(3). If the landowner does not accept the offer within twenty days, the condemnor may make its award tendering payment and filing the award with the Register of Deeds. Thereupon, title vests in the condemnor which is then entitled to possession of the property.

The landowner may appeal within two years to have the damages reassessed. Wis. Stats. §32.05(3), (6) and (7).

5. [§2.6] Recommendations

Irrespective of indirect or direct statutory obligation, every condemning agency as a matter of policy should attempt negotiations and make a formal offer to purchase the property sought before instituting legal proceedings. Certainly, good faith negotiations before the pressure of litigation hangs over the property owner's head can assist in amicable completion of acquisition as expressed by the New Jersey Eminent Domain Review Commission.

Those condemnors desiring to pursue this policy, but experiencing a practical difficulty because of the pressure of securing orders of immediate possession for the property, are answered by a compromise solution that, if condemnor is unable to attempt purchase before the complaint is filed, the attempt to purchase should be made a condition precedent to the property owner's filing of an answer. In other words, the time in which the defendant has to file an appropriate pleading in response to the complaint is extended until such time as an attempt to purchase has been made.

Another approach, which avoids statutory direction regarding attempts to purchase, is to simply call for a jurisdictional offer. Prof. Orrin L. Helstad in A Survey and Critique of Highway Condemnation Law and Litigation in the United States 239-241 (1966), propounds the following draft of a statute

outlining the steps preliminary to instituting action:

(1) The condemnor shall cause at least one appraisal to be made of all property proposed to be acquired. In making such appraisal the appraiser shall confer with the owner or one of the owners or his personal representative, if reasonably possible.

(2) Before making the offer provided for in subsection (3) of this section, the condemnor shall attempt to negotiate personally with the owner or one of the owners or his personal representative for the purchase of the property, but failure to negotiate shall not be a defense to condemnation of the property.

(3) As a prerequisite to instituting condemnation proceedings, the condemnor shall serve upon the owner or one of the owners of record, and upon the mortgagee or upon one of the mortgagees of each mortgage of record, a notice of offer to purchase:

(a) Stating briefly the nature of the project and that the condemnor in good faith intends to use the property sought to be acquired for such public purpose.

(b) Describing the property and the interest therein sought to be taken. If only part of a parcel is being taken, the notice shall be accompanied by a map or plat showing the portion to be taken in relation to the whole parcel or shall state that such map or plat is on file in the office of (county or municipal office) and may there be inspected.

(c) Stating the proposed date of occupancy, if one has been established.

(d) Stating the amount of compensation offered and that the appraisal or appraisals on which the offer is based are on file in the office of (county or municipal office) and may there be inspected.

(e) Stating that an action to condemn the property will be commenced if the offer is not accepted within 20 days after the service of the notice.

(4) The giving of such notice is a jurisdictional prerequisite to instituting condemnation proceedings. Such notice may be served in the same manner as the summons and complaint or may be served by certified mail. If service is by mail, service shall be deemed

completed on the date of mailing, and the use of mail service shall not increase the time allowed to act in answer to or in consequence of such service. If the owner or mortgagee is unknown or cannot be found, such notice shall be published once in a newspaper of general circulation in the county wherein the property is located. If the owner is a minor or an incompetent person, the condemnor shall serve such notice upon the legal guardian of such minor or incompetent. If there is no such guardian, the condemnor shall petition the court in which the condemnation proceedings will be commenced to have a special guardian appointed to represent such minor or incompetent in the condemnation proceeding. [The reasonable fees of such special guardian, as approved by the court, shall be paid by the condemnor.]

(5) If the offer is accepted, the transfer of title shall be accomplished within 30 days after acceptance, including payment of the consideration stipulated in the offer or as agreed upon between the parties, unless such time is extended by mutual written consent of the condemnor and condemnee. If the owner fails to convey the property within the specified time, the condemnor may commence condemnation proceedings.

(6) If the offer is rejected in writing by one or more of the owners of record or is not accepted within 20 days after the service of the notice, the condemnor may forthwith commence condemnation proceedings.

The Professor bases this proposed section upon the Wisconsin law discussed above. The draft prescribes "negotiation" without making it a jurisdictional prerequisite in order to avoid the litigation which has revolved about the question of whether the condemnor had in fact negotiated with the landowner before instituting proceedings. But under this section, the service of the offer to purchase would be a jurisdictional requirement.

Another out-of-state statute which could be adapted to California condemnation procedure is that of New York, which reads as follows:

1. In all cases where the owner is a resident and not under legal disability to convey title to real property the plaintiff, before service of his petition and notice may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated; and which cannot be given in evidence before the commissioners, or considered by them. The owner may at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer and its acceptance, enter an order that upon payment of the compensation agreed upon, he may enter into possession of the real property described in the petition, and take and hold it for the public use therein specified.

2. If the offer is not accepted and the compensation awarded by the commissioners does not exceed the amount of the offer with interest from the time it was made, no costs shall be allowed to either party. If the compensation awarded shall exceed the amount of the offer with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the cost of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the supreme court, including the allowances for proceedings, before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded. The court shall also direct in the final order what sum shall be paid to the general or special guardian, or committee or trustee of an infant, idiot, lunatic or habitual drunkard, or to an attorney appointed by the court to attend to the interests of any defendant upon whom other than personal service of the petition and notice may have been made, and who has not appeared, for costs, expenses and counsel fees, and by whom or out of what fund the same shall be paid. If a trial has been had, and all the issues determined in favor of the plaintiff, costs of the trial shall not be allowed to the defendant, but the plaintiff shall recover of any defendant answering the costs of such trial caused by the interposition of the unsuccessful defence, to be taxed by the clerk at the same rate as is allowed to the prevailing party for the trial of an action in the supreme court. N. Y. Cond. Law §16. (Emphasis added.)

This provision was drafted in such a way as to provide benefits to the condemnor which makes a formal written offer to purchase prior to condemnation.

C. Resolution of Condemnation

1. [§2.7] Generally

Eminent Domain Comprehensive Statute §§302 and 311, proposed by the California Law Revision Commission, tentatively approved May 1970, restate what California law currently says is established by a resolution of condemnation of an authorized agency. Section 302 declares:

> Before property may be taken by eminent domain, all of the following must be established:
>
> (a) The proposed project is a necessary project.
>
> (b) The proposed project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.
>
> (c) The property sought to be acquired is necessary for the proposed project.

These same elements are found in CCP §1241, Sts. & Hwys. Code §103, and other statutes relating to the resolutions of specific condemning authorities. (The question whether the resolution should be a part of the complaint is discussed in §7.1.)

Beyond the effect of legislatively determining these matters, what impact does such a resolution have upon a subsequent action in eminent domain? In particular, does the resolution constitute a taking?

There are several California decisions indicating that

preliminary steps, such as resolutions and ordinances of condemnation, prior to the filing of an action in eminent domain or the physical taking of the property by the construction of the public project, do not constitute a taking. Heimann v. Los Angeles (1947) 30 C2d 746, 754, 185 P2d 597 (involving plans for construction of a viaduct under consideration by the city); Eachus v. Los Angeles etc. Ry Co. (1894) 103 C 614, 621-622, 37 P 750 (involving an ordinance establishing a grade which would impair plaintiff's access); Bank of America v. Los Angeles (1969) 270 CA2d 165, 175-177, 75 CR 444 (involving deputy county counsel's announcement in probate court of a resolution of condemnation affecting property which was the subject of a hearing for confirmation of sale); Riverside County Flood etc. District v. Halman (1968) 262 CA2d 510, 517, 69 CR 1 (dicta regarding legislative steps preceding action in eminent domain); Gianni v. San Diego (1961) 194 CA2d 56, 61, 14 CR 783 (involving an ordinance fixing the official grade); Stafford v. State of California (1956) 144 CA2d 79, 82, 300 P2d 231 (involving evidence of public agency's intention to open a highway through affected property); Silva v. San Francisco (1948) 87 CA2d 784, 198 P2d 78 (involving resolution of condemnation of entire city block for playground purposes). But compare, Peacock v. Sacramento (1969) 271 CA2d 845, 77 CR 391 (regarding restrictive zoning) and Hilltop Prop. v. State of California (1965) 233 CA2d 349, 356, 43 CR 605 (involving the reservation of two strips of land for freeway purposes at the express request of the public agency).

2. [§2.8] The Problem of Abandonment Before Suit and Possible Solutions

The problem to the property owner which these cases underscore is the status of the land itself where there is a long delay between resolution and institution of condemnation proceedings or simply no subsequent action by the condemning authority. Where no suit has been filed, there can be no question of abandonment under CCP §1255a. But an outstanding resolution can have an impact upon the marketability of the property. Connecticut apparently recognizes this in its eminent domain procedure by providing that the referee, whenever there is unreasonable delay between the filing of the map laying out state highways and the filing of the certificate of taking may award additional damages. Conn. Gen. Stat. §13a-76a.

Some suggest that there be a time limitation for the filing of a condemnation action after the adoption of the resolution of necessity. Yet, most condemnors only adopt a resolution affecting property upon which a lawsuit is imminent. And, when delays do occur, they are not often intentional but the result of unanticipated increases in the project's costs which necessitate a reduction in the size of the project or postponement of its complete scheduling.

One solution would be to require the resolution of condemnation to contain a statement, similar to that found in New York's condemnation petition: "[I]t is the intention of the [condemnor], in good faith, to complete the work or

improvement, for which the property is to be condemned . . ." N.Y. Cond. Law §4(7). Another remedy is to compel rescission of any resolution of condemnation for which the property is no longer needed.

D. [§2.9] Environmental Compatibility as Prerequisite

Two recent acts may provide an opportunity to more closely, than in the past, scrutinize a resolution's establishment that the project is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

The California rule, in cases where a statute has given conclusive effect to the condemning body's findings of necessity, is that determination of the three elements of necessity is legislative and not judicial. The court has no power of review over such a resolution. People v. Chevalier (1959) 52 C2d 299, 304-306, 340 P2d 598. See also CALIFORNIA CONDEMNATION PRACTICE §8.39 (CEB 1960).

But can a location be made necessary where the condemning body has not considered the environmental impact of the project? The answer requires examination of two laws. First, six years ago, California enacted the Williamson Act, more formally known as the "California Land Conservation Act of 1965." A key feature of the act allows a private property owner to contract for the placing of certain undeveloped lands in an agricultural preserve for an initial term of 10 years (Govt. Code §51244) to receive a lower assessed valuation

(Govt. Code §51252, incorporating Cal. Const. Art. XXVIII; see also Rev. & Tax. Code §§421-431).

More to the point, there is within the act an article on eminent domain. Government Code §51290(c) makes it the policy of the state for any agency or entity proposing the location of a public improvement within an agricultural preserve to give consideration to the value to the public of acquiring that land and devoting it to the proposed public project. Section 51292 denies such location where the primary justification is the lower cost of acquiring land in an agricultural preserve or where there are other lands available which are reasonably feasible for the location.

Still, locations approved by the board or council administering the agricultural preserve or Public Utilities Commission, certain compatible types of improvements, such as flood control works, and some projects, such as state highways on certain routes, are excluded from the above section. Govt. Code §51293. Further, section 51292 is only enforceable by mandamus proceedings brought by the local governing body administering the agricultural preserve or the Director of Agriculture. "However, as applied to condemnors whose determination of necessity is not conclusive by statute, evidence as to the compliance of the condemnor with section 51292 shall be admissible on motion of any of the parties in any action otherwise authorized to be brought by the landowner or in any action against him." Govt. Code §51294. Thus, the Chevalier rule is not circumvented by this legislation.

