#36.80 10/26/71

Memorandum 71-78

Study 36.80 - Condemnation (Procedural Problems Generally)

SUMMARY

Attached to this memorandum as Exhibit I is a staff draft of preliminary procedural provisions for the Eminent Domain Code. Exhibit II consists of related provisions and repealers. This memorandum discusses the procedural provisions in roughly numerical order. The memorandum attempts basically to indicate the present law or prior Commission decisions as well as staff divergencies or refinements that may appear in the draft provisions without going into inordinate detail.

ANALYSIS

Jurisdiction (Sections 2000-2002)

Jurisdiction, as at present, the Commission has left in the Superior Court. Section 2000. The extent of the authority of the Public Utilities Commission in eminent domain proceedings is a matter the Commission has yet to consider.

Along with the court's general jurisdiction to handle an eminent domain proceeding, the court has also the competency to consider related matters. Section 2001 is a provision that codifies the competency of the court to hear and determine related matters generally. Rules for determining specific matters, such as conflicting claims of the parties, manner of utility relocation, and the like (cf. Code Civ. Proc. §§ 1247 and 1247a), will be considered at a later time.

Section 2002 codifies the inherent power of a court to make orders and judgments, and to enforce them.

Venue (Sections 2010-2011)

The present venue provisions have been retained and simplified according

to Commission direction in Section 2010. Under present law, proceedings must be commenced in the county where the property is located or, if the property straddles a county line, in either or both of the counties.

Section 2010 eschews use of the term "property" where necessary and substitutes the term "tract," meaning a particular piece of property. (See Section 111 in Exhibit II .) The term "property" is overbroad and imprecise when applied to venue provisions as it is when applied to joinder provisions. See Section 2041 (joinder of 10 tracts in a complaint).

Section 2010 alters present law by making it mandatory that the plaintiff pick one county or the other in cases where the property straddles a county line rather than allowing possible harassment of the defendant by permitting the plaintiff to bring a separate action in each county.

Venue change (Sections 2012-2013)

The Commission directed the staff to investigate whether eminent domain proceedings should have special change of venue provisions.

Generally, the change of venue provisions of the Code of Civil Procedure apply to eminent domain actions. Code Civ. Proc. § 1243; see also Code Civ. Proc. § 1256; contrast City of Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 P. 1123, 1136 (1903)(decided under an earlier version of the Code of Civil Procedure change of venue provisions).

Accordingly, such grounds as unavailability of an impartial trial, no judge qualified, and the like, may be used as the basis for change of venue in eminent domain proceedings. See Code Civ. Proc. § 397; People v. Spring Valley Co., 109 Cal. App.2d 656, 241 P.2d 1069 (1952); People v. Ocean Shore Railroad, 24 Cal. App.2d 420 , 75 P.2d 560 (1938). A review of the cases involving these grounds reveals no problems peculiar to eminent domain cases, and the

staff recommends that they be retained. See Section 2012. (This section is advisable despite general Section 201 (Exhibit II) so that Section 2013, which follows, will not be construed to be the sole ground for transfer of an eminent domain proceeding.)

One other ground of change of venue is applicable to eminent domain proceedings: Code of Civil Procedure Section 394. This section provides that, where a local public entity brings an action against a resident of another entity, or against a corporation doing business in another entity, the action must, upon motion of either party, be transferred to a neutral county. The intent of the provision is to insulate both parties from local prejudices. This intent applies particularly well to eminent domain proceedings. See generally discussion in Chadbourn, Grossman, and Van Alstyne, attached as Exhibit III.

Although the section is so inartfully drafted as not to carry out its intent, the case law under the statute appears to the staff to be adequate. Nonetheless, the staff has attempted to redraft the statute, not entirely satisfactorily, to codify the decisions under it, and has made it applicable to any defendant, including an unincorporated association. "Doing business," as explained in the Comment, involves more than simply holding land.

Naming plaintiffs (Sections 2020-2021)

Pursuant to the Commission's prior decision, the condemnor is styled "plaintiff" and the condemnee is styled "defendant." This continues present law.

The provision relating to naming plaintiffs, Section 2021, while differing from existing law, reflects past Commission decisions. Under existing law,

the "person in charge of the public use for which the property is sought" must be named in the complaint. This means in essence that the proceeding must be maintained in the name of the real party in interest. But the Commission has decided that only a person authorized by statute may maintain a proceeding. The staff draft therefore provides a two-fold requirement: The plaintiff must be a person authorized by law to condemn but, where the plaintiff is condemning on behalf of another person, the other person must be named in the complaint.

Naming Defendants (Section 2022)

The present rule that the plaintiff must name all persons having or claiming an interest in the property as defendants is continued in Section 2022. The consequence of a failure to name the proper persons is that the plaintiff runs the risk of failing to join a necessary party. The eminent domain proceeding cannot give title to the plaintiff as against a person not joined. The practical way for the plaintiff to avoid this problem is by naming persons unknown and serving them by publication and posting.

Where the plaintiff has an interest in the property, it may do one of two things. It may simply describe in the complaint the property it seeks to acquire, omitting a description of the property or interest it already claims; or, it may describe in the complaint the whole property, and then allege its interest in it. It need not name itself as a defendant.

The problem that arises when the recorded owner of property sought to be acquired is deceased is as follows:

(1) Upon death of the decedent, the title to the property passes to his heirs or devisees. Prob. Code § 300.

(2) However, the heirs and devisees are not ascertainable until after the probate of the will or estate, at which time the order of distribution by the probate court is recorded, and the new owners of the property are specified. Prob. Code § 1222.

(3) Between the death of the decedent, therefore, and the recordation of the interests of the new owners, there is a hiatus. During this period, the property is subject to the possession of the decedent's personal representative and to the control of the probate court, and is chargeable with the expenses of administering the estate and payment of debts and family allowance. Prob. Code § 300.

Since there is no clear owner of the property between the time of the decedent's death and the time it is distributed to named new owners, the logical person to name and serve in an eminent domain proceeding brought or pending in the interim is the personal representative. There is old case and statutory law to this effect, and this rule is codified in Section 2022(b) of the proposed legislation.

Where no personal representative has been appointed, however, there is no one, other than potential heirs or devisees, primarily concerned to defend the law suit. Rather than making the condemnor await the appointment of a representative, however, Code of Civil Procedure Section 1245.3 permits the condemnor to name the heirs and devisees generally. This means, because the heirs and devisees are not yet known, that they may have to be served by publication. In addition to the possibility of lack of adequate notice, there is the added likelihood that a person will not wish to defend an eminent domain action if he is not certain that he will be the ultimate recipient of the award. To curtail the circumstances under which this situation might occur, Section 1245.3 permits the naming of heirs and devisees only if all of the following conditions are met:

(1) The superior court of the county in which the property is located has not appointed a representative who is duly qualified.

(2) The superior court of another county has not appointed a representative who is duly qualified and acting.

(3) The plaintiff knows of no other duly qualified and acting representative.

(4) The plaintiff, or its attorney, avers all of the above facts in the complaint or in an affidavit filed with the complaint.

The staff believes that these limitations are overly restrictive, since it is the manner and nature of service that is significant and not the naming of defendants. As a consequence, the staff draft, Section 2022(b), proposes that a condemnor may name heirs and devisees simply if no duly qualified and acting personal representative is known to it. The methods of assuring adequate notice of the proceeding are discussed below under "Service of Summons." As a practical matter, the potential heirs and devisees have a pretty good idea whether their interest in the property is worth defending. And, in any case, naming a personal representative may have the result of a compromise negotiated sale to the condemnor by the representative who does not want to fuss with a condemnation action while trying to clear up the estate.

"Intervention" (Section 2023)

Under present law, only persons who claim a legal interest in the property sought to be acquired may participate in the eminent domain proceeding. This condition may be overly restrictive, since holders of equitable interests in the property may be equally concerned to participate, either to challenge the right to take itself, or the adequacy of compensation. Examples of equitable interests that are not presently granted the right to participate, and that perhaps should be, include:

(1) Purchaser under an executory contract for sale;

(2) Shareholder in company whose property is sought to be acquired;

(3) Person who has been promised the land upon the death of the owner or at the age of 21.

These examples could be multiplied. The staff draft, Section 2023, permits claimants of equitable interests to appear and participate. It should be noted, however, that this does not permit third parties not interested in the title to or compensation from the property, to do so. An example of such an excluded person would be someone who is affected by or opposed to the public use for which the property is being acquired.

Under the staff draft of the "intervention" statute, the third party is treated precisely as an original party to the proceeding, and is allowed only the usual time limits for pleading and the like (with, of course, the opportunity to obtain time extensions). This is unlike civil actions generally, in which a person has up to the time of trial to intervene. See Code Civ. Proc. § 387. The reason for this disparate treatment is that, in the eminent domain proceeding, many of the significant issues will be raised and resolved prior to actual trial of compensation. There will be expeditious determination of the right to take as well as of, perhaps, preliminary and foundational issues involved in determining compensation. As a consequence, third parties must come in on schedule, if at all. They are protected by the fact that their interest is not affected by the proceeding if they are not named and served.