The second law bringing ecology to eminent domain is the Environmental Quality Act of 1970. It makes it state policy for "governmental agencies at all levels to consider qualitative factors as well as economic and technical facts and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment." Pub. Res. Code §21001(g). All state agencies, boards and commissions must include in any report on any project they propose an environmental impact study. Pub. Res. Code §21100. Local governmental agencies, receiving allocation of state or federal funds through state agencies, must make the same study. Pub. Res. Code §21150. Finally, in regard to local agencies:

> The legislative bodies of all cities and counties which have an officially adopted conservation element of a general plan shall make a finding that any project they intend to carry out, which may have a significant effect on the environment, is in accord with the conservation element of the general plan. All other local governmental agencies shall make an environmental impact report . . . to the appropriate local planning agency . . . Pub. Res. Code §21151.

Unlike the Williamson Act, no provision is made here for mandamus proceedings to compel compliance or the admissibility of non-compliance in an eminent domain action. It certainly is arguable that the Environmental Quality Act of 1970 demands a finding independent of the passage of a resolution fixing proper location. New York takes a more direct approach. In the case of major utility transmission facilities for which a certificate of environmental compatibility and public need is required, the petition for condemnation must contain

"a statement that such certificate relating to such property has been issued and is in force." N.Y. Cond. Law §4(3)(b).

Section 3: JURISDICTION AND VENUE

A. Introduction

1. [§3.1] Types of Procedural Condemnation Systems

Since the enactment of its eminent domain procedure law in 1872, California has followed a judicial system. Although an eminent domain action is deemed special in nature, Bayle-Lacoste & Co. v. Superior Court (1941) 46 CA2d 636, 116 P2d 458, it is broadly similar in procedure to other civil actions. The plaintiff condemnor must file a complaint and have issued a summons in the Superior Court where the property is located; after service the complaint is answered by parties defendant who have an interest in the property being acquired. (Some of these similarities are discussed below in §7.5 regarding the nomenclature of condemnation complaints.) The action, if not settled, then progresses toward trial with each side entitled to a hearing before a jury.

There are three general classifications of condemnation procedures among the states: judicial, quasi-judicial and administrative. It should be noted that a particular state may have more than one procedure. For example, New York's procedure for state highway takings is administrative (N.Y. Hwy. Law §30), but its procedure for condemnation by public corporations is quasi-judicial. N.Y. Cond. Law §§1-27.

Some of the other states having a system similar to California are Arizona (Ariz. Rev. Stat. §§12-1111 to 12-1128), Florida (Fla. Stat. §§73.01-73.25), Illinois (Ill. Stat. Ch. 47),

Nevada (Nev. Rev. Stat. §§37.009-37.260), Oregon (Ore. Rev. Stat. §§35.010-35.140, §§281.010-281.550 and §§366.365-366.393), and Washington (Wash. Rev. Code Tit. 8).

The second type of system is labeled quasi-judicial. The proceedings are commenced "by the filing of a petition with a court or judge, but instead of the trial common to judicial proceedings, the court or judge generally appoints special appraisers or viewers to make the award of compensation. If no exceptions to the award are taken, the award generally becomes final upon its approval by the court or judge. Even if exceptions are taken, the condemnor usually has a right to obtain possession pending determination of the 'appeal' to the trial court for a trial de novo." Helstad, A Survey and Critique of Highway Condemnation Law and Litigation in the United States 166 (1966). Examples of this procedure are the law of Alabama (Ala. Code Tit. 19 §§1-31, Indiana (Ind. Stat. §§3-1701 to 3-1712), Kansas (Kans. Stat. §§26-501 to 26-516), and Pennsylvania (Pa. Stat. Tit. 26).

The third type of procedure is administrative. Under this system title to the property or right of possession may vest in the condemnor without filing or appearance in court. There are two forms such procedures usually take: (1) Upon filing a petition with a local administrative body, that agency appoints viewers or appraisers who determine both the feasibility of the project and compensation to be awarded, and report these findings to the body which appointed them. Then, the administrative body can approve the award which will become

final, unless it is appealed to a court within a specified time. (2) Upon the filing of the award, which has been predetermined in a hearing before the legislative body of the condemnor, with an official such as the local register of deeds [county recorder], title and the right to possession vest in the condemning agency. The landowner must initiate court action if he desires to question the taking or award. Examples of this procedure are Massachusetts (Mass. Stats. Ch. 79), New York (N.Y. Hwy. Law §30), and Ohio (Ohio Rev. Code §§5519.01 to 5519.05).

2. [§3.2] This Study Does Not Purport to Change the California System

This study accepts the California judicial system for eminent domain and seeks to review the procedure within that system. An essential ingredient of that system is the constitutional guarantee of the right to a jury trial on the question of compensation. Art. I, §14.

However, there is criticism of that part of the system. "[T]he complexities of valuation are far too great for the comprehension of a group of persons, totally uninformed and ill-equipped to adjudicate such issue. It is well recognized that upon the voir dire, all persons having any semblance of expertise on the subject are excused from jury service." Report of Eminent Domain Revision Commission of New Jersey 20-21 (April 15, 1965).

The dissent of California's Appellate Court Justice Friedman

in State of Cal. v. Wherity (1969) 275 CA2d 241, 252, 79 CR 591, is also disapproving: "Trial judges, lawyers and appraisers are willy-nilly players in a supercharged psychodrama designed to lure 12 mystified citizens into a technical decision transcending their common denominator of capacity and experience."

More importantly, on February 22, 1971, a Special Committee on Judicial Reform of the Los Angeles Superior Court recommended the following to the Governor and California Legislature: First, the right to all civil jury trials be abolished. Recommendation No. 13. Second, as one alternative measure to this sweeping proposal, "a constitutional amendment be proposed abolishing jury trials in eminent domain proceedings." Recommendation No. 14(d). Third, as an alternative to the latter proposal, "appropriate legislation be enacted to provide that expert appraiser testimony in eminent domain cases be limited to two appraisers appointed by the court, with provision for appointment of a third appraiser if a divergence exists in the two appraisals greater than ten percent; the costs of the appraisers to be borne by the condemning agency; the right of the property owner to give valuation testimony himself to be unaffected by these provisions." Recommendation No. 22. The last recommendation, seemingly offered as a compromise, takes away each party's right to introduce its own expert appraisal testimony, but allows the property owner himself to come forward to testify regarding the value of his property. The preservation of the owner's right to testify is tied to the due process of giving the

aggrieved party an opportunity to be heard. Yet, as the comment to Recommendation No. 22 indicates, the proposal is as concerned with the cost of appraisal to the property owner as the trial time expended by valuation witnesses hired by each side.

Therefore, the conclusion first drawn in this section requires some support.

First, although the guarantee of Art. I, §14, has required superior courts to devote approximately 8% of their civil jury time to eminent domain cases (1970 Annual Report of the Administrative Office of the California Courts, p. 98) California lawyers are reluctant to give up the right. Interestingly, even though the right to a jury trial is generally considered a protection to the property owner, in those cases where the property owner is willing to waive a jury, condemnors are reluctant to do so. In fact, some agencies ask for a jury, in cases where the spread of opinion of value is small, to place the drag of additional days of trial upon the defendant. On the other hand, many condemnors have the policy that a jury should decide any question involving the expenditure of public funds. Arnebergh, Trial Tactics from the Standpoint of the Condemnor, 8 INSTITUTE ON EMINENT DOMAIN 1, 20-21 (1968).

These practices provide background to support the finding of the L. A. Superior Court Special Committee that "jury requests generally come exclusively from the governmental agency taking the property." Yet, the essential evidence - the filing

of the memorandum to set for trial - relied upon to reach this conclusion has probably been misinterpreted. In most cases, it is the condemnor which files the "At Issue Memorandum," because it is anxious to push the case to trial at the earliest date. See CCP §1249. And, expediency as much as policy move it to request a jury trial for three reasons: (1) whichever side asks for a jury, the condemnor pays for it; (2) it is expected that the property owner will ask for a jury; and (3) when the property owner does not want a jury, it is presumed to be to the advantage of the plaintiff to request one. Consequently, the fact that the request almost exclusively comes from condemnor is circumstantial. When the plaintiff does not make the request, usually a demand is quickly filed by the defendant. His motivation is the theory that jurors will be influenced primarily by their roles as property owners rather than their roles as taxpayers. A jurist, on the other hand, may more evenly hold these roles in balance.

Second, in regard to the criticism of both the New Jersey Commission and California Appellate Justice Friedman, condemnation attorneys recognize the sophistication of some appraisal problems, but also know that the standard of just compensation is measured in the market place. See Sacramento etc. R.R. Co. v. Heilbron (1909) 156 C 408, 409, 104 P 979. The theories of appraisal are best translated to this standard by being measured in the minds of jurors who are drawn from the market itself.

Third, Recommendation No. 22, providing for court appointed

appraisers but leaving the right to a jury trial intact, has its own deficiencies. Initially, it evidences lack of recognition that competent counsel, not the appraiser, guides the valuation of the property being condemned. Such attorneys will not sit in anticipation of the findings of the court appointed appraisers; rather they will pursue independent investigation as a basis for cross-examination and rebuttal, if permitted. The costs, which this proposal seeks to save, are simply credited to another account. Further, Recommendation No. 22 does not prohibit non-appraisal testimony. Expert opinion concerning the probability of rezoning the property condemned can be introduced by a non-valuation witness. State of Cal. v. Wherity (1969) 275 CA2d 241, 79 CR 591. And, foundational experts, such as civil engineers, can be called to establish matters not within the expertise of an appraiser. People v. Flintkote (1968) 264 CA2d 97, 70 CR 27.

Fourth, there are other methods to fix just compensation available in California which are little used. The Public Utility Commission is authorized to determine: the manner of crossing and compensation in cases of grade separation for railroad crossings (Pub. Util. Code §§1201-1220), and compensation for acquisition of public utility property by a political subdivision of the state (Pub. Util. Code §§1401-1421). In each case, however, this jurisdiction is non-exclusive and an alternate to the judicial system set forth in the Code of Civil Procedure. Pub. Util. Code §§1217 and 1421. Further, there is provision for voluntary reference of the issue of

compensation to referees in the Street Opening Act of 1903 (Sts. & Hwys. Code §§4000-4443) and the Park and Playground Act of 1909 (Govt. Code §§38000-38213). And, even CCP §1248 makes reference to the "court, jury, or referee" determining compensation.

Moreover, California has taken recent small steps away from its traditional judicial approach to condemnation. In 1970, the Legislature, at the urging of the California Law Revision Commission, provided for the arbitration of just compensation. CCP §§1273.01-1273.06. See Recommendation Relating to Arbitration of Just Compensation, Cal. L. Revision Comm'n (September 1969). The County of Los Angeles, also willing to attempt some modification of the system, has adopted a short cause trial procedure. In those cases where only value and/or a simple severance question are in dispute, both sides may elect to waive a jury and stipulate that the matter be decided by any of five judges whom the parties agree upon and name. Written appraisal reports will be received in evidence, with the author of the report not being called unless the opposing party desires to cross-examine the appraiser.