Summons (Sections 2030-2032)

Form of summons. The Commission has previously determined that the form of summons is to be the same as in civil actions generally. The summons in civil actions generally contains (Code Civ. Proc. § 412.20(a)):

(1) Title of the court.

(2) Names of parties.

(3) Direction to defendant to respond, upon penalty of default.

(4) Bold-face invitation to seek the advice of an attorney.

Adoption of this simplified summons in Section 2030 will delete the following elements presently required for eminent domain summons by Code of Civil Procedure Section 1245:

(1) Statement of public use.

(2) Description of the property.

(3) Notice to appear and show cause why property should not be condemned.

In addition, where service is to be by publication, the published notice should describe the property. See Section 2032. This requirement is necessitated by the deletion of the description from the summons since the complaint containing a description is not published with the summons.

Service of summons. The Commission has previously determined that service of summons is to be in the same manner as in civil actions generally. The staff draft provides for this, and also provides that, where service is by publication, a copy of the summons and complaint be posted on the affected property. This added provision is already applicable in eminent domain proceedings where "heirs and devisees" and other "persons unknown" are being served for the purposes of giving the eminent domain judgment an in rem effect. See Code Civ. Proc. § 1245.3. Since the object of service is to give the best possible notice, as required by due process, the staff draft makes this posting requirement applicable in any case where process is served by publication.

Complaint (Section 2040)

Section 2040 is an exclusive listing of the substantive allegations that must be contained in the complaint. Other procedural elements of the complaint, such as caption, request for relief, and subscription, must of course appear.

The contents of the complaint vary from presently required contents in the following ways, all of which conform to the Commission's previous determinations:

(1) Provision for naming parties has been streamlined, and requirements moved to other sections.

(2) Description of property need not indicate whether property is part of larger parcel.

(3) Statement of right of plaintiff to condemn is expanded and detailed.

(4) Map must accompany complaint in all cases, not merely for rights of way. Map is not intended to convey precision as much as to aid in general identification purposes.

In addition, the staff has added a provision that would require the plaintiff to state any interest it claims in the property. This provision, while not essential, will be extremely helpful to an early determination of preliminary issues.

Joinder of Property in Complaint (Section 2041)

At present, any amount of property can be joined in a complaint so long as it is all in the same county and sought for the same project. Once joined, the property is tried together unless the parties move to separate for trial.

Under the Commission's decisions, the plaintiff should be limited to 10 tracts per complaint, to be tried separately unless consolidated for trial. Section 2041 is a draft of this scheme. For a definition of "tract," see Section 111 (Exhibit II). A discussion of separation and consolidation for trial appears below.

Amending the Complaint

The staff draft continues present law allowing amendment of complaints as in other civil actions. Thus, the amendments may be either separate

references to portions of the original complaint, or may take the form of a complete amended pleading. The amendment is allowed as a right once before the answer is filed, and upon order of the court where it will further justice. See Code Civ. Proc. §§ 432, 472, 473.

Section 2501 permits either party to dismiss the proceeding as contained in the superseded complaint or superseded portions. This provision in effect permits the defendant to recover the costs he incurred which would not have been incurred if the complaint as amended had been the original complaint. This is an expansion of the "partial abandonment" concept. See discussion under "dismissal."

Responsive Pleadings (Sections 2050-2060; 2090)

After service of process, a defendant has within 30 days to make a responsive pleading, or be subject to entry of default. Section 2090. A person not a party who wishes to intervene should, for the sake of convenience, do so within the time the last served party is required to respond or within such greater time as the court may allow.

The basic responsive pleading is the answer which the Commission has determined should contain only the defendant's claim of interest in the property and any objections the defendant chooses to include in the answer. It is analogous to a formal notice of appearance. The staff draft has added the requirement that the defendant also indicate an address for receiving notice of further proceedings.

Another responsive pleading is the demurrer, which under the staff draft is limited to challenges to defects apparent on the face of the complaint. The specific defects that may appear in an eminent domain complaint are: lack of subject-matter jurisdiction, lack of required contents in the complaint, uncertainty in the complaint, and joinder of more than 10 tracts.

Other possible responsive pleadings include motion to strike or to quash service. For a listing, see Code Civ. Proc. §§ 585, 586 (default entered if responsive pleading not made).

Ultimately, if the proceeding is to go to trial, there must be an answer. Any defendant who has answered the complaint is entitled to a determination of the plaintiff's right to take the property. The defendant raises the right to take issue by filing objections. It should be noted that the objections are not a responsive pleading and do not take the place of an answer. They may only be filed when the defendant answers and is properly a party to the proceeding.

Cross-Complaints (Section 2070)

The cross-complaint provisions of the Code of Civil Procedure, while designed for civil "actions," have in the past been applied to certain types of special "proceedings." Eminent domain proceedings, by virtue of Code of Civil Procedure Section 1256 (rules for civil actions apply in eminent domain), have been held to constitute one type of special proceeding in which cross-complaints are available. See People v. Buellton Development Co., 58 Cal. App.2d 178, 136 P.2d 793 (1943); People v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967); People v. Los Angeles County Flood etc. Dist., 254 Cal. App.2d 470, 62 Cal. Rptr. 287 (1967).

The cross-complaint provisions of the Code of Civil Procedure are applicable to eminent domain proceedings only on a limited basis, however. Section 1256 provides that the rules governing civil actions prevail except as otherwise provided in the specific eminent domain provisions. Because specific provisions indicate that value and damage to property are to be raised by answer (Section 1246), a cross-complaint is not available to raise these issues.

Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). Likewise, the nature and extent of the estate claimed by the defendant should be raised by answer rather than by cross-complaint. People v. Buellton, supra.

What, then, may be raised by cross-complaint under present law? Initially, the claim must relate to the property that is the subject of the eminent domain proceeding. Code Civ. Proc. § 428.10(b)(2). Thus, if there is a conflicting claim to the property sought to be acquired, or if there is a trespass and damages to the property, the defendant may cross-complain to allege these facts. Buellton, supra; People v. Clausen, supra. In addition, if other property is so connected with the property sought as to constitute a unity, or if other property will be necessarily affected by the taking, a cross-complaint for damages may be appropriate. Buellton, supra. Contra: California P. R.R. Co. v. Central P. R. R., 47 Cal. 549 (1874)(consequential damages to other property), and El Monte School Dist. v. Wilkins, 177 Cal. App.2d 47, 1 Cal. Rptr 715 (1969) (conflicting regulations affecting the property). [These decisions are both pre-Buellton decisions, and thus may have been decided purely on technical grounds that cross-complaints were not available in special proceedings such as eminent domain.]

It would be quite helpful to clarify by statute just when a cross-complaint in eminent domain is available. The staff suggests that cross-complaints not be available to assert an interest in the property sought to be acquired, or to raise damages to the property or to other property by severance. This should be done in the answer (interest) and at pretrial proceedings (value, severance). However, other claims related directly to the property, whether against the plaintiff or against third parties, should be capable of being raised by cross-complaint. The court should have adequate authority to determine these related

claims, but should be able to sever them for trial if not closely connected. Section 2070 is a staff draft of the proposed cross-complaint provision. See also Section 2001 (competency of court) and Section 2200 (severance for trial).

Commencement of Proceedings (Sections 2080-2090)

The staff draft, Sections 2080 and 2082, continues present rules that proceedings are commenced by filing a complaint and that the plaintiff should file a lis pendens upon commencement. The staff draft is more technically accurate than Section 1243 which it supersedes, however, since Section 1243 appears, as drawn, to state that proceedings are commenced upon service of summons and that the plaintiff must file a lis pendens. The case law has in effect rewritten Section 1243 so as to state the law as preserved in the staff draft. It should be noted that Sections 2080 and 2082 are comparable to Code of Civil Procedure Sections 411.10 and 409 relating to commencement of actions and filing lis pendens in civil actions generally.

Contesting the Right to Take (Sections 2100-2122, 2450)

The basic scheme the Commission has previously approved for contesting the right to take is one in which objections are raised at one time and resolved prior to the valuation portion of the proceeding. The attached draft of this procedural scheme is described below.

The attached draft also incorporates several significant changes from existing law intended to make it easier for a defendant to prove his objection to the right to take. These changes are predicated on the observation that present law makes it nearly impossible to prove lack of public use. The specific changes discussed below are (1) reasonable probability is added as a test for lack of public use; (2) the burden of proof is placed uniformly on the

plaintiff and changed from preponderance to clear and convincing; and (3) the defendant is provided a means to vacate the judgment or claim damages upon subsequent discovery that the plaintiff should not have been allowed to take the property.