These innovations evidence the cautious manner in which California is experimenting with alternatives to its judicial system. The drastic reform of abolition of the jury in eminent domain cases does not appear acceptable to the practitioner at this time. Experimentation, however, should be encouraged to provide a means to evaluate such change.

B. Jurisdiction in California (CCP §1243)

1. [§3.3] Jurisdiction Lies in Superior Court

Initially, CCP §1243 declares that jurisdiction for all condemnation proceedings brought under the provisions of Title VII [Eminent Domain] of the Code of Civil Procedure are within the jurisdiction of the superior court of the county in which the property is located. See also Cal. Const. Art. VI, §6. For the moment, venue, which occupies a prime part of the language of section 1243, is set aside to be discussed separately in §§3.6-3.7.

"A condemnation action is a proceeding in rem. The filing of the complaint, and not the issuance of summons, vests the court with jurisdiction." Bayle-Lacoste & Co. v. Superior Court (1941) 46 CA2d 636, 642, 116 P2d 458. Nonetheless, section 1243 states that the action "must be commenced by filing a complaint and issuing summons." It also says that a lis pendens shall be recorded, but case law holds the failure to do so does not affect jurisdiction. Housing Authority v. Forbes (1942) 51 CA2d 1, 10, 124 P2d 194. And, finally, a void order of immediate possession does not affect jurisdiction. San Bernadino etc. Water Dist. v. Gage Canal Co. (1964) 226 CA2d 206, 37 CR 856.

2. [§3.4] Jurisdiction of the Public Utilities Commission

This statute, after conferring complete jurisdiction in condemnation matters upon the superior courts, indicates an exception: "Nothing herein contained shall be construed

to repeal any law of this State giving jurisdiction to the Public Utilities Commission to ascertain the just compensation which must be paid in eminent domain proceedings."

As mentioned in §3.2, the PUC is granted non-exclusive jurisdiction in cases where there is a grade separation for railroad crossings and in the acquisition of utility property by a political subdivision of the state. Under Pub. Util. Code §1206, the Commission may fix the compensation for property taken or damaged in the separation of grades for railroad crossings. [Note, this power may not be exercised in the taking of private property of private persons. S.H. Chase Lumber Co. v. Railroad Comm. (1931) 212 C 691, 300 P 12.] It is the option of the petitioner whether it wishes to proceed before the Commission. Pub. Util. Code §1217. And, under Pub. Util. Code §1403, any political subdivision may petition the PUC to acquire property of any public utility. But, again, only the condemnor has the election to proceed in this fashion. Pub. Util. Code §1421.

At the same time, other statutes within the Public Utility Code incorporate by reference the judicial system set forth in Title VII of Part 3 of the Code of Civil Procedure. See Pub. Util. Code §§7526(f), 7526(g), 7535 and 7536 in regard to the power of a railroad to acquire lands. [Under the first three of these statutes, it is noteworthy that there appears to be the requirement that a good faith attempt to negotiate has preceded the resort to a condemnation action (Cf. §2.4); the language common to each is: "If the persons

or corporations cannot agree as to the compensation, then resort to eminent domain proceedings may be had . . ."]

3. [§3.5] Recommendations

There is no difficulty with the jurisdictional language of section 1243, but overall the section is a cluttered statute. It should be divided into at least two major areas: jurisdiction and venue. Further, any reference to the complaint and summons, as well as the lis pendens, should be removed and placed elsewhere.

C. Venue

1. [§3.6] CCP §1243's Venue Provisions

The proper superior court in which a condemnation action is to be commenced is that for "the county in which the property sought to be taken is situated." In those cases where the property sought straddles county lines, the statute sets forth two provisos:

(1) Where any one portion of the property or interest in the property "is situated in one county and another portion thereof is situated in another county, the plaintiff may commence such proceedings in any of the counties where any portion of the property or interest in the property is situated, and the county so selected is the proper county for the trial of such proceedings."

(2) Where the following class of public entities -- county, city and county, incorporated city or town, or a municipal water district -- seeks property which "is situated in more than one

county, then the proceeding may be brought, at the option of the plaintiff, in any county wherein is situated any of the property sought to be taken, and said proceeding may be tried in said county with reference to any property situated in the state."

When section 1243 was first enacted in 1872, it simply read:

> All proceedings under this Title must be brought in the District Court for the county in which the property is situated. They must be commenced by filing a complaint and issuing summons.

The statute offered a straightforward rule but gave no direction where to institute an action taking property lying across county boundaries. In 1913, the Legislature introduced the above-mentioned provisos to rectify the situation. Cal. Stats. 1913, Ch. 200 at 349. Interestingly, the second differs from the first in specifying a particular class of plaintiffs, making no mention of an "interest in property" (Eminent Domain Comprehensive Statute §101, proposed by the California Law Revision Commission, tentatively approved April 1970, defines "property" to include an interest therein), and using the phrase that the county selected is proper "with reference to any property situated in the state." Although there appears to be no valid reason for saying twice what could be said once, perhaps the specification of a class and the mention of any property within the state offer a clue to the reason for the second proviso. It does tend to reinforce the right of a public entity which does not have statewide territorial

jurisdiction to condemn property outside of its boundaries. A county, for example, can acquire a parcel which lies across its common boundary with a neighboring county in one lawsuit which can be either filed and prosecuted in its own county or the neighboring county. Yet, the wording of the first proviso is actually broad enough to cover this situation. The distinction, thus, is without a difference and should not be repeated.

After these two provisos, section 1243 sets out a limiting provision which was also added in 1913 and modifies the first two: "provided, however, that the right in this section granted to any plaintiff to commence and try an action in any county other than the county in which may be located any property in said action sought to be taken, shall be limited to property which is owned by the defendant, or by the defendant in common with the other defendants, or some of them."

The phrase "in any county other than the county in which may be located any property" is poorly chosen and should have read "in any of the counties where any portion of the property is situated." But, the purpose was to prevent a plaintiff from filing a multi-parcel action affecting land across county lines which joins as parties defendant separate owners of each parcel. CCP §1244(5), discussed in §7.1, likewise provides: "All parcels of land, or other property or interest in or to property, lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff . . ." It again seems unnecessary to say the same or nearly the same thing in two places.

Such a view suggests that the more particularized language of section 1243's limiting provision be removed from that section and inserted to modify CCP §1244(5). This is recommended if multi-parcel actions are limited as urged in §7.2. Conversely, if multi-parcel actions are not restricted, venue is not discussed in section 1244 and all modifications defining proper venue should be together. Since CCP §1243 sets forth the right to choose between counties which each contain portions of the same condemned parcel, any restrictions may properly be noted there.

2. [§3.7] Change of Venue

The next portion of section 1243 is also involved in duplicating what is found elsewhere. It states: "The provisions of this code for the change of place of trial of actions shall apply to proceedings under this title except as in this section otherwise provided." CCP §1256, discussed in §§5.1-5.3, concerning rules of practice for eminent domain proceedings, says the same. However, the latter statute escaped the notice of the majority of Supreme Court justices in 1903, Santa Rosa v. Fountain Water Co. 138 C 579, 71 P 1123, despite a dissent which pointed out the existence and meaning of section 1256. Further, Professor Orrin L. Helstad, in his work A Survey and Critique of Highway Condemnation Law and Litigation in the United States 237 (1966), advises in a comment to his suggested Condemnation Procedure Act that the application or nonapplication of the general rules to change

of venue should be settled by statutory provision. His statement of nonapplication of the general rules regarding change of venue necessarily is placed in the jurisdiction and venue statute, which is followed immediately by a rules of procedure statute similar to CCP §1256. If the general rules apply, it is sufficient to state this but once in the broader rules of practice statute.

One of the general rules of practice which has been utilized to obtain a change of venue in California condemnation actions is CCP §394 which requires, in an action brought by a county, city and county, or city, against a resident of another county, city and county, or city, on the motion of either party, the transfer of the case to a neutral county. See Oakland v. Darbee (1951) 102 CA2d 493, 227 P2d 909. In that case, the condemnor sought six contiguous parcels within Alameda County for airport purposes; but each parcel was severally owned by one defendant or group of defendants. The fact that some of the defendants were residents of Alameda County did not prevent a change of venue by defendants who were residents of San Francisco, and a separation of their parcel from the consolidated action. Query: Does the change of venue proviso of section 1243 allow a plaintiff-county, city and county, or city, to file initially in a neutral county? If so, the phrase - "other than the county in which may be located any property in said action sought to be taken" - employed by the limiting provision discussed in §3.6, may be literally correct.

Venue can be changed on the motion of one defendant who does not join his co-defendants, on the ground that an impartial trial cannot be had in the county where the property lies. People v. Ocean Shore Railroad (1938) 24 CA2d 420, 422-424, 75 P2d 560. In this case newspaper articles and statements of local citizens showed widespread prejudice against the defendant railroad company. But, Riverside etc. Dist. v. Wolfskill Co. (1957) 147 CA2d 714, 717, 306 P2d 22, points out that payment of the award by the taxpayers of a particular county does not disqualify those people as jurors or provide a reason for change of venue. These rules, however, need not be spelled out in a venue statute, because they are incorporated through CCP §1256's rules of practice. See §5.2.

D. [§3.8] Recommended Statute

It is recommended that the statute for jurisdiction and venue take the following form:

(1) All proceedings in eminent domain must be commenced in the superior court of the county in which the property sought to be taken is located.

(2) Where the property sought to be taken is located in two or more counties, the plaintiff may commence such proceedings in the superior court of any one of the counties.

(a) The superior court so selected is the proper county for the trial of such proceedings, and all

subsequent proceedings regarding the property shall be brought in the same county.

(b) However, this right shall be limited to property owned by the same defendant, or by the same defendant in common with other defendants or some of them.

(3) Nothing contained herein shall be construed to repeal any law of this state which gives jurisdiction to the Public Utilities Commission to ascertain the compensation which must be paid in an eminent domain proceeding.

Comment: As long as Pub. Util. Code §§1201-1220 and 1401-1421 confer alternative jurisdiction on the PUC, this provision must be maintained.

A neater manner of saying the above, with the deletion of 2(b) and 3 is Pennsylvania's Eminent Domain Code §401:

> The court of common pleas shall have exclusive jurisdiction of all condemnation proceedings. All condemnation proceedings shall be brought in the court of common pleas of the county in which the property is located, or, if the property is located in two or more counties, then in the court of common pleas of any one of the counties. Where the property is located in two or more counties, and a proceeding is commenced in the court of common pleas of one of the counties, all subsequent proceedings regarding the same property shall be brought in the same county.

Section 4: OTHER JURISDICTION STATUTES

A.[§4.1] Introduction

While condemnation is a special proceeding of limited jurisdiction, the court has implied power under CCP §1243 to do all things and determine all issues incident to the proceedings. Felton Water Co. v. Superior Court (1927) 82 CA 382, 388, 256 P 255. Some of the incidental matters which the court may decide are spelled out in CCP §§1247 and 1247a.

B.[§4.2] CCP §1247

First, CCP §1247 provides that the court has power:

> 1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in subdivision 6 of Section 1240;
>
> 2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor; and
>
> 3. To determine the respective rights of different parties seeking condemnation of the same property.

1. [§4.3] Subparagraph (1)

Precisely what is the scope of the court's power to regulate and determine the manner of making intersections of rights of way? Initially, limitations on that power must be recognized.