Contesting the right to take. The draft permits any person who has answered to rais objections. An answer to the complaint amounts to a general appearance in which the defendant asserts his interest in the property sought to be taken.

Objections must be raised within a relatively brief time, if at all. If not raised, they are deemed waived forever unless the defendant is later able to attack the final judgment on the basis of newly discovered evidence. See below. The time to object is basically the time allowed for filing the answer. This time may be extended by stipulation of the parties or, if they are unable to agree, by order of the court upon good cause.

The "objection" is visualized as a pleading much like the answer in civil actions, raising special defenses of lack of right to take. It may be included in the answer or filed and served separately. The defenses it raises must be specifically alleged and supporting facts stated. If this is not done, or if it is done in an unclear manner, the plaintiff may demur to the objections. The defendant has the opportunity to amend his objections so that they are not demurrable or to make other changes, just as answers in civil actions generally may be amended.

Either party may set the objections for hearing, but the proceeding may not move forward to valuation problems until the objections are disposed of. At hearing, the burden of proof is on the plaintiff (see below). All the normal rules of civil procedure relating to the gathering and production of evidence are applicable in such a hearing.

The court then determines whether there is a right to take the property. If it finds a right to take all the property, it so orders, and the proceeding continues. The issue may in an appropriate case be reviewed upon writ, and is appealable following judgment. If it finds a right to take only some of the property, it so orders and dismisses the proceeding as to the rest. Recoverable costs and disbursements are available to the defendant upon dismissal for lack of right to take. The order of dismissal may be appealed while the proceeding as to the rest continues. And, if the court finds no right to take any of the property, it dismisses the proceeding entirely. The order of dismissal is a final judgment and is appealable.

A final judgment may be subsequently attacked under the draft if new evidence comes to light. See discussion below.

Grounds for contesting. The draft contains a listing of all possible grounds for objecting to the right to take. Objections to the complaint on its face, e.g., that it is unclear or that it does not contain all required information, are to be made by demurrer to the complaint.

The grounds for objection listed are all those that may be raised under the Commission's right to take proposal. One major change from present law is that, at present, the only way a defendant may assert lack of public use is by alleging fraud or abuse of discretion in the sense that the plaintiff does not intend to use the property as it declares. The attached draft, recongizing that it is nearly impossible to demonstrate subjective intent, proposes as an alternate ground that there is no reasonable probability that the property will be devoted to the use declared within a reasonable time. The listing is not exclusive, but allows objections on other grounds provided by law, should any exist.

It is clear that this procedural listing of grounds for objection will have to be reviewed to conform with their corresponding substantive provisions in the Eminent Domain Code. Particularly, the staff will have to ascertain that there is a means provided to object even where the condemnor fails to indicate what substantive authority (e.g., future use, substitute, and the like) it is proceeding under.

Burdens and presumptions. The law governing which parties must plead and prove different facts, and the applicable presumptions governing the proof, is sufficiently confused to warrant statutory clarification in the comprehensive statute.

As nearly as we have been able to discern, the following represents present law governing right to take issues:

(1) The plaintiff in all cases has the burden of pleading public use and necessity.

(2) the defendant may contest the public use of the property--whether or not the plaintiff has the benefit of a conclusive resolution on the issue of necessity--by pleading specific facts indicating fraud or abuse of discretion in that the plaintiff does not intend to put the property to a public use. The burden of proof is upon the defendant on this issue. The plaintiff is aided by a presumption of regularity of official action if the plaintiff is a public entity.

(3) The defendant may contest the public necessity of the project by a specific denial in his answer if the resolution of the condemnor is not conclusive on the issue of necessity. Where the issue of necessity is for judicial determination, the three aspects of necessity are treated disparately:

(a) Whether the proposed improvement is necessary is not subject to judicial review.

(b) Whether the property is necessary for the project, the burden of proof is on the plaintiff. Where the plaintiff is a public entity, the resolution of necessity (in cases where it is not conclusive) appears to create a presumption that shifts to the defendant the burden of going forward with the evidence. Where the plaintiff is a private person, it must prove the aspect of necessity by a preponderance of the evidence.

(c) Whether the project is located in a manner most compatible with greatest public good and least private injury, the burden of proof is on the defendant. The burden on the defendant is a difficult one since he must establish another location that is clearly better than that selected by the plaintiff.

The reasons for these varying burdens and presumptions are not clear. They appear from the few cases to have developed in a haphazard manner on an ad hoc basis. The staff proposes the following uniform set of burdens and presumptions:

(1) The defendant has the burden to raise any objections to the right to take, or else they are waived.

(2) The plaintiff has the burden of proof on all objections to the right to take. The burden should be one of "clear and convincing proof."

(3) If the plaintiff is a public entity, it will be aided by presumptions. In certain cases, the resolution of necessity will be given conclusive effect; in others, merely rebuttable effect.

The justification for such a system is that a person ought not to have his property taken unless the taker can clearly and convincingly demonstrate to a court that it has the right to do so. As a practical matter, this amounts largely to a restriction on private condemnors only who are not aided by any presumption.

Exhibit IV is a letter objecting to placing the burden of proof on the plaintiff with regard to the issue whether the project is located in the manner most compatible with the greatest public good and least private injury. The thrust of the letter is basically that public utilities and other private condemnors should be afforded a presumption of propriety that the property owner must rebut. The letter asserts that a burden on the condemnor may cause its acquisition costs to rise and may result in disparate decisions in neighboring counties.

In addition to these general rules on burdens, there will be provisions designed for special cases, e.g., future use, excess, more necessary, compatible. These provisions will specify their own burdens and presumptions. The staff has yet to review them for integration with the provisions relating to contesting the right to take.

Vacating judgment or damages. The attached draft includes provisions designed to deal with fraudulent acquisitions. In the attached draft, the defendant is aided by shifting the burden of proof to the plaintiff and by making a more liberal test for lack of public use. A third provision of the attached draft is based on the assumption that these liberalizations are not really adequate to overcome the defendant's handicap, particularly if the plaintiff is a public entity aided by a presumption of regularity. All the evidence is in the hands of the plaintiff and will often be inaccessible.

One possible way to limit fraud is to give the former owner a repurchase right at original acquisition cost. The Commission rejected this approach as unwieldy and suggested we might do more directly what a repurchase right would have accomplished indirectly.

The attached proposal is to allow direct attack on the judgment where evidence comes to light sometime later, as will happen on occasion, that reveals the plaintiff had no right to take, perhaps because it did not intend to devote the property to the use alleged. Obviously, the problems that will arise under this sort of scheme are as numerous as those that arise under an owner's right to return. However, these problems can be resolved by statute should the Commission determine that the underlying idea of direct attack where no right to take existed is meritorious.

Section 2450 is a draft of a provision permitting attack on the judgment on the ground of newly discovered evidence. The right to attack the judgment has been limited to the period of seven years after the judgment becomes final. The judgment may be successfully attacked only if evidence is brought to light that was previously not discoverable with reasonable diligence. And the new evidence must be such as to have caused a denial of plaintiff's right to take if produced at the original trial.

Where the court finds for the condemnee on the basis of the subsequent evidence, it may dismiss the original proceeding and order the property reverted to the condemnee who must, in turn, surrender the award. If,however, the property has changed hands or is presently in public use, the subsequent holders and present users are protected: The condemnee is awarded damages in the amount of the increase in value of the property, plus his recoverable disbursements as if he had defeated the right to take initially.

Bifurcation of Preliminary Issues for Trial (Sections 2200-2201)

The Commission has previously approved the concept that preliminary issues relating to just compensation for the property be determined by the court prior

to jury trial. The staff draft of Sections 2200 and 2201 contemplates that such issues may be raised by either party or by the court on its own motion, but that the issues must be raised no later than the pretrial conference, if any, or 45 days prior to trial. The court determination is not appealable until judgment in the proceeding has been rendered.

The Commission should consider three further significant alterations to this scheme: (1) Broadening the scope of bifurcated issues to all severable nonjury issues, not merely those related to compensation; (2) Making early resolution of these issues mandatory rather than permissive; and (3) Allowing the issues to be raised at any time prior to trial, rather than 45 days. The reasons for these suggestions are outlined below.

(1) Broaden scope of issues. There may be issues not related to compensation that deserve early trial. For example, the plaintiff may be asserting an interest in the property it seeks to condemn, or there may be a dispute among the defendants as to their respective interests. At present the value of the property is first litigated, and then parties who claim interests are left to resolve among themselves the existence of their interests so as to enable them to share in the award. If title claims were litigated beforehand, then only parties directly affected by the proceeding will need to become involved in it and to present evidence on value.

If such a scheme is adopted, it would be advisable to have the answers of parties served among each other so that they will be aware early of any adverse claims. The Commission has previously determined not to adopt such a requirement.

(2) Mandatory resolution of issues. It is clear that preliminary and foundational issues will have to be solved at some time. Particularly is this true of problems relating to valuation, such as the larger parcel, comparable sales, and the like. Rather than consuming the jury's time at trial while

arguing these issues, it might be helpful to get them all out of the way ahead of time. They are, after all, identifiable issues for the court to determine, and upon which the preparation of the parties for the valuation portion of the trial will depend.

(3) Elimination of time limitations. The staff draft requires preliminary issues to be raised well ahead of trial time, if at all. It is clear that these issues will have to be resolved at some time. It might, however, be more appropriate to grant the court the freedom to sever these issues for separate hearing at any time up to trial.

Separation and Consolidation (See Study attached to Memorandum 71-79, pages 98-102)

Existing law governing separation or consolidation of parcels for trial is generally as follows:

(1) Parcels joined together in the complaint are generally tried together, absent a motion to separate.

(2) Parcels not joined together may be tried together upon court order to consolidate.

The standards governing consolidation and separation for trial are somewhat ambiguous. Code of Civil Procedure Section 1244(5) provides that the court may consolidate or separate for trial "to suit the convenience of the parties." Code of Civil Procedure Section 1048 provided (prior to 1971 amendment on Commission recommendation) that the court might consolidate or separate "whenever it can be done without prejudice to a substantial right." Under these criteria the court has wide discretion, and its decision is not reversible unless it involves an abuse of discretion. See, e.g., City of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 P. 972 (1905).

The 1971 amendment of Section 1048 provides more definite standards. Actions may be severed for trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Actions may be consolidated for trial if they involve "a common question of law or fact."

Both the research study (page 102) and the staff recomend that Section 1048 constitute the standard for separation and consolidation in eminent domain proceedings. Under this scheme, then, the plaintiff may join up to 10 tracts in a complaint, but each will be tried separately, unless a motion to consolidate demonstrates that they involve common questions of law and fact. Different parcels or interests within each separate tract may also be severed for trial on the grounds of convenience, avoidance of prejudice, expedition, or economy.

This scheme will also preserve the rule stated in City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933), that the grounds for consolidation and separation are entirely distinct from the grounds for joinder of tracts in a complaint and consoldiation may be appropriate even where joinder might not be.

Adoption of this scheme will retain the rule that plaintiffs may consolidate proceedings to acquire different property for different purposes so long as common questions of law or fact are involved. In City of Los Angeles v. Klinker, for example, the same plaintiff wanted portions of defendant's land for disparate uses. Consolidation of separate proceedings was allowed because the two portions of the land were interrelated in that severance damages to each depended in part upon the other. Thus, there were both common questions of fact and common questions of law involved. Similarly, in People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959), disparate condemnors sought portions of defendant's property for aspects of the same public project. Since the same project was involved, the actions were interrelated, and consolidation was

proper for purposes of evaluating the combined effects of the project on the remaining property. Thus, there were common questions of fact involved, and consolidation would be proper under Section 1048 of the Code of Civil Procedure.

Consolidation Where Different Plaintiffs Seek Property (Section 2210)

Where several plaintiffs are trying to acquire the same property, the defendant obviously would like to avoid litigating several cases, just as the plaintiffs would like to avoid subsequent disputes over who acquired the property. The staff believes that the simplest and most efficient way of resolving this problem is to allow any of the parties involved to move for consolidation of the proceedings. Upon consolidation, the court is to determine which of the uses is most necessary, and which ones are compatible with it. The court will then allow the most necessary and compatible users to join together to complete the proceeding, and will apportion the award among them for payment. The court will dismiss the proceeding as to the other plaintiffs. This scheme is set out in Section 2210.

Effect of Judgment (Section 2300)

Section 2300, specifying the effect of an eminent domain judgment, is a tentative staff draft to be used as an aid to determine the nature of an eminent domain proceeding. It says, in effect, that eminent domain is a quasi in rem proceeding, and that the condemnor gets only the property interests of the persons it calls in and litigates against. Thus, failure to name and serve a person having an interest, or failure to file a lis pendens, may result in the plaintiff's failure to acquire all interests in the property it seeks.

Dismissal (Sections 2500-2511)

The Commission has previously approved, at various times, awarding costs and fees to a condemnee where the proceeding is dismissed for any of the following reasons:

(1) The plaintiff failed to bring the action to trial within the statutorily required time limits.

(2) The plaintiff abandoned the proceeding.

(3) The plaintiff failed to deposit the award within statutorily prescribed time limits.

(4) The defendant defeated the right to take.

In addition, the Commission directed the staff to explore the adequacy of reimbursement where amendment of the complaint causes wasted money by the condemnee ("partial abandonment").

The staff draft gathers all these provisions together under a chapter headed "dismissal." The draft makes provisions for dismissal of a proceeding as to a superseded complaint, as well as for dismissal in all four of the situations listed above, or where the proceeding is dismissed for any other reason. Upon dismissal of a proceeding, the defendant is entitled to his reasonable costs and expenses; and if he has been dispossessed, he is entitled to repossession and to any damages caused by possession. In the case of a partial abandonment or where the plaintiff amends the complaint, the defendant is entitled to only those expenses that he would not have incurred had the proceeding been commenced originally as it was finally concluded.

In addition, where the plaintiff voluntarily abandons the proceeding after entry of judgment, the staff draft eliminates one significant feature of present law: The defendants at present have the option to seek execution of the judgment or to recover costs and expenses. The staff draft deletes the option to have execution for several reasons. Where many defendants are involved, some may want to go one way, some another; the plaintiff is caught in the middle. And, the opportunity for the defendant to force an acquisition limits the

plaintiff's right to abandon, creating a situation where unwanted property is forced into public ownership. The most economically sound resolution is to make the defendants whole, and leave the property in private ownership.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

COMPREHENSIVE STATUTE

DIVISION 8. PROCEDURE

Memorandum 71-78

EXHIBIT I

COMPREHENSIVE STATUTE

Staff recommendation November 1971

DIVISION 8. PROCEDURE

Comment. This division contains rules of practice expressly applicable to eminent domain proceedings. The omission of a particular aspect of procedure from this division does not indicate that such aspect is inapplicable to eminent domain proceedings, but only that the general rules of civil practice apply where consistent with the efficient administration of this code. See Section 201 and Comment thereto. Likewise, a treatment herein of some particular aspect of procedure, such as the listing of pleadings in Chapter 5 or the catalog of grounds for dismissal in Chapter 13, is not intended to be exhaustive or to preclude other applicable rules of civil practice.

COMPREHENSIVE STATUTE § 2000

Staff recommendation November 1971

CHAPTER 1. JURISDICTION

§ 2000. Jurisdiction of court

2000. Except as provided in Division 10 (commencing with Section 3500), all eminent domain proceedings shall be commenced and prosecuted in the superior court. Nothing in this section affects the jurisdiction of the Public Utilities Commission to ascertain the just compensation that must be paid in eminent domain proceedings.

Comment. Section 2000 declares the basic rule that eminent domain proceedings are to be conducted in the superior court. This declaration continues prior law. See former Code Civ. Proc. § 1243. For demurrer based on lack of jurisdiction, see Section 2050.

However, the jurisdiction of the superior court is not exclusive. The issue of just compensation may be submitted to arbitration (see Division 10 (commencing with Section 3500)), and the Public Utilities Commission has concurrent jurisdiction in several limited areas. See Cal. Const., Art. XII, § 23a. See also former Code Civ. Proc. § 1243. The commission, upon petition of the plaintiff, may determine just compensation for the taking of property belonging to a public utility and for the taking or damaging of property for grade separation at crossings. Pub. Util. Code §§ 1206 and 1411. This jurisdiction is nonexclusive and alternate to the procedures provided in the Eminent Domain Code. Pub. Util. Code §§ 1217 and 1421.

It should be noted, however, that the Public Utilities Commission has exclusive jurisdiction over the manner of each crossing of a railroad over a public road or another railroad. Pub. Util. Code § 1202. For a listing of procedures alternate to those provided in the Eminent Domain Code, see Comment to Section 200.

Note: The last sentence of Section 2000, preserving the jurisdiction of the Public Utilities Commission, is simply a recodification of an existing provision--Code of Civil Procedure Section 1243. It does not necessarily state with accuracy the full jurisdiction of the Public Utilities Commission, which extends to matters other than the determination of just compensation. See Comment. The Law Revision Commission has yet to review the role of the Public Utilities Commission in eminent domain proceedings.

§ 2001. Competency of court

2001. The court has jurisdiction over all matters incident and related to eminent domain proceedings.

Comment. Section 2001, declaring the competency of the superior court sitting in an eminent domain proceeding to determine matters incident to the proceeding itself, is intended as a broad statement of the potential range of the court's determinations. It codifies the principle that the court has the usual and ordinary judicial powers to dispose of all issues necessarily involved in or incident to the proceeding. See Los Angeles v. Pomeroy, 124 Cal. 597, 609, 57 P. 585, (1899), dismissed 188 U.S. 314 ( ); Felton Water Co. v. Superior Court, 82 Cal. App. 382, 388, 256 P. 255, (1927).