Public Utilities Code §1201 prohibits railroad track crossings over other tracks, public roads, highways or streets at grade and vice versa, without first obtaining the approval of the PUC. Where an eminent domain complaint fails to state

that the Commission has authorized the crossing, no cause of action can be stated. Great Northern R. Co. v. Superior Court (1926) 126 CA 575, 14 P2d 889. (Note that this power of the PUC is not alternative as is its jurisdiction to determine compensation.) Thus, location of a railroad grade crossing is not for determination by the court.

But, in crossings of rights of way other than those involving railroad lines, is the statute actually speaking of location or place of crossing? A resolution adopted pursuant to CCP §1241(2) of the governing body of the public agency, authorizing the acquisition by condemnation of property within the territorial limits of the agency, is considered conclusive on the question of location.

Moreover, People v. Reed (1934) 139 CA 258, 263, 33 P2d 879, makes a distinction between laying out a new road and connecting a new highway with an existing highway or other road; only the latter comes within the provisions of CCP §1247. This case may be read to say that the manner of crossing, not location, is the only concern. Nonetheless, the fact is the statute employs the word "place." [Subsequent to this decision, in 1939 (Cal. Stats. 1939, Ch. 687 at 2204, as amended by Cal. Stats. 1953, Ch. 1200 at 2719), Sts. & Hwys. Code §100.2 was enacted to give the Highway Commission exclusive jurisdiction to determine crossing of any freeway by city streets, county roads or other public highways.]

The second half of Subparagraph (1) concerns the common use of the same right of way by two users. The sentence

structure placement of the reference to CCP §1240(6) modifies only this portion of the subparagraph. Yet a reading of CCP §1240(6) which states:

> All rights of way for any and all the purposes mentioned in section 1238, and any and all structures and improvements on, over, across or along such rights of way, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by or embraced within any other right of way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

would indicate that its language is broad enough to cover both halves of CCP §1247(1). See Comment, California Law Revision Commission's Eminent Domain Comprehensive Statute §471 at IX-5 (Staff Recommendation, September 1970), which statute concerns the taking of public property for a consistent use. If this is the case, then there may be no necessity for the first half of Subparagraph (1). And yet, the Legislature seemingly made "place" a matter of concern to the court in the first clause, while deleting its mention in the second clause.

An example of the court's review of a proposed common use which does not involve a crossing of the first right of way would be the longitudinal placement of an underground line within a surface or overhead easement. The holder of the first easement could resist the intrusion, contending construction and maintenance of the proposed underground easement will interfere with the prior use. Unless the interference

is found to be incidental, the court would have to balance the injury, perhaps conditioning the second use upon an adjustment of its alignment but not general location, in order to grant the common use. See generally 1 NICHOLS ON EMINENT DOMAIN §2.2[8], at 237-238 (Rev. 3d ed. 1964).

2. [§4.4] Subparagraph (2)

Subparagraph (2) is clearer but has received more attention in the appellate courts than Subparagraph (1).

Reed Orchard Co. v. Superior Court (1912) 19 CA 648, 665, 128 P 9, held that CCP §1248 together with §1247(2) provide ample authority for the court to settle any controversy between claimants regarding apportionment of the entire fund awarded. Subsequent to this case, in 1939, CCP §1246.1 was enacted (Cal. Stats. 1939, Ch. 210 at 1456) to furnish a specific procedure for apportionment of the award among co-owners.

Under CCP §1247(2) the court has the right to try title to the entire parcel where only a portion is acquired. Los Angeles v. Darms (1928) 92 CA 501, 128 P 924. And, having jurisdiction to determine all adverse and conflicting claims to the property, a city may in the same action assert its claim to an interest in the property and condemn the outstanding interest of others. Los Angeles v. Pomeroy (1899) 124 C 587, 57 P 585. This maneuver has received recent popularity as a result of the combined cases of Gion v. Santa Cruz and Dietz v. King (1970) 2 C3d 29, 84 CR 162. In these cases the

property owners attempted to terminate public recreational use of their beach areas. The City of Santa Cruz in the first case contended that the long term uninterrupted use by the public, the acquiescence of the previous owners and the expenditure of public funds on the property deprived the fee owners from restricting the public from these lands. In the second case involving property in Mendocino County, no governmental agency took an active part in maintaining the beach and road to it, but the public had used the land without regard to who owned it for over 100 years. The Supreme Court held that implied dedications of property rights were created in both cases in favor of the public. Condemnors are now looking more closely for similar elements to either bring a quiet title action or assert in a condemnation suit a public recreation easement over lands sought to be acquired, and then deduct the value of such easement from the value of the underlying fee.

But the device of the condemnor asserting an interest in the condemned parcel has been used in other situations, such as in cases where the condemnor holds a leasehold interest [State of Cal. v. Witlow (1966) 243 CA2d 490, 52 CR 336], or a roadway easement [People v. Vallejos (1967) 251 CA2d 414, 59 CR 450], to diminish the value of the underlying fee.

Finally, CCP §1247(2) relates to the complaint (CCP §1244) and answer (CCP §1246) in that the parties to an action can only be those having an interest in the property. San Joaquin etc. Irr. Co. v. Stevenson (1912) 164 C 221, 241, 128 P 924.

3. [§4.5] Subparagraph (3)

CCP §1247(3) is self-evident in purpose. Where two condemnors seek to take the same property, the court can determine their respective rights. This would include both mutually exclusive rights and rights that can be exercised in common.

Generally San Bernadino etc. Water Dist. v. Gage Canal Co. (1964) 226 CA2d 206, 211, 37 CR 856, holds that the plaintiff which files first in a court of competent jurisdiction prevails, because the action is one in rem. There defendant water company offered as a special defense to plaintiff's action that another action, previously filed by the City of Riverside condemning the same property, was pending. The trial court's stay of the second plaintiff's proceeding was ruled proper on appeal. Although this case appears to involve the problem envisioned by CCP §1247(3), it makes no mention of the section. Instead, it relies on sections 1243 and 1245.3, regarding jurisdiction and the conclusive nature of an eminent domain judgment respectively.

The case of Long Beach v. Aistrup (1958) 164 CA2d 41, 52-53, 330 P2d 282, however, does cite CCP §1247(3), together with section 1246.1 for the proposition: "After the amount of award has first been determined, the court is empowered in the same proceeding to determine the respective rights of the defendants having divided interests in the property and apportion the award accordingly." Either the court meant to cite Subparagraph (2) or it misconstrues the wording of Subparagraph (3) to produce more authority than it needs. Such is not the purpose of section 1247(3).

C. [§4.6] CCP §1247a

Code of Civil Procedure §1247a is a further amplification of the jurisdiction of the superior court to attend to all the problems which might arise in a condemnation action. This section, as CCP §1247(1), is divided into two areas of concern, but here the modification of only the second clause by reference to another code section, CCP §1240(3), seems properly placed. Code of Civil Procedure §1240(3) prohibits the taking a property already appropriated to a public use, unless the taking is for a "more necessary public use . . .", but does permit a taking of pre-existing public uses for a "consistent use."

1. [§4.7] The First Clause

The initial power conferred is "to regulate and determine the place and manner of removing or relocating structures or improvements." Marin v. Superior Court (1960) 53 C2d 633, 642, 2 CR 758, held that section 1247a authorizes the trial court to adopt a plan for relocation of structures appropriated to a public use by a public agency. In this case, a municipal water district, desiring to construct a reservoir, which would cover portions of two county highways, brought an action in eminent domain to resolve the relocation of the roads. But, because the roads were federally aided highways, neither the municipal water district nor the superior court could adopt specifications for their relocation.

2. [§4.8] The Second Clause

The secondary power conferred by this statute is to regulate and determine the manner "of enjoying the common use mentioned in Subdivision 3 of Section 1240." Again, as in the second half of section 1247(1), there is no mention of regulating the place of common use. An example of the jurisdiction of the court being invoked under the second clause of section 1247a is San Bernadino County Flood etc. Dist. v. Superior Court (1969) 269 CA2d 515, 75 CR 24. In that case East San Bernadino County Water District had filed an action against, and successfully withstood the challenge of, the Flood Control District and others to condemn a non-exclusive easement in the beds and banks of the water courses and channels owned by the Flood Control District and planned for an integrated flood control system. It was alleged, although not seriously advanced, id. at 519, that the taking was for a more necessary public use; the prime contention was that the two uses were compatible. A writ of prohibition restraining the superior court from exercising jurisdiction over the condemnation action was sought by the Flood Control District. Finding the Water District use in conflict with the proposed use by the Flood Control District, the appellate court ruled that the Water District was unauthorized to maintain its action in eminent domain. The result of the Water District suit would prevent the Flood Control District which owned the lands from constructing its proposed project and "have the superior court redesign it." Id. at 525. The court in effect said that it was appropriate to review a common use but

not to suggest alternatives to incompatible use.

Query: Is the court's regulation and determination of the manner of common use restricted to granting or denying the second use based solely on the conditions advanced by the proposed manner of construction? (Cf. remarks found at conclusion of §4.3.) If the answer is affirmative, modifications of those conditions to make the uses more compatible might be pleaded by the plaintiff in a second suit, after denial of the first. Such a narrow view of "regulation" denies the meaning of the word. If the court determines the use to be compatible, "regulation" implies modification of an otherwise compatible use. An incompatible use cannot be redesigned by the court in the first instance or by a multiplicity of actions.

The San Bernadino decision also pointed out: "Subdivisions 3 and 6 of section 1240 of the Code of Civil Procedure govern a taking for a common compatible use and sections 1247 and 1247a of the Code of Civil Procedure empower the court to regulate the manner in which the common uses shall be enjoyed." Id. at 521-522. (Examples of the more familiar common use are "crossings, intersections or rights-of-way, or the maintenance of utility transmission facilities in highway rights-of-way." Ibid.) The indication is that sections 1240(3) and 1240(6) should be taken together to modify both CCP §§1247(1) and 1247a, which in turn should be combined.

A Comment to California Law Revision Commission's Eminent Domain Comprehensive Statute §471 at IX-4 to IX-5 (Staff Recommendation, Sept. 1970), points to an inconsistency

between Subdivisions (3) and (6) of section 1240:

> Subdivision (3) of former Code of Civil Procedure Section 1240 referred only to property "appropriated to a public use or purpose, by any person, firm or private corporation," thereby implying that property appropriated to a public entity could not be subjected to imposition of a consistent use. However, subdivision (6) of that section authorized the imposition of "rights-of-way" with no such limitation.

See also San Bernadino County Flood etc. Dist. v. Superior Court, supra at 523-524, ftn. 10. The Commission recommends the approach of Subdivision (6) to encourage common use.

D. [§4.9] Recommended Statute

It is recommended that CCP §§1247 and 1247a be combined into one statute:

The Court shall have power:

(1) To determine and regulate the manner of enjoying the common use mentioned in CCP §1240(3) and (6) [Eminent Domain Comprehensive Statute §471(a), recommended by the California Law Revision Commission (Sept. 1970)];

Comment: "Determine" is used in the sense of deciding whether the second use is allowed or denied; and "regulate" permits the court to impose conditions but not to redesign either of the two uses.

(2) To determine and regulate the manner of making connections and crossings of rights of way;

Comment: Since a common use usually occupies a greater portion of the prior public improvement than

crossings, a separate subdivision regarding crossings is appropriate. Further, because the word "place" implies location which most often is beyond the scope of the court's review, this is deleted. On the other hand, place or location may be an appropriate area of court concern in overlapping public use; the necessity for a particular location may not be absolute under a resolution authorizing interference with another public use.

(3) To determine and regulate the place and manner of removing or relocating structures or improvements;
Comment: Here, "place" is intentionally retained.

(4) To determine the respective rights of different parties seeking condemnation of the same property;
Comment: This could be deleted under the rule of San Bernadino etc. Water Dist. v. Gage Canal Co. (1964) 226 CA2d 206, 211, 37 CR 856, holding that the plaintiff that files first obtains jurisdiction.

(5) To determine all adverse or conflicting claims to the property sought to be condemned;
Comment: Here, the clause of CCP §1247(2), relating to damages for conflicting claims to the property condemned, is deleted on the ground that it is covered by CCP §§1246.1 and 1248(1); but the portion

retained is relevant in those cases where a condemnor asserts some claim of title to the property in order to diminish the value of the take.

(6) To determine all issues incident to the proceedings.

Section 5: RULES OF PRACTICE

A. [§5.1] Introduction

The rules of practice applicable in an eminent domain proceeding are related to the jurisdictional powers conferred upon the court and should immediately follow those sections.

Code of Civil Procedure §1256 defines the rules of practice applicable to a California condemnation action stating: "Except as otherwise provided in this title, the provisions of part two of this code [CCP §§307-1062a] are applicable to and constitute the rules of practice" in an eminent domain proceeding.

The same language, found in section 1256, is repeated in other special proceeding procedural laws: CCP §1109 for writs of review, mandate and prohibition, CCP §1177 for unlawful detainer, and CCP §1201.1(a) for mechanics liens. See Holman v. Totem (1942) 54 CA2d 309, 316, 128 P2d 808.

B. [§5.2] Scope of CCP §1256

The Code Commissioners' Notes cited by West's California Code of Civil Procedure under the statute provide:

> The object of this section is to give a trial by jury in every case, if demanded, and when not demanded, a trial by the Court; and to conform the practice in these proceedings as near as practicable to that in civil actions. The advantage to having the practice in different proceedings in the Courts as nearly uniform as possible is manifest.

As the latter portion of the Code Commissioners' Note indicates, this section has the broader purpose of making the

general rules of practice for civil proceedings applicable to a condemnation action. People v. Clausen (1967) 248 CA2d 770, 779, 57 CR 227; People v. Buellton Development Co. (1943) 58 CA2d 178, 183, 136 P2d 793; and Holman v. Totem (1942) 54 CA2d 309, 316, 128 P2d 808.

Some examples of general procedural rules incorporated by section 1256 are: change of venue under CCP §394, Oakland v. Darbee (1951) 102 CA2d 493, 494, 227 P2d 909, and Stockton v. Ellingwood (1926) 78 CA 117, 121, 248 P 272; dismissal for failure to serve and return summons within three years under CCP §581(a), Dresser v. Superior Court (1965) 231 CA2d 68, 70, 41 CR 473 (but the same section forbidding voluntary dismissal where affirmative relief is sought by cross complaint is inapplicable and does not prevent abandonment of a condemnation action, People v. Buellton Development Co., supra at 189); CCP §409 which provides that the lis pendens gives constructive notice from the time of filing [recording], Roach v. Riverside Water Co. (1887) 74 C 263, 265, 15 P 776; and the filing and entry of verdict and judgment are required to conform to CCP §§632 and 668, Fountain Water Co. v. Dougherty (1901) 134 C 376, 377, 66 P 316.

Although section 1256 refers only to the rules of practice embodied in CCP §§307-1062a, it has been used to reach beyond those provisions. For instance, in John Heinlen Co. v. Superior Court (1911) 17 CA 660, 121 P 293, CCP §170 relating to judicial disqualification because of a financial

interest was made applicable; and in Kohn v. Superior Court (1966) 239 CA2d 428, 48 CR 785, CCP §170.6 regarding prejudice as a ground for judicial disqualification was applied to an eminent domain case.

Moreover, other special proceedings which are outside the scope of CCP §§307-1062a are applicable to condemnation actions: certiorari will lie to review a void order, California Pac. R. Co. v. Central Pac. R. Co. (1874) 47 C 528, 530; prohibition is proper where the court lacks jurisdiction, La Mesa v. Superior Court (1925) 73 CA 90, 94, 238 P 117; and mandamus can be employed to compel the trial court to reinstate pleadings improperly struck, Holtz v. Superior Court (1970) 3 C3d 296, 90 CR 345 (this is an inverse condemnation case), and to modify an award to conform to the jury verdict, San Francisco v. Superior Court (1928) 94 CA 318, 320-321, 271 P 121.

The rule of construction for incorporating general rules of practice otherwise applicable is set forth in Harrington v. Superior Court (1924) 194 C 185, 193, 228 P 15: "Such construction is not opposed to the terms of the statute, and hence the usual rule of practice would apply." Further, the dissent of former Chief Justice Beatty in 1903, Santa Rosa v. Fountain Water Co. (1903) 138 C 579, 580-581, 71 P 1123, invoked the standard of applying general rules of procedure which do not impair the power of eminent domain.

C. [§5.3] Suggestion Regarding Bifurcation of Preliminary Issues From Issue of Valuation

It has been suggested by the Southern Section of the California State Bar Committee on Governmental Liability and Condemnation (January 10, 1970) that consideration be given by the California Law Revision Commission to making available as a matter of law to each side the bifurcation of nonjury issues from the jury question of compensation. For example, "What constitutes the larger parcel for valuation, severance damage, and for special benefit purposes; whether or not there exists an impairment of access; and, other matters subject to Court determination before they are submitted to the jury as trier of fact should be capable of easy separation and trial, preferably in advance of completion of the final appraisal reports."

This suggestion is not to be confused with a bifurcated trial on the issue of public use, for which the California Law Revision Commission recommends Eminent Domain Comprehensive Statute §2401 to raise preliminary objections to the condemnor's right to take. See discussion at §11.5. The preliminary issues considered here concern the right to compensation or theories for compensation.

Vallejo etc. R.R. Co. v. Reed Orchard Co. (1913) 169 C 545, 556, 547 P 238, stated: "[E]xcept in those relating to compensation, the issues of fact in a condemnation suit are to be tried by the court . . ." See also Oakland v. Pacific Coast Lumber etc. Co. (1915) 171 C 392, 153 P 705.

Presently, California provides for the separate trial of severable issues in CCP §§597, regarding special defenses not involving the merits of the case, 597.5, regarding the issue of an action being barred by the statute of limitations in a suit for professional negligence, and 598, concerning trial of the issue of liability before damages.

Generally, under sections 597 and 598 a motion for a bifurcated trial may be made by either party and it is within the discretion of the court to sever the issues; under section 597.5, the question of statute of limitations must be tried separately when it is raised by answer and either party so moves for a separate trial. A decision or verdict in favor of the defendant gives rise to judgment in favor of that party and no trial on the other issues in the action shall be had, but the plaintiff has the right of appeal.

Code of Civil Procedure §597 has been recognized as authority for a separate trial on the special issue of public use, which if decided in favor of the defendant would bar prosecution of the condemnation action. San Mateo v. Bartole (1960) 184 CA2d 442, 435, 7 CR 569.

There is further authority for the court to separate issues for a trial found in Evid. Code§320 (formerly CCP §2042): "Except as otherwise provided by law, the court, in its discretion, shall regulate the order of proof." Although not specifically incorporated by CCP §1256, this is the authority the parties to an eminent domain action would rely upon to seek bifurcation of preliminary nonjury valuation issues.

It has been the experience of this writer that when a separation of such preliminary issues, which are matters of consequence, is deemed desirable by one party, that decision is often concurred in by the other side. The primary reason for this agreement has been to minimize the appraisal expense of exploring alternate theories of value which may or may not be appropriate pending a determination of preliminary questions.

Because CCP §§597, 597.5 and 598 are rules for specific situations, it appears advisable to make a special rule of practice for eminent domain proceedings regarding the separation of nonjury issues from the jury issues of compensation and damage.

However, the decision on these separated issues should not be appealable until conclusion of the trial of the other issues, because such a ruling may not necessarily determine the final issue as does a special defense or statute of limitations. One way to avoid what may be inevitable after determination of a key preliminary issue was followed in People v. Lynbar, Inc. (1967) 253 CA2d 870, 62 CR 320. When the trial court ruled that it was proper for the appraisers to consider the actual rent under a long-term lease rather than the economic rent in utilizing an income approach to the value of the condemned property, the State Division of Highways stipulated to judgment at a figure indicating this adjustment by its witnesses in order to take an immediate appeal of the court's decision. This maneuver is likewise available where, for example, the trial court concludes there

has been no abandonment of a public street, and the underlying fee commands only nominal value because of the burden of the easement. People v. Vallejos (1967) 251 CA2d 414, 59 CR 450.

In those cases where the outcome of the main issue is not so evident, the priority given to eminent domain cases (CCP §1264) would bring the second phase of the bifurcated trial to quick conclusion. Hence, bifurcation of nonjury from jury valuation issues, without the right of appeal until decision or verdict on all issues, has the advantage of shortening jury trial time while not giving rise to more appeals than presently occur.

D. [§5.4] Recommendations

It is recommended that section 1256 be modified to reflect that it incorporates more than Part 2 of the Code of Civil Procedure. The wording of Federal Rule §71A(a) offers a guide to the proper wording:

> The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real property and personal property under the power of eminent domain, except as otherwise provided in this rule.

California's statute might read as follows:

> The general rules of practice set forth in the Code of Civil Procedure govern the procedure for proceedings in eminent domain, except as otherwise provided in this Code.

Comment: If a Comprehensive Eminent Domain Code is

enacted as urged by the California Law Revision Commission, its purpose should answer the objection: "a provision that one set of rules is to apply 'except as otherwise provided' somewhere else is always subject to the danger that it may be--and frequently is--difficult to determine just what has been 'otherwise provided'." 3 Barron and Holtzoff, FEDERAL PRACTICE AND PROCEDURE §1516 at 348 (Supp. 1969). Note further that this wording is broad enough to make applicable the general rules for change of venue, as recommended in §3.7.

Regarding the bifurcation of nonjury issues from the jury issues of compensation and damage, such a rule would either become a second section to CCP §1256 or be stated as a separate statute. The language for this rule of practice could take the following form:

> Upon the motion of either party, after notice and hearing, not later than the close of the pretrial conference in cases in which a pretrial conference is to be held, or, in other cases, no later than 45 days prior to trial, the court may make an order that the trial of severable nonjury issues, regarding the right to or elements necessary to compensation, damages, and/or benefits, be tried before the court separately preceding the trial of the ultimate issue of just compensation. The decision of the court upon these preliminary issues shall govern the trial of the

ultimate issue and merge therewith for the purpose of judgment.

Comment: This provision does not suggest that title between various claimants, excluding the condemnor, should be tried by the court in advance of the valuation part of the trial. That determination would still be governed by CCP §1246.1. See People v. Shasta Pipe etc. Co. (1968) 264 CA2d 520, 536-537, 70 CR 618.

Related to CCP §1256 but considered elsewhere are CCP §§1256.1, regarding burden of proof, and 1257, the procedure for new trials and appeals. Also somewhat related is section 1250 concerning new proceedings to cure defective title. These sections will be considered in subsequent studies of trial and post-trial procedures.