In addition to adjudicating the right to take and the amount of just compensation (subject to jury trial of facts), for example, the court may also decide any subsidiary issues such as liability for property taxes, the rights of parties under an executory sale contract, damage to other property of parties, claims of adverse interests in the property, and the like. See, e.g., San Gabriel v. Pacific Elec. R.R., 129 Cal. App. 460, 18 P.2d 996 (1933), and Los Angeles v. Darms, 92 Cal. App. 501, 268 P. 487 (1928)(title to condemned property). See also Sacramento & San Joaquin Drainage Dist. v. Truslow, 125 Cal. App.2d 478, 499, 270 P.2d 928, , 271 P.2d 930, (1954)(protection of lienholders). See also Los Angeles v. Dawson, 139 Cal. App. 480, 34 P.2d 236 (1934)(construing assignment of right and interest

in award). Compare former Code Civ. Proc. §§ 1247, 1247a, 1264.9 (jurisdiction of court to determine various incidental issues). See also Section 2070 (cross-complaints). Contrast California Pac. R.R. v. Central Pac. R.R., 47 Cal. 549, 553-554 (1874), and Yolo Water & Power Co. v. Edmonds, 50 Cal. App. 444, 450, 195 P. 463, (1920)(denying power of court to determine damage to other property of parties). Cf. Section 2023 and Alhambra v. Jacob Bean Realty Co., 138 Cal. App. 251, 31 P.2d 1052 (1934)(denying right of third party alleging consequential damages to intervene).

The fact that a particular issue is not specified under this code does not preclude the court from deciding the issue, provided it is reasonably related to the parties or property involved in the proceeding. Thus, a court has jurisdiction to determine causes of action raised by cross-complaint pursuant to Section 2070.

Note: Code of Civil Procedure Sections 1247 and 1247a grant the court jurisdiction of certain issues such as relocation of structures and adverse claims of parties. These issues, with rules for their resolution, will be disposed of at a later time.

COMPREHENSIVE STATUTE § 2002

Staff recommendation November 1971

§ 2002. Orders, judgments; enforcement

2002. (a) The court may make all orders and render such judgments as are necessary to effectuate its determinations made in any eminent domain proceeding.

(b) The court has the power to enforce any of its orders or judgments, including orders for possession, whether prior to or following judgment, by appropriate process.

Comment. Section 2002 reiterates the general rule that a court has inherent power to do any and all acts necessary to the full and effective exercise of its jurisdiction. See Code Civ. Proc. §§ 128 and 187; see also 1 B. Witkin, California Procedure Courts §§ 116-118 (2d ed. 1970). This general power to render and enforce judgments and orders includes the specific power to issue writs of possession or assistance as indicated in subdivision (b). A plaintiff who has obtained an order for possession is entitled to enforcement of the order as a matter of right. See Section 1269.08 and Comment thereto. See also Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 Santa Clara Lawyer 37, 85-86 (1966), reprinted in 8 Cal. L. Revision Comm'n Reports 1171, 1221-1222 (1967).

CHAPTER 2. VENUE

§ 2010. Place of commencement

2010. (a) Except as provided in subdivision (b), an eminent domain proceeding shall be commenced in the county in which the property sought to be taken is located.

(b) When a tract sought to be taken is situated in more than one county, the plaintiff shall commence proceedings in any one of such counties.

Comment. Section 2010 specifies where an eminent domain proceeding must be brought. Because eminent domain is basically a proceeding quasi in rem, failure to bring the proceeding in the proper county is a failure to vest the necessary jurisdiction in the court. See Sections 2300 and 2050 and Comments thereto. For provisions authorizing transfer of the proceedings for trial, see Section 2012. For demurrer on ground of lack of jurisdiction, see Section 2050.

Section 2010 does not authorize joinder in a complaint of more property than would be allowed under Section 2041. Nor does it authorize a condemnor to condemn property beyond its territorial limits. See Section 490. For provisions requiring separation of property in a complaint for trial, see Section 2041.

COMPREHENSIVE STATUTE § 2010

Staff recommendation November 1971

Section 2010 recodifies the substance of the venue provisions of former Code of Civil Procedure Section 1243.

Subdivision (a). Generally speaking, the only place an eminent domain proceeding may be brought is the county in which the property sought to be acquired lies.

Subdivision (b). Where a single tract (see Section 111--"tract" defined) straddles a county line, the plaintiff has the option to bring suit on either side of the line, and the county so chosen is the proper place of trial for all the property even though a portion is not located in the county. See Section 2011. Under former law, where a single tract situated in more than one county was sought to be acquired, the plaintiff could elect to bring separate proceedings relating to separate portions of the tract in the county where such portion was situated. See former Code Civ. Proc. § 1243. Subdivision (b), however, requires the plaintiff in this situation to make an election and bring the proceeding in one of the counties in which the tract is situated.

§ 2011. Place of trial

2011. (a) Except as provided in subdivision (b), the county in which an eminent domain proceeding is commenced pursuant to Section 2010 is the proper county for trial of the proceeding.

(b) Where the court changes the place of trial pursuant to Section 2012 or 2013, the county to which the proceeding is transferred is the proper county for trial of the proceeding.

Comment. Section 2011 continues the substance of a portion of former Code of Civil Procedure Section 1243.

§ 2012. Change of place of trial generally

2012. Except as provided in Section 2013, the provisions of the Code of Civil Procedure for the change of place of trial of actions apply to eminent domain proceedings.

Comment. Section 2012 makes clear that the rules of practice for civil actions generally govern venue change in eminent domain proceedings. This continues prior law. See former Code Civ. Proc. § 1243 and Yolo Water & Power Co. v. Superior Court, 28 Cal. App. 589, 153 P. 394 (1915). Cf. Section 201. Contrast Santa Rosa v. Fountain Water Co., 138 Cal. 579, ; 71 P. 1123, 1136 (1903).

For special provisions relating to venue change if the plaintiff is a local public entity, see Section 2013.

COMPREHENSIVE STATUTE § 2013

Staff recommendation November 1971

§ 2013. Plaintiff a local public entity

2013. (a) If a local public entity commences an eminent domain proceeding in a county in which it is situated, any defendant who is not situated, doing business, or residing in such county may move to have the proceeding transferred for trial to another county.

(b) If a local public entity commences an eminent domain proceeding in a county in which it is not situated, either the entity or any defendant who is not situated, doing business, or residing in such county may move to have the proceeding transferred for trial to another county.

(c) Upon a motion under this section, the court shall transfer the proceeding, if required, to enable trial to be held in a county (1) upon which the parties agree, (2) in which, as nearly as possible, no party is situated, doing business, or residing, or (3) in which, as nearly as possible, all parties are situated, doing business, or residing.

Comment. Section 2013 supersedes a portion of Section 394 of the Code of Civil Procedure as applied to eminent domain proceedings. Section 2013 represents largely a codification, for clarity, of decisions under Section 394. Unlike Section 394, however, Section 2013 limits a motion for change of venue to the potentially prejudiced party whereas Section 394 allowed a motion by any party in an appropriate situation.

The policy of this section is to protect all parties by allowing any potentially prejudiced party to move for a change of venue. Thus, the

court is obligated to transfer the trial to as nearly a neutral county as possible. Where the property is located in a neutral county to begin with, the court need not transfer the proceeding even though a motion to transfer would be authorized under this section. See Stockton v. Wilson, 79 Cal. App. 422, 249 P. 835 (1926). See also Los Angeles v. Pacific Tel. & Tel. Co., 164 Cal. App.2d 253, 330 P.2d 888 (1958).

This section applies to proceedings commenced by any public entity other than the state. See Section 106 ("local public entity" defined). See also People v. Spring Valley Co., 109 Cal. App.2d 656, 241 P.2d 1069 (1952)(Section 394 not applicable in action by state); Riverside etc. Dist. v. Joseph W. Wolfskill Co., 147 Cal. App.2d 714, 306 P.2d 22 (1957)(Section 394 not applicable in action by state agency); Georgetown Divide Pub. Util. Dist. v. Bacchi, 204 Cal. App.2d 194, 22 Cal. Rptr. 27 (1962)(Section 394 applicable in action by special district having status of local public entity).

This section applies to any defendant, including unincorporated associations, and regardless of the interest the defendant claims in the property sought to be taken. See Georgetown Divide Pub. Util. Dist. v. Bacchi, supra (joint owners may take advantage of Section 394); Oakland v. Darbee, 102 Cal. App.2d 493, 227 P.2d 909 (1951)(separate owners may take advantage of Section 394); Long Beach v. Lakewood Park, 118 Cal. App.2d 596, 258 P.2d 538 (1953)(owners of divided interests may take advantage of Section 394). The mere fact that the proceeding is a "mixed action," one in which only some of the defendants fall within the terms of this section,

does not preclude its applicability. See 1 J. Chadbourn, H. Grossman, A. Van Alstyne, California Pleading § 367 (1961). See also People v. Ocean Shore R.R., 24 Cal. App.2d 420, 75 P.2d 560 (1938)(relating to motion for change of venue by only some defendants on grounds of impossibility of impartial trial).

The term "doing business" as used in this subdivision is intended to mean conducting some substantial activity, e.g., holding one's self out to others as engaged in the selling of goods or services. See Los Angeles v. Pacific Tel. & Tel. Co., supra. Ownership of property alone does not amount to doing business.

CHAPTER 3. PARTIES

§ 2020. Identification of parties

2020. (a) A person seeking to take property by eminent domain shall be styled the plaintiff.

(b) A person from whom property is sought to be taken by eminent domain shall be styled the defendant.

Comment. Although an eminent domain proceeding is a special proceeding, the terms "plaintiff" and "defendant," as well as "complaint" and "answer," are utilized throughout the Eminent Domain Code. This usage is consistent with the generally judicial nature of eminent domain proceedings in California, as well as with past practice and custom. See former Code Civ. Proc. § 1244(1), (2)(parties styled "plaintiff" and "defendants").

Generally, the parties to an action can only be those having an interest in the property described in the complaint. San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924 (1912); cf. former Code Civ. Proc. §§ 1245.3, 1246, 1247.2.

COMPREHENSIVE STATUTE § 2021

Staff recommendation November 1971

§ 2021. Named plaintiffs

2021. (a) Eminent domain proceedings shall be commenced only in the name of a person described in Section 301.

(b) Where the plaintiff has commenced proceedings on behalf of another person, such person shall also be named a plaintiff in the proceeding.

Comment. Section 2021 provides a rule for naming plaintiffs to an eminent domain proceeding that varies from the rule that normally would be applicable in civil actions. Contrast Code Civ. Proc. § 367.

Subdivision (a). Subdivision (a), by reference to Section 301, specifies the persons eligible to commence and prosecute an eminent domain proceeding. Such persons must be authorized by statute to exercise the power of eminent domain to acquire the property sought for the purpose listed in the complaint. A proceeding may not be maintained in the name of any other person. See People v. Superior Court, 10 Cal.2d 288, 73 P.2d 1221 (1937); Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961); Black Rock etc. Dist. v. Summit etc. Co., 56 Cal. App.2d 513, 133 P.2d 58 (1943).

Subdivision (b). Where the person authorized to commence an eminent domain proceeding is authorized to do so on behalf of another person, the "real party in interest" must also be named as a plaintiff.

The requirement formerly found in subdivision (5) of Section 1244 of the Code of Civil Procedure, that required the board of supervisors to be

named as plaintiff when condemning for sewerage on behalf of unincorporated territory, is superseded by subdivisions (a) and (b). See Comment to former subdivision (8) of Section 1238 of the Code of Civil Procedure.

Note: This provision assumes the state's procedure for naming plaintiffs will be consistent. At the time the Commission considers the authority of the state to condemn, this provision will be reviewed.

§ 2022. Named defendants

2022. (a) The plaintiff shall name as defendants those persons who appear of record or are known to it to have or claim a right or interest in the property described in the complaint.

(b) If a person described in subdivision (a) is dead or is believed by the plaintiff to be dead, the plaintiff shall name as defendant the duly qualified and acting administrator of the estate of the claimant; if the plaintiff knows of no duly qualified and acting administrator and avers this fact in an affidavit filed with the complaint, the plaintiff may name as defendants the claimant, the heirs and devisees of the claimant, and all other persons claiming by, through, or under him.

(c) The plaintiff may name as defendants all persons unknown claiming any right or interest in the property described in the complaint.

Comment. Section 2022 lists the persons who may or must be named as defendants in the complaint. A defendant is a person from whom property is sought to be acquired. Section 2020. "Person" includes business associations and public entities as well as individuals. See Section 107. The naming of defendants is basically within the control of the plaintiff. People v. Shasta Pipe etc. Co., 264 Cal. App.2d 520, 537, 70 Cal. Rptr. 618, (1964). However, the naming of defendants controls their service which in turn controls the jursidiction of the court over persons. See Section 2031

and Comment thereto. Failure to join a proper party to the proceeding leaves his interest unimpaired. Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957). A person not named as defendant who claims an interest in the property sought to be acquired may participate in the proceeding. Section 2023.

Subdivision (a). Subdivision (a) is an elaboration of the requirement formerly found in subdivision (2) of Section 1244 of the Code of Civil Procedure that the names of all owners and claimants of the property must be listed in the complaint. The language of subdivision (a) has been adapted from former Code of Civil Procedure Section 1245.3.

Under subdivision (a), occupants of the property sought to be acquired who claim a possessory interest in the property must be named as defendants.

A plaintiff may also use the device provided in Code of Civil Procedure Section 474 of fictitiously naming defendants who claim an interest but whose names are not known. See Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). When the fictitiously named party's true name is discovered, the pleading must be amended accordingly. Alameda County v. Crocker, 125 Cal. 101, 57 P. 766 (1899). For a related provision, see subdivision (c) of this section, permitting the plaintiff to name persons unknown.

Subdivision (b). Subdivision (b) specifies the requirements for naming defendants where one of the claimants to or owners of the property is deceased. The basic rule is that the personal representative of the decedent or his estate must be named as defendant in the decedent's place. This was

formerly the rule under Probate Code Section 573. See Monterey County v. Cushing, 83 Cal. 507, 23 P. 700 (1890)(decided under former Code of Civil Procedure Section 1582, predecessor of Probate Code Section 573). Subdivision (b) once more codifies this rule.

Where there is no personal representative duly qualified and acting known to the plaintiff, it need not await the appointment and qualification of one, but may proceed with the suit naming the claimant believed to be dead and his heirs and devisees. It is sufficient to name them in the following manner: "the heirs and devisees of ..... (naming the deceased claimant), deceased, and all persons claiming by, through, or under said decedent." Subdivision (b) is a condensation of language formerly found in Section 1245.3 of the Code of Civil Procedure.

Subdivision (c). Subdivision (c) continues provisions formerly found in Code of Civil Procedure Sections 1244(2) and 1245.3, enabling the plaintiff to name unknown holders of interests in the property. It is sufficient to name them in the following manner: "all persons unknown, claiming any right or interest in the property." By following this procedure and by following the methods of service provided in Section 2032, the plaintiff can assure that the eminent domain judgment will be conclusive against all persons. Cf. Section 2300.

COMPREHENSIVE STATUTE § 2023

Staff recommendation November 1971

§ 2023. Third parties

2023. Any person who claims a legal or equitable right or interest in the property described in the complaint may appear in the proceeding as if named as a defendant in the complaint.

Comment. Section 2023 supersedes portions of former Code of Civil Procedure Sections 1245.3 and 1246 relating to the right of interested persons to participate in an eminent domain proceeding. Section 2023 is intended to provide a simple method for admission of an interested person. Cf. San Bernardino etc. Water Dist. v. Gage Canal Co., 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964).

Persons required to participate. An eminent domain judgment is generally binding only on persons named in the complaint and adequately served. See Section 2300. A person who has an interest in the property but who is not named and served may, but need not, participate. However, if his interest arose after the plaintiff filed a lis pendens, the judgment will bind him. See Drinkhouse v. Spring Valley Water Works, 87 Cal. 253, 25 P. 420 (1890).

Persons permitted to participate. Generally, persons not named in the complaint who claim an interest in the property may enter and participate. See Stratford Irr. Dist. v. Empire Water Co., 44 Cal. App.2d 61, 111 P.2d 957 (1957)(persons not defendants who claim any interest may appear and defend). See also Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924)(right

of interested persons to participate in eminent domain proceeding is characteristic of action in rem). A person who seeks to acquire the same property does not necessarily have an interest in it and hence may not participate. His proper remedy, if he has commenced another proceeding, is to move to consolidate the proceedings. See Section 2202.

Section 2023 does not authorize the admission of a person who does not show that he has some interest in the property. San Joaquin Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924 (1912). An answer filed by such a person, if it shows on its face no interest in the property, is properly demurred to by the plaintiff. Burlingame v. San Mateo County, 103 Cal. App.2d 885, 230 P.2d 375 (1951).

In order to participate, a person must have or claim a legal or equitable interest in the property described in the complaint. Examples of a legal interest that would permit participation include the fee (e.g., Harrington v. Superior Court, supra), a leasehold (e.g., Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941)), or other possessory interest under claim of right (lawful occupancy). Likewise, a successor in interest to the owner of a legal interest may properly participate (e.g., San Benito Co. v. Copper Mtn. Min. Co., 7 Cal. App.2d 82, 45 P.2d 428 (1935)).