Section 6: COMMENCEMENT OF EMINENT DOMAIN PROCEEDINGS

A. [§6.1] CCP §1243

Within CCP §1243 is described the manner of commencing an eminent domain proceeding: "All such proceedings must be commenced by filing a complaint and issuing summons." Simply to avoid the present clutter of section 1243, this process of instituting an action should be stated elsewhere.

B. [§6.2] Delete Mention of Issuing Summons

The complaint alone confers jurisdiction. Bayle-Lacoste & Co. v. Superior Court (1941) 46 CA2d 636, 116 P2d 458. Hence, it is not necessary to include the words "and issuing a summons" in section 1243.

C. [§6.3] Recommendations

An alternative, to establishing a separate section for the commencement of eminent domain proceedings, is to make the language recommended below the first clause of a statute describing the contents of the complaint. But, if the new language stands alone, a section relating to the recording of the lis pendens, which also ought to be separated from section 1243, might be placed before the general complaint statute found in §7.6.

The new language to accomplish the above would read as follows:

> Eminent domain proceedings shall be commenced by the filing of a complaint.
>
> Comment: The terminology for the initial condemnation pleading is subject to modification as noted in §7.5.

Section 7: THE COMPLAINT

A. [§7.1] CCP §1244's Required Contents

A condemnation complaint is required by CCP §1244 to contain five parts:

(1) The name of the plaintiff in charge of the public use for which the property is being sought. The decision when to use the power of eminent domain belongs to the legislative body of the condemning agency. In the event of authorizing action to employ this power, the suit must be brought in the name of the condemning agency. However, where an access road was required as a condition to a subdivision of private property, the private corporation subdividing the property could not sue in the name of the municipality requiring the access road, although it could do so in its own name under CC §1001. Sierra Madre v. Superior Court (1961) 191 CA2d 587, 12 CR 836.

Leaping over the other necessary contents of the complaint set forth in subsections (2)-(5) of section 1244, further modification of the first requirement is found in the last sentence of the statute:

> When application for the condemnation of a right of way for the purpose of sewerage is made on behalf of a settlement, or of an unincorporated village or town, the board of supervisors of the county may be named as plaintiff.

(2) The names of all persons possessing an interest in the property, or a statement that they are unknown. Code of Civil Procedure §1245.3 provides two phrases to cover the

latter situation: "all persons unknown claiming any title or interest in or to the property"; and, where there is no executor or administrator of an estate through which persons claim an interest, "the heirs and devisees of . . . . . (naming such deceased claimant), deceased and all persons claiming by, through, or under said decedent."

"Parties to be named defendant are entirely within the control of the plaintiff." People v. Shasta Pipe etc. Co. (1964) 264 CA2d 520, 537, 70 CR 618. But, failure to join a party who holds a recorded interest in the property leaves that interest unimpaired; and that party is free to later file an inverse condemnation action to seek compensation for the taking of his unimpaired interest. Wilson v. Beville (1957) 47 C2d 852, 855, 306 P2d 789. This case also points out that CCP §§1245.3, 1248(1) and (8), and 1252 touch upon the same subject matter as CCP §1244(2).

(3) A statement of the right of the plaintiff. Generally, CCP §§1238 and 1238.1-1238.7 categorize approved public uses.

The case of Los Altos School Dist. v. Watson (1955) 133 CA2d 447, 449, 284 P2d 513, declared this provision "does not . . . mean that plaintiff must allege it was empowered by a valid or any resolution of its board to proceed in condemnation." "It is sufficient to allege that the taking was sought pursuant to the provisions of Title VII, Part III, of the Code of Civil Procedure." Kern County Union High School Dist. v. McDonald (1919) 180 C 7, 10, 179 P 180.

Nor is it necessary to allege compliance with CCP §1242 in respect to location of the site -- that is, the property "is located in the manner which will be most compatible with the greatest public good and the least private injury." Montebello etc. School Dist. v. Keay (1942) 55 CA2d 838, 841-842, 131 P2d 384. Nevertheless, failure to comply with section 1242 may be a defense to a condemnation action if the defendant makes an issue of it by his pleading. Pasadena v. Stimson (1891) 91 C 238, 255-256, 27 P 604.

On the other hand, CCP §1241, requiring a condemnor to show that the use for which the property is being acquired is a use authorized by law and that the taking is necessary to that use, is construed in conjunction with CCP §1244. Hence, both general allegations of public use, Orange County Water Dist. v. Bennett (1958) 156 CA2d 745, 751, 320 P2d 536, and necessity, Linggi v. Garovotti (1955) 40 C2d 20, 26-27, 286 P2d 15, are necessary elements of a complaint.

In order to provide the property owner with some understanding of why his property is being taken, a complaint should set forth or summarize the resolution authorizing condemnation. Currently, the State Division of Highways in its first pleading either sets out in full the Highway Commission's resolution or includes this paragraph:

> Prior to the commencement of this action, at a meeting of the California Highway Commission duly and regularly convened at Sacramento, California, on _____, 19___, said California Highway Commission duly and regularly passed and adopted Condemnation Resolution No. _____ stating and determining that public interest and necessity

> require the acquisition of certain real property in fee simple absolute unless a lesser estate is described herein for State highway purposes in connection with State highway, Road _____, declared a freeway. The use of the real property described in said resolution is a public use authorized by law.

Either manner of pleading satisfies the requirement of a general allegation of necessity.

(4) If a right of way is being acquired, a map must be attached to the complaint to show the location, general route and termini of the right of way. This subsection relates only to right of way acquisitions, Sacramento etc. Dist. v. Pacific Gas & Elec. Co. (1946) 72 CA2d 638, 645, 165 P2d 741. Where the complaint seeks the whole parcel and not a right of way thereover, it is not necessary to comply with this provision. Deseret etc. Co. v. State of California (1914) 167 C 145, 157, 138 P 981.

The map must show the location, general route and termini of the right of way. See Pasadena v. Stimson (1891) 91 C 238, 252, 27 P 604. The general route requirement does not show how a project particularly affects an individual parcel being acquired, although Stimson talks of the particular route being depicted by the map supplied in that case. [See also CCP §1247b which, in cases where only a portion of the property is sought, entitles the defendant, upon request made at least thirty (30) days prior to trial, to "a map showing the boundaries of the entire parcel, indicating thereon the part to be taken, the part remaining . . ."]

(5) A description of the land or property interests being acquired and whether it is a total or partial take. Because of the right granted the condemnor by CCP §1242 to enter the property to make surveys, no excuse for insufficient description exists. California Cent. Ry. Co. v. Hooper (1888) 76 C 404, 413, 18 P 599. The map attached to a complaint for right of way acquisition is not sufficient to establish the amount of the land to be condemned. "This must be determined by averments in the complaint." People v. Thomas (1952) 108 CA2d 832, 840, 239 P2d 914. The map and description, however, can be viewed together to identify the property taken. San Francisco etc. R.R. Co. v. Gould (1898) 122 C 601, 602-603, 55 P 411. Finally, it is not necessary to describe the remaining land subject to severance damage in a partial acquisition. People v. Broome (1932) 120 CA 267, 271, 7 P2d 757.

B. [§7.2] Multi-Parcel Complaint

The second sentence under subdivision (5) of this statute gives the plaintiff the option to place all parcels of land or other interests for a particular public project in the same or separate proceedings. But the court has the discretion to consolidate or separate actions within the same project to suit the convenience of the parties for the purpose of trial. This option is not limited to several parcels owned by the same defendant, Sacramento v. Glann (1910) 15 CA 780, 788, 113 P 360, except in regard to county boundaries

as mentioned in §3.6. The State Division of Highways and other condemnors sometime include in one complaint several parcels adjacent to one another under different ownership, arbitrarily assigning each parcel a number against which is stated the various ownerships and interests. At the time of settlement or trial, these parcels are broken out of the en masse complaint.

Weiler v. Superior Court (1922) 188 C 729, 732-733, 207 P 247, spells out the consequences of such a complaint. "The damage will in no particular depend upon the damage to others. Neither party will be interested in any allowance for damages except his own. . . . The action with respect to each party is of the same character as if he was the sole defendant."

The Southern Section of the State Bar Committee on Governmental Liability and Condemnation (January 10, 1970) criticized multi-parcel cases as "confusing not only to the property owner involved when a case name is different than the owner's but also [posing] problems for the court and various court personnel handling various trials in multi-ownership and multi-parcel cases." The criticism is justified. Since the burden of running off extra form complaints is not great, the condemnor should only have the option to include in the same complaint parcels owned by the same defendant or by the same defendant in common with other defendants or some of them. See §3.6 concerning venue. The court still should have the discretion to consolidate or separate actions

for trial upon motion by either party.

Lastly, it has been contended unsuccessfully that section 1244(5) permits consolidation only where the properties are being condemned for the same public use. In Los Angeles v. Klinker (1933) 219 C 198, 211, 25 P2d 826, part of defendant's land was being acquired for public buildings and grounds and the remainder for a street. It was there held that under CCP §§1048 and 1256, the trial court had discretion to make the order of consolidation where no injury could be done to the property owner because the two actions covered the whole of its property. Any statutory revision should not change this rule.

C. [§7.3] Amendments

As in all other civil actions, amendments are allowed in condemnation proceedings to alter the allegations of the plaintiff, including the lessening or increasing of the quantity of land being acquired. Kern County Union High School Dist. v. McDonald (1919) 180 C 7, 15, 179 P 180. However, depending upon the timing of an amendment to reduce the size of the take, there may be a question of partial abandonment under CCP §1255a(c).

D. [§7.4] Allegation of Value and Verification of Pleading

Two related suggestions to the California Law Revision Commission by the Southern Section of the State Bar Committee on Governmental Liability and Condemnation (January 10, 1970) are: first, to study the desirability of requiring the

plaintiff to make allegations of value, damage and/or benefits in its complaint; and, second, to study whether the complaint should be verified by an officer, agent, or responsible employee of the plaintiff.

A condemnation complaint containing a verified allegation of compensation would take the initial figure presented to the landowner out of the category of "offer," e.g., People v. Glen Arms Estate, Inc. (1964) 230 CA2d 841, 41 CR 303, and make it a statement of fact which would provide a floor to the condemnor's testimony at trial.

The dual suggestion apparently is directed toward combatting what is termed by condemnee attorneys as "lowballing" or "sandbagging." The circumstances giving rise to this practice follow a typical pattern. The condemning agency begins negotiations for the property being sought based upon one appraisal, perhaps a staff product; thereafter, when settlement is judged impossible, it employs a second appraiser to take a closer look at the question of value. The "sandbagging" occurs where the second appraiser comes in with an opinion of value which is lower than the first. Then the higher offer is withdrawn, and the author of the opinion on which it was based is never called to testify at the subsequent trial. This practice is universally criticized by attorneys for property owners, because it penalizes the defendant who seeks judicial resolution of the condemnation of its land.

The primary device available to counteract this tactic suffers from a serious drawback. Although courts have

permitted the first appraisal to be introduced in evidence, the hidden appraiser must be called by the other side and made its own witness rather than an adverse witness. People v. Cowan (1969) 1 CA3d 1001, 81 CR 713; Pleasant Hill v. First Baptist Church (1969) 1 CA3d 384, 425, 82 CR 1. (Note that in the latter case, the hidden appraiser was not that of the condemnor but of the condemnee. Certainly, the "sandbagging" tactic is not the exclusive province of the condemnor.)

Besides having to make the witness your own, there are other disadvantages to the present method of self-defense. First, the identity of the hidden appraiser must be discovered. And, second, there is no certainty that, if discovered, the witness can be called. See People v. Younger (1970) 5 CA3d 575, 86 CR 237, where the property owner's attempt to call the discarded appraiser was denied as highly improper.

A requisite that a condemnation complaint be verified would be largely redundant in that CCP §1256 incorporates CCP §446 which provides in part:

> When the state, any county thereof, city, school district, district, public agency, or public corporation, or an officer of the state, or of any county thereof, city, school district, district, public agency, or public corporation, in his official capacity is plaintiff, the complaint need not be verified.

Also, under this section a complaint by such a party plaintiff demands a verified answer, unless the defendant is also a member of the above class. In other words, the condemnation complaint of a public entity is deemed verified. Only privately owned public utilities, having the power of

eminent domain, are omitted from the applicable class.

The point, thus, is not whether the complaint ought to be verified but whether it contains allegations of value, damages and/or benefits. Initially, it may seem axiomatic, in a case where the ultimate question to be resolved is compensation, that the question be put in issue by the pleadings.

The law is presently one-sided in favor of the condemnor. Code of Civil Procedure §1244 requires no allegation of value in the complaint, while section 1246 makes each defendant state in its answer the amount claimed for each item of damage specified in CCP §1248. Yet, condemnation-wise attorneys avoid this allegation by one of three ways. The answer may simply plead: "defendant be awarded just compensation for the taking of the property described in the complaint;" or, more closely complying with CCP §1246, allege: "at this time the fair market value of the property being taken is unknown to defendant, and defendant requests leave to amend this answer to show the actual value when the same has been ascertained." Another alternative is to insert a figure of value which is twice the outside limits of any foreseeable opinion. Condemning agencies concerned with moving a case toward trial within the one year from the date of issuance of summons, seldom quarrel with such answers.

Eminent Domain Comprehensive Statute §2400, proposed by the California Law Revision Commission staff, strikes the need for an answer to contain statements of value and damage. This author concurs in that recommendation, see §11.4. By

adopting this statute and adding an allegation of value to the complaint, the existing one-sidedness of the present system would be reversed. Condemnee attorneys probably argue that this is as it should be. The condemnor which holds an appraisal on the property sought, before it begins negotiations with the property owner, can more easily make the allegation than the defendant. Nevertheless, the proposal may encourage the undesired practice of condemnors relying exclusively upon staff or outside appraisals which look narrowly at the property to be acquired. A natural consequence will be lower initial offers to property owners, creating a potential for higher fees to the attorneys who represent them. To counter this possibility, there would have to be a penalty imposed upon the tight-fisted condemnor, such as payment of reasonable attorney's fees and costs where an award exceeds a certain percentage of the amount alleged in the complaint.

Whether more from my prejudice of working for a condemning agency or from the uncertain results of the practical application of this suggestion, it appears a better course to delete the necessity of a condemnee to plead value through its answer.

E. [§7.5] Nomenclature

Another suggestion is that the term "complaint" with its corresponding designation of parties "plaintiff" and "defendant" is not appropriate to an action in eminent domain. The word "defendant" places a subtle stigma of fault upon the property

owner which does not belong to one whose land happens to be in the path of a public project. Moreover, the wording "condemnation complaint" implies in the mind of some that the property suffers a defect.

This nomenclature could all be changed by retitling the complaint a "Petition for Eminent Domain." For example, a petition for dissolution of marriage [CC §4503 and CCP §426(c)] has replaced a complaint for divorce as one measure to take the fault finding aspect out of such proceedings.

The term "petition" connotes a request or prayer for the authority to do some act which requires the sanction of the court. For this reason, it is usually, but not exclusively, employed in quasi-judicial and administrative eminent domain procedural systems, where the preliminary question of the right to take is determined before compensation is considered.

The word in this sense does not fit the California system. But Eminent Domain Comprehensive Statute §2401, recommended by the California Law Revision Commission staff, would modify the California procedure and provide a reason for change of terminology. That section gives the property owner an opportunity to question the taking of his property by filing preliminary objections to the complaint within 45 days after service of summons. Thus, there would be an obvious opportunity to invoke the sanction of the court for the taking before contesting the compensation to be awarded. Finally, "petition" as "complaint" does indicate the first pleading.

The only objection to such a small change in form is that the change and adjustment to it by the practitioner might outweigh the benefit.

F. [§7.6] Recommended Statute

A statement that a condemnation action be commenced by the filing of a complaint [petition] (see §6.3) can be made the first part of a new statute which then continues as follows:

(2) The complaint [petition] shall contain:

(a) The name of the person in charge of the public use for which the property is sought, who shall be styled the plaintiff [petitioner];

Comment: The last sentence of CCP §1244, which concerns naming the board of supervisors of the county in condemnation actions for right of way for sewage purposes for a settlement or unincorporated town, is deleted as unnecessary.

(b) The names of all owners and claimants of the property, who shall be styled defendants [respondents];

Comment: The naming of defendants statute set out in §8.4 may be merged with subsection (2)(b).

(c) The public use for which the property is required; and a statement of the facts showing the necessity of its acquisition for such use;

Comment: The first half of subsection (2)(c) requires only a statement of the proposed public use

and not the condemnor's general statutory authority for invoking the power of eminent domain. It recognizes that property can only be taken by condemnation for a public use. Cal. Const., Art I, §14. The latter half calls for either a synopsis of the resolution of necessity [see CCP §1241 (or Eminent Domain Comprehensive Statute §311, recommended by the California Law Revision Commission, tentatively approved May 1970) for elements to be included in such a resolution] or the incorporation of the resolution itself in the pleading.

(d) A description of the property to be condemned; and

(e) If only a portion of the property is being condemned, a map showing the boundaries of the entire parcel and indicating thereon the part to be taken.

Comment: This subsection requires a map in all partial takes, not just right of way acquisitions; it further makes the map which may be requested under CCP §1247b part of the complaint [petition].

(3) Plaintiff [petitioner] may include in the same complaint [petition] all parcels required for the same public use, owned by the same defendant [respondent], or by the same defendant [respondent] in common with other defendants [respondents] or some of them.

Comment: This language would remove the necessity of similar language found in subsection 2(b) of the

recommended statute for jurisdiction and venue at §3.8.

(4) The court may consolidate or separate proceedings to suit the convenience of the parties upon the motion of either party.

Comment: To consolidate more parcels than the limit given in subsection (3), the condemnor must seek the permission of the court; and to separate what the condemnor has consolidated, the condemnee must also come to the court. The court is then expected to exercise its discretion and balance the convenience of consolidation or separation to both parties.

Section 8: NAMING OF DEFENDANTS

A. [§8.1] Generally

Code of Civil Procedure §1244(2) requires a complaint to contain the names of all owners and claimants of the property condemned, if they are known, or a statement that they are unknown.

B. [§8.2] Unknown Defendants

The first sentence of CCP §1245.3 provides the manner of naming unknown defendants: "all persons unknown claiming any title or interest in or to the property." This simply is a recognition that all persons who claim an interest in the property condemned, even though not named, may appear by answer. CCP §1246.

Interestingly, CCP §1244(2) states that the complaint "must" contain the names of all known owners or claimants, or a statement that they are unknown; while CCP §1245.3 says that, in addition to persons of record or known, the plaintiff "may" name as defendants unknown claimants to the property. The resolution of this conflict lies in favor of the permissive naming of unknown defendants, because unrecorded and unknown interests do not affect title to the land. Wilson v. Beville (1957) 47 C2d 852, 306 P2d 789.

For the purpose of service, condemnors usually name several does as defendants, alleging they "have or claim to have an interest in the property, the exact nature of which is unknown to plaintiff" and praying leave to amend the

complaint to show their true names and capacities when ascertained. This satisfies the requirements of CCP §§1244(2) and 1245.3, the latter of which, except for its use of the word "may," appears to be surplusage as regards naming unknown defendants.

C. [§8.3] Deceased Claimants

The second clause of the first sentence of CCP §1245.3 concerns the naming of deceased claimants:

> [I]f any person who appears of record to have or claim an interest or who is known to plaintiff to have or claim an interest in the property is dead or is believed by plaintiff to be dead, and if no executor or administrator of the estate of said person has been appointed . . ., . . . and said facts are averred in the complaint . . ., plaintiff may also name as defendants, "the heirs and devisees of ..... (naming such deceased claimant), deceased and all persons claiming by, through, or under said decedent," naming them in that manner, and if it is alleged that any such person is believed by plaintiff to be dead, such person may also be named as a defendant.

The purpose of this provision is to allow the condemnation suit, an action in rem, to be initiated and proceed without the making necessary and delay of awaiting the appointment of an executor or administrator of the estate of a deceased property owner or claimant.

The statute then goes beyond the scope of naming defendants and spells out the manner of serving unknown heirs and devisees. This is followed by two paragraphs which concern the trial of a condemnation suit involving deceased claimants and the binding effect of the judgment upon both heirs and devisees of deceased claimants as well as unknown claimants.

The first of these three additional items should be placed under the service of process statute (see §9.4), the second item under either CCP §1248 or §1252, and the third item under CCP §1253 or another statute defining the binding effect of the judgment.

D. [§8.4] Recommended Statute

Adapting the model suggested in Helstad, A Survey and Critique of Highway Condemnation Law and Litigation in the United States 242-243 (1966), the following statute is suggested:

> The following rules apply to the naming of defendants [respondents] in the complaint [petition]:
>
> (1) Plaintiff [petitioner] shall join as defendants [respondents] only those persons who appear of record or are known to plaintiff [petitioner] to have or claim an interest in the property.
>
> (2) In addition to those persons, plaintiff [petitioner] may name all persons unknown claiming any interest in the property.
>
> (3) If any person, who appears of record or is known to plaintiff [petitioner] to have or claim an interest in the property, is dead or believed by plaintiff [petitioner] to be dead, and if no executor or administrator of the estate of the

decedent has been appointed and qualified to act as executor or administrator of the estate of such person, and said facts are alleged in the complaint, plaintiff [petitioner] may also name as defendants [respondents], "the heirs and devisees of ..... (naming such deceased claimant), deceased and all persons claiming by, through and under said decedent;" and, if it is alleged that any such person is believed by plaintiff [petitioner] to be dead, such person may also be named in a like manner as a defendant [respondent].

Comment: These are special rules for the naming of parties to an eminent domain suit; other than these, all other general civil procedure rules in regard to parties defendant would apply. However, if in eminent domain actions "defendant" is changed to "respondent," it may be advisable to make the applicability of other general rules specific by a fourth subdivision to this statute.

Section 9: SUMMONS AND SERVICE

A. [§9.1] CCP §1245

Upon the filing of a complaint, the clerk of the court shall issue a summons. CCP §§1243 and 1245. While the filing of the complaint vests the court with jurisdiction of the subject matter of a condemnation action, jurisdiction over the person is secured by service of process. Dresser v. Superior Court (1964) 231 CA2d 68, 76, 41 CR 473.

Section 1245 describes the contents of the summons in an eminent domain action. It shall contain: (1) the names of the parties, (2) a general description of the whole property in which case there shall be a reference to the complaint for descriptions of the respective parcels, or specific descriptions of each parcel to be taken, (3) a statement of the public use for which the property is sought, and (4) a notice to the defendants to appear and show cause why the property should not be condemned as prayed for in the complaint. Otherwise, a condemnation summons follows the form of a summons in other civil actions.