Examples of an equitable interest that would permit participation include an executory contract of sale or some other expectancy (contrast Hidden v. Davisson, 51 Cal. 138 (1875)), beneficiary of a deed of trust

(e.g., Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1048 (1926)), assignee of eminent domain proceeds (e.g., City of Los Angeles v. Dawson, 139 Cal. App. 480, P. (1934)), and shareholder in owner of property sought to be acquired (contrast Riverside v. Malloch, 226 Cal. App.2d 204, 37 Cal. Rptr. 862 (1964)).

Examples of interests that are not legal or equitable interests in the property described in the complaint include those of third parties who will be affected neither by the title nor the compensation adjudicated in the eminent domain proceeding. These may include upstream riparian owners (e.g., San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924 (1912)), owners of abutting property who may suffer consequential damages from the project for which the property is being acquired (e.g., Alhambra v. Jacob Bean Realty Co., 138 Cal. App. 251, 31 P.2d 1052 (1934)), and other persons opposed to or affected by the public use for which the property is being acquired.

Consequences of participation. Although no person entitled to participate in an eminent domain proceeding is obligated to do so, participation confers personal jurisdiction on the court. The court may then render a valid judgment with regard to the interest of that person in the property that is the subject of the proceeding. See Harrington v. Superior Court, supra, and Bayle-Lacoste & Co. v. Superior Court, supra.

CHAPTER 4. SUMMONS

§ 2030. Contents of summons

2030. (a) Except as provided in subdivision (b), the form and contents of the summons is as prescribed by Sections 412.20 and 412.30 of the Code of Civil Procedure.

(b) Where process is served by publication, the summons shall describe the property sought to be taken in a manner reasonably calculated to give persons with an interest in the property actual notice of the pending proceeding.

Comment. Section 2030 prescribes the contents of the summons.

Subdivision (a). Subdivision (a) supersedes former Section 1245 of the Code of Civil Procedure. Only the matters specified in Code of Civil Procedure Sections 412.20 and 412.30 need be specified in the summons.

Subdivision (b). Since under subdivision (a) the summons no longer contains a description of the property, defendants must refer to the complaint. However, where service of the summons is by publication, a copy of the complaint is not published. To assure that the persons served by publication will be able to determine if they have an interest in the property, subdivision (b) requires the summons to contain a description adequate for this purpose. Cf. Code Civ. Proc. § 413.10 (service required in a manner "reasonably calculated to give actual notice").

§ 2031. Persons served

2031. A summons shall be served on the following persons:

(a) Every person named as a defendant in the complaint.

(b) Where the state is a defendant, the Governor, the Attorney General, the Director of General Services, and the State Lands Commission.

Comment. Section 2031 indicates the persons upon whom summons is to be served. While filing of a complaint vests the court with subject matter jurisdiction in the eminent domain proceeding, service of summons is essential to confer upon the court jurisdiction over the person of the defendants. Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964). Failure to serve summons upon a person who has an interest in the property acquired renders any eminent domain judgment void as against his interest. Absent service of summons, personal jurisdiction may only be acquired by general appearance or by waiver. See Code Civ. Proc. § 410.50 (general appearance). See also Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924)(waiver); Kimball v. Alameda Co., 46 Cal. 19 (1873); Dresser v. Superior Court, supra; Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941).

Subdivision (a). Every person named in the complaint should be served with summons. The manner of service is prescribed in Section 2032. For provisions governing service upon various types of persons, see Code of Civil Procedure Sections 416.10-416.90.

Subdivision (b). When property belonging to the state is sought to be taken, in addition to serving the Governor as provided in Code of Civil Procedure Section 416.50, subdivision (b) requires the plaintiff to serve the Attorney General, the Director of General Services, and the State Lands Commission. This continues a requirement formerly found in subdivision (8) of Section 1240 of the Code of Civil Procedure, with the addition of the Director of General Services. See California & N. R.R. v. State, 1 Cal. App. 142, 81 P. 971 (1905). See also former Code Civ. Proc. § 1245.4.

§ 2032. Manner of service

2032. (a) Except as provided in subdivision (b), all persons shall be served in the manner specified in Chapter 4 (commencing with Section 413.10) of Title 5 of Part II of the Code of Civil Procedure.

(b) Where the court orders service by publication, it shall also order the plaintiff to post within 10 days a copy of the summons and complaint on the property sought to be taken.

Comment. Due process requires that the rights of a person may be adjudicated only if that person is served with process in a manner reasonably calculated to give him actual notice and an opportunity to be heard. See, e.g., Milliken v. Meyer, 311 U.S. 457 (1940); Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356 (1906). Cf. Code Civ. Proc. § 413.30.

Section 2032 provides the manner of service of process in eminent domain proceedings and is designed to satisfy due process requirements. Persons properly served under this section are bound by the judgment of the eminent domain court. See Section 2300.

Subdivision (a). Subdivision (a) incorporates the service provisions of the Code of Civil Procedure. This continues the rule formerly found in Code of Civil Procedure Section 1245.

Subdivision (b). Under subdivision (a), a person must be served by mail, personal delivery, or substituted service. If he cannot, after reasonable diligence, be served by those methods, the court may order service by publication. See Code Civ. Proc. § 415.50. This may occur either because the whereabouts of the named defendant are unknown or because the identity of the defendant is unknown (as where heirs and devisees) or all persons unknown are named defendants pursuant to Section 2022.

Where service by publication is ordered pursuant to Code of Civil Procedure Section 415.50, subdivision (b) requires that the court also order the plaintiff to post a copy of the summons and complaint on the property within 10 days after the making of the order. This provision is designed to maximize the possibility of reaching interested parties. Cf. Title & Document Restoration Co. v. Kerrigan, supra.

Subdivision (b) supersedes a portion of former Code of Civil Procedure Section 1245.3 relating to service of heirs and devisees, persons unknown, and others. Subdivision (b) extends the posting requirement to the case where any defendant is served by publication.

Although generally service statutes are liberally construed (cf. Code Civ. Proc. §§ 4 and 187), the due process considerations involved in service by publication demand strict compliance with the statute. See Stanford v. Worn, 27 Cal. 171 (1865). See also Los Angeles v. Glassell, 203 Cal. 44, ___ P. ___ (1928).

CHAPTER 5. PLEADINGS

Article 1. Complaint

§ 2040. Contents of complaint

2040. The complaint shall contain all of the following:

(a) The names of all plaintiffs and defendants.

(b) A description of the property sought to be taken. The description need not indicate the nature or extent of the interests of the defendant in the property but must indicate any interests claimed by the plaintiff.

(c) A statement of the right of the plaintiff to take by eminent domain the property described in the complaint. The statement shall include:

(1) A description of the purpose for which the property is sought to be taken.

(2) An allegation of the necessity for the taking as required by Section 302.

(3) A reference to the specific statutes, resolutions, and declarations authorizing the plaintiff to exercise the power of eminent domain for the purpose alleged. Such authority may be in the alternative and may be inconsistent.

(d) A map indicating generally the property described in the complaint and its relation to the project for which it is sought to be taken.

Comment. Section 2040 prescribes the necessary contents of a complaint in an eminent domain proceeding. A complaint that does not contain the elements specified in this section is subject to demurrer. See Section 2050. Section 2040 is an exclusive listing of the substantive allegations required to be made by the plaintiff. Other substantive allegations may, but need not, be made. See, e.g., California S. R. R. v. Southern Pac. R. R., 67 Cal. 59, 7 P. 123 (1885)(averment of value not required and is surplusage); San Luis Obispo Co. v. Simas, 1 Cal. App. 175, 81 P. 972 (1905)(averment of manner of construction of proposed improvement not required).

Other necessary procedural elements not specified in this section should be incorporated in the complaint, however. These include a caption (Code Civ. Proc. §§ 422.30 and 422.40), a request for relief (Code Civ. Proc. § 425.10), and a subscription (Code Civ. Proc. § 446). It should be noted that, when a public entity is the plaintiff, the complaint need not be verified but requires a verified answer. Code Civ. Proc. § 446.

Subdivision (a). The rules for designating parties to an eminent domain proceeding are prescribed in Sections 2020-2022. Persons who have an interest in the property described in the complaint but who are not named and served generally are not bound by the judgment in the proceeding. See Section 2200 and Comment thereto.

Subdivision (b). Subdivision (b), which requires a description of the property sought to be taken, supersedes subdivision (5) of former Code of Civil Procedure Section 1244. The property described in the complaint may

consist of anything from a fee interest in land to water rights to noise easements to franchises. See Section 101 ("property" defined).

The description of the property should be sufficiently certain to enable the parties, and any ministerial officer who may be called upon to enforce the judgment, to know precisely what land is to be taken and paid for. See California Cent. R. R. v. Hooper, 76 Cal. 404, 18 P. 599 (1888). See also Section 2050 (grounds for demurrer).