Item (2) is further explained in Zobelein Co. v. Los Angeles (1930) 209 C 445, 447, 288 P 68. There the complaint contained separate descriptions of each parcel joined in a multi-parcel action, while the summons utilized an en masse description. It was held that the direction in the summons--"to appear and show cause why the property above described should not be condemned as prayed for in the complaint"--

was a sufficient reference to the complaint for a description of the separate parcels to be taken.

Undoubtedly, the reason for the special rules of form for a summons in an eminent domain action, Title etc. Restoration Co. v. Kerrigan (1906) 150 C 289, 325, 88 P 356, is that multi-parcel and otherwise ponderous complaints need translation into simpler terms for most defendants.

B. [§9.2] CCP §1245.2

Code of Civil Procedure §1245.2 allows a summons to be tailored to individual defendants, by excluding the names of all other defendants and describing only the property sought against the defendants so named. It was amended in 1969 (Cal. Stats. 1969, ch. 1611 at 3398) to conform to the new California law of jurisdiction and service of process, which among other things eliminated the "alias" summons. CCP §412.10. But section 1245.2 appears to be unneeded, when the general form of summons is incorporated by the last sentence of CCP §1245.

C. [§9.3] Service

Code of Civil Procedure §1245 says that summons must be served in a like manner to summons in other civil actions. Thus, CCP §§413.10-417.30 are specifically incorporated by this reference as well as through the more general CCP §1256, discussed in §§5.1-5.4.

D. [§9.4] Recommendations

There is no reason to change the name of the summons to

"notice of condemnation," as suggested by some. First, despite the changing of "complaint" to "petition" in dissolution of marriage actions, the term "summons" is still retained there. Moreover, the term "notice" can suffer from overuse when there are: lis pendens or notice of pendency of action (see §10.1), notice of offer to purchase (see §2.5) and notice of appearance (see §11.4), all within the same procedure.

But the contents of the summons can be streamlined, especially if multi-parcel complaints are lessened. See §7.2. Notice in an eminent domain summons could read as follows:

> A complaint in eminent domain [petition for eminent domain] has been filed by the plaintiff [petitioner] against the property described in Exhibit "A" attached hereto. This is a proceeding brought to condemn said property for a public use, to wit: _____.
>
> If you wish to appear in this action, you must file in this court a written notice of appearance within 30 days after this summons is served upon you. Otherwise, your default will be entered on the application of the plaintiff [petitioner] and the court may enter judgment against your interest in the above-mentioned property.
>
> You are further notified to appear and show cause, if any you have, why the above-mentioned property should not be condemned as prayed for in the complaint [petition], by filing in this court preliminary objections within 45 days after summons is served upon you.

Regarding the last paragraph of this notice, see §11.5 concerning the possibility of limiting the right to challenge the taking to a certain class of defendants or respondents.

A new statute is suggested as follows:

(1) The clerk of the court shall issue summons upon the filing of the complaint [petition] in the form of summons in other civil actions, but specifically containing:

(a) The names of the defendants [respondents] to be served therewith;

(b) A description or descriptions of the property sought to be condemned against the defendants [respondents];

(c) A statement of the public use for which the property is sought;

(d) Notice of the defendants' [respondents'] right to file a notice of appearance within 30 days after service of summons; and

(e) Notice of defendants' [respondents'] right to file preliminary objections to the condemnation of the property within 45 days after service of summons.

(2) Summons in an eminent domain proceeding shall be served in like manner to summons in other civil actions; except where service by publication is authorized, the court shall also order that the summons be posted in a conspicuous place upon the property within 10 days after making the order.

Comment: The lengthy language describing the service of process upon unknown heirs and devisees of

a deceased claimant (see CCP §1245.3) is stricken by incorporating by reference CCP §415.50, regarding service by publication, and adding direction to post the summons on the condemned property.

(3) Judgment based upon failure to appear after service of such summons shall be conclusive against such defendants in respect to the property described in such summons.

Section 10: LIS PENDENS

A. [§10.1] CCP §§409 and 1243

In any action affecting title to real property there must be a notice of pendency of action, "containing the names of the parties, and the object of the action . . ., and a description of the property in that county affected thereby." CCP §409.

The overstuffed CCP §1243 has one sentence referring to a notice of pendency of action: "A lis pendens shall be recorded in the office of the county recorder at the time of the commencement of the action in every county in which any of the property to be affected shall be located." The word "shall" as used within this sentence gives the wrong connotation. It is not mandatory to file a lis pendens; CCP §409 uses the permissive phrase, "may record." The notice is not necessary to confer jurisdiction, but its absence will protect subsequent innocent purchasers or encumbrancers from the effect of the judgment. Housing Authority v. Forbes (1942) 51 CA2d 1, 10, 124 P2d 194. See also Drinkhouse v. Spring Valley W. W. (1890) 87 C 253, 255-256, 25 P 420.

B. [§10.2] Recommended Statute

Notice of pendency of an action in eminent domain should be given its own section and worded as follows:

> In order to give notice to subsequent purchasers and encumbrancers, a lis pendens shall be recorded

in the office of the county recorder at the time of commencement of the action in every county in which any of the property to be affected is located.

Comment: The wording "property to be affected" comes from CCP §1243 and relates to section 409's language as well. It could be changed to "property sought" or "property condemned."

Section 11: ANSWER

A. [§11.1] CCP §1246

The only pleading other than the complaint provided for in Title VII of the Code of Civil Procedure is the answer. Under CCP §1246, "Each defendant must, by answer, set forth his estate or interest in each parcel of property described in the complaint and the amount, if any, which he claims for each of the several items of damage specified in section 1248." Secondly, all persons in occupation or claiming an interest in the property sought, though not named in the complaint, may also appear by answer and defend that interest. This procedure presents an easy manner for intervention by a proper party. San Bernadino etc. Water Dist. v. Gage Canal Co. (1964) 226 CA 206, 214, 37 CR 856.

But, neither this section nor CCP §§1244 and 1247 "authorize the admission of a person as a party who does not show that he has some interest in or right to the property sought to be condemned, or of a person whose statement of his right shows that he has no such interest." San Joaquin etc. Irr. Co. v. Stevenson (1912) 164 C 221, 241, 128 P 924. A demurrer by the condemnor to such an answer is proper. Burlingame v. San Mateo County (1951) 103 CA2d 885, 889-890, 230 P2d 375.

B. [§11.2] Cross Complaint

Ordinarily a claim for damages by a defendant constitutes a cross complaint, but section 1246 permits this to be done

by answer. Bayle-Lacoste & Co. v. Superior Court (1941) 46 CA2d 636, 645, 116 P2d 458. Thus, a cross complaint is not a proper pleading to raise the issue of the extent of a property owner's lands and the damages thereto. People v. L. A. County Flood etc. Dist. (1967) 254 CA2d 470, 478, 62 CR 287. But, it has been employed by one defendant against another, where, for example, it was alleged by certain defendants that they owned easements over parcels belonging to co-defendants, that these parcels included part of the land to be condemned, that this ownership was disputed, and that the cross-defendants had trespassed upon the easements. People v. Buellton Development Co. (1943) 58 CA2d 178, 136 P2d 793. Moreover, a cross-complaint can lie against the condemnor, where it does not serve the purpose of seeking to adjudicate an interest in the property sought nor damages recoverable under CCP §1248 in a condemnation action. In People v. Clausen (1967) 248 CA2d 770, 57 CR 227, a cross complaint seeking damages for the state's alleged trespass upon the property sought and the remaining lands was proper.

C. [§11.3] Demurrer

A demurrer may be filed to a complaint in eminent domain as in all other civil actions. Here it is addressed to failure to make the necessary allegations contained in CCP §1244. Its most frequent use is to question the plaintiff's right to take. Harden v. Superior Court (1955) 44 C2d 630, 284 P2d 9; San Bernadino County Flood etc. Dist. v. Superior

Court (1969) 269 CA2d 514, 75 CR 24.

D. California Law Revision Commission's Recommendation

1. [§11.4] Eminent Domain Comprehensive Statute §2400

The California Law Revision Commission's staff has recommended statutes authorizing two responses to the complaint. First, Eminent Domain Comprehensive Statute §2400, following Rule 71A(e) of the Federal Rules of Civil Procedure, says that an answer shall contain: (1) the caption of the action; (2) a description of the property in which the condemnee claims an interest and the nature and extent of that interest; and (3) the name and address of the condemnee or other person designated as agent for service of notice of all proceedings affecting the property. Unlike the federal rule which styles such a pleading a "notice of appearance," this proposed statute still refers to the response as an answer. But the federal rule distinguishes between a notice of appearance, which is to be filed where defendant has no objection or defense to the taking of his property, and an answer, which must be filed to put in issue such objection or defense. Since (1) the pleading authorized by proposed section 2400 also deletes the requirement that the answer contain a statement of value and/or damages, (2) the issue of compensation is understood by one's appearance in a condemnation action, and (3) a separate procedure is provided in proposed Eminent Domain Comprehensive Statute §2401 to raise any defense to the taking, section 2400's

response to the complaint should be entitled "notice of appearance."

The deletion of a statement of value in the response is appropriate because the condemnor is not likewise required in the complaint to make such a statement, and condemnees often avoid the statement by pleading that value is unknown at the time of answer and requesting leave to amend when the same is ascertained. See discussion at §7.4.

Item (2), the description of the property in which the condemnee claims an interest and the nature and extent of that interest, is essential to put in issue the question of title. Therefore, even though the statement of value is removed from the answer or notice of appearance, the responsive pleading should still be verified if the plaintiff has either in fact or by law (CCP §446) verified its complaint. A verified allegation of exclusive ownership and uncontroverted testimony at trial allows the property owner to demand the entire compensation awarded.

This allegation is particularly important to ascertaining the alleged claim of right of a defendant not named by the plaintiff. But there presently is no express requirement that any answer be served upon co-defendants. Redevelopment Agency v. Penzner (1970) 8 CA3d 417, 423, 87 CR 183; Santa Cruz v. MacGregor (1960) 178 CA2d 45, 49, 12 CR 727; cf. CCP §465 which provides that all pleadings subsequent to the complaint must be filed with the court and copies served upon the adverse parties. Nor is it required

that one defendant deny or otherwise plead to the allegations of the answer of a co-defendant. People v. Ocean Shore R.R. Co. (1949) 90 CA2d 464, 478, 203 P2d 579. The avoidance of numerous cross complaints and pleadings is an advantage. But, in order to apprise at least the record owner, the condemnor should be obligated to serve a copy of the responsive pleading of any unnamed claimant upon the record owner within 15 days of receipt thereof.

2. [§11.5] Eminent Domain Comprehensive Statute §2401

The other response to the condemnor's pleading proposed by the California Law Revision Commission is found in its draft of section 2401. Instead of raising defenses to the taking by demurrer or answer, there is offered a specific pleading entitled "preliminary objections." A condemnee who wishes to challenge the right to take is given 45 days after service of summons in which to file preliminary objections to the complaint. The court then must determine all preliminary objections and make appropriate orders.

The formalizing of this procedure is desirable. And, generally the "condemnee" is understood to be the fee owner. On the other hand, these defenses, at least theoretically, are available to all defendants. The statute should make specific that the right to challenge by filing preliminary objections is given only to certain defendants, such as the record owner or owners.