Like the former provision, subdivision (b) does not require the complaint to identify the nature of the interests the various parties may have in the property sought to be taken. An allegation that each defendant has or claims some interest in the property is sufficient for purposes of the complaint. Specification of the precise interest held by the defendant is left to the defendant. See Section 2060. Where the plaintiff has or claims a pre-existing interest in the property sought to be taken, this interest must be indicated in the complaint. Cf. City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585 (1899); People v. Witlow, 243 Cal. App.2d 490, 52 Cal. Rptr. 336 (1966); People v. Vallejos, 251 Cal. App.2d 414, 59 Cal. Rptr. 450 (1967). Compare Gion v. City of Santa Cruz, 2 Cal.3d 29, ___ P.2d ___, 84 Cal. Rptr. 162 (1970).

Unlike former Section 1244, subdivision (b) does not require that the complaint indicate whether the property taken is a part of a larger parcel but requires only a description of the property taken. Contrast Inglewood v. Johnson (O.T.) Corp., 113 Cal. App.2d 587, 248 P.2d 536 (1952). The "larger

parcel" issue is an issue to be determined at a later time. See Section 2200 et seq. However, the judgment in eminent domain affects only the interests of the parties named in the property described. See Section 2300; see also People v. Shasta Pipe Etc. Co., 264 Cal. App.2d 520, 70 Cal. Rptr. 618 (1968).

The plaintiff may join up to ten tracts in a complaint. Section 2041. The defendants involved in each tract must be clearly indicated. See Section 2050 (grounds for demurrer).

Subdivision (c). Subdivision (c) supersedes subdivision (3) of former Code of Civil Procedure Section 1244 requiring a statement of the right of the plaintiff. Subdivision (c) is intended to provide the owner of the property sought to be taken with an understanding of why his property is being taken and the authority on which the taking is based. The items required to be alleged in subdivision (c) constitute the basis of the plaintiff's right to take and must be proved if the taking is objected to by the defendant. See Section 2100 et seq.

The requirements of subdivision (c) may be satisfied in any way convenient to the plaintiff so long as they are indicated in the complaint. This might include setting out the descriptions in full, summarizing the resolution of necessity, or attaching the resolution to the complaint and incorporating it by reference.

Paragraph (1) requires a description of the public purpose or public use for which the property is being taken. Property may not be taken by eminent domain except for a public use. Cal. Const., Art. I, § 14; Section 301.

The public use must appear on the face of the complaint. See, e.g., Aliso Water Co. v. Baker, 95 Cal. 268, 30 P. 537 (1892).

Paragraph (2) requires a description of the public necessity for the taking. The items of public necessity are listed in Section 302 and include public necessity for the project, plan, or location of the project compatible with the greatest public good and least private injury and necessity of the particular property for the project. This extensive description of the necessity for the taking supplants the general allegation permitted under prior law. See, e.g., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

It should be noted that, while subdivision (2) requires an extensive statement of the necessity for the acquisition, this statement may be satisfied by incorporation of a resolution of necessity containing appropriate findings and declarations, and these declarations may, under certain conditions, be given conclusive effect in the proceeding. See Section 313.

Paragraph (3) requires specific references to the authority of the condemnor. The power of eminent domain may be exercised only by persons expressly authorized by statute for purposes expressly designated by statute. Section 301. In addition, some condemnors must first adopt an appropriate resolution before they may proceed. See, e.g., Section 310. The requirement of a specific reference to all authorizing statutes and resolutions supplants the general allegation of right to condemn permitted under prior law. See, e.g.,

Kern Co. High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919) and Los Altos School Dist. v. Watson, 133 Cal. App.2d 447, 284 P.2d 513 (1955). Where the plaintiff may be authorized to take the property on differing and inconsistent grounds, the plaintiff may allege such authority in the alternative.

Subdivision (d). Subdivision (d) broadens the requirement formerly found in subdivision (4) of Code of Civil Procedure Section 1244 that the complaint be accompanied by a map where the taking was for a right of way. Subdivision (d) requires a map to be attached to the complaint in all cases. The map should be sufficiently detailed and accurate to enable the parties to identify the property and its relation to the project. Where the taking is for a right of way, the map should show its location, general route, and termini with respect to the property sought to be taken. The map need not indicate whether the property sought is a part of a larger parcel.

§ 2041. Joinder of property

2041. (a) The plaintiff may join up to ten tracts in a complaint if:

(1) Each tract is located in whole or in part within the same county; and

(2) Each tract is sought to be acquired for the same purpose.

(b) Except as provided in Code of Civil Procedure Section 1048, the taking of each tract joined pursuant to subdivision (a) shall be separately tried.

Comment. Section 2041, prescribing the rules for joinder of property in a complaint, supersedes the second sentence of subdivision (5) of former Section 1244 of the Code of Civil Procedure.

Subdivision (a). Subdivision (a) provides the basic rule that the plaintiff has the option to join up to ten tracts in the complaint. See Section 111 ("tract" defined). The condemnor is free to include only one tract per complaint, but may join any number up to ten as it deems appropriate. Former law permitted unlimited joinder of different parcels belonging to different defendants in the same action. Cf. County of Sacramento v. Glann, 14 Cal. App. 780, 113 P. 360 (1910). The contents of the complaint must, of course, be complete as to any of the tracts joined. See Section 2040 and Comment thereto. And which defendants have interests in which tracts must be clearly indicated. See Section 2050.

Under subdivision (a), as under prior law, property may be joined in a complaint only if it lies wholly or partially in the same county (see Section 2010) and only if it is to be put to the same public purpose or public use.

Subdivision (b). Subdivision (b) provides for separate trial of each tract joined in a complaint unless the court has ordered consolidation pursuant to Code of Civil Procedure Section 1048. This provision marks a change from prior law under which all parcels joined in a complaint would be tried together absent a motion to separate. See California Condemnation Practice §§ 10.5-10.6 (Cal. Cont. Ed. Bar 1960). Subdivision (b) in effect recognizes that the damage to each tract will not depend upon the damage to the others, nor will any party be interested in any damages except his own. See Weiler v. Superior Court, 188 Cal. 729, 207 P. 247 (1922).

It should also be noted that, although the condemnation of each tract is to be tried separately, a tract may be composed of distinct "parcels" or "lots." Separation of these portions for trial may be appropriate. See Code Civ. Proc. § 1048.

Article 2. Demurrer

§ 2050. Grounds for objection to complaint

2050. (a) The grounds for objection to the complaint are:

(1) The court has no jurisdiction of the proceeding.

(2) The complaint does not contain the information required by Section 2040.

(3) The complaint is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(4) The complaint joins more tracts than is permitted by Section 2041.

(b) Objections on the grounds listed in subdivision (a) shall be taken by demurrer.

Comment. Section 2050 provides the rules governing the demurrer to a complaint in an eminent domain proceeding. The rules governing demurrer to an answer or to a cross-complaint are the same as for civil actions generally. See Section 201.

The demurrer is the responsive pleading normally filed by a defendant who believes the proceedings have been defectively instituted. The grounds for demurrer are indicated in subdivision (a). It should be noted that all grounds are ones that would normally appear on the face of the complaint.

Failure to object to defects in the complaint by demurrer waives any objections to those defects, including subject matter jurisdiction. County of Los Angeles v. Darms, 92 Cal. App. 501, 268 P. 487 (1928). Contrast Code Civ. Proc. § 430.80. It should be noted that, where the person filing a

demurrer is not a named defendant, the filing of such demurrer subjects the person to the jurisdiction of the court. Code Civ. Proc. § 1014. In order for such a person to appear, he must claim an interest in the property. Section 2023.

Subdivision (a) specifies the grounds upon which a demurrer to the complaint can be made. For grounds of demurrer to cross-complaints and answers, see Code of Civil Procedure Sections 430.10 and 430.20.

Paragraph (1). An eminent domain proceeding may generally be commenced only in the superior court of the county in which the property is located. See Sections 2000 and 2010.

Paragraph (2). The required contents of the complaint are listed in Section 2040.

Paragraph (3). The contents of the complaint should be clear. If the description of the property sought to be acquired is not clear, or if the public use for which it is to be taken is not specifically indicated, the complaint is defective. See, e.g., Southern Pac. Co. v. Raymond, 53 Cal. 223 (1878); Aliso Water Co. v. Baker, 95 Cal. 268, 30 P. 537 (1892).

Paragraph (4). A plaintiff may join up to ten tracts. See Sections 2041 and 111 ("tract" defined).

The grounds contained in subdivision (a) are the only grounds for demurrer to the complaint. Pendency of another proceeding, for example, is not a demurrable defect. Cf. Section 2202 (consolidation of proceedings). Contrast Code Civ. Proc. § 430.10(c).

And the traditional ground for demurrer in eminent domain, lack of a public use or right to take, can no longer be raised by demurrer. A demurrer is the pleading by which defects on the face of the complaint are raised. Challenges to the right to take may be raised by a special pleading after the answer has been filed. See Section 2100 et seq.

Article 3. Answer

§ 2060. Contents of answer

2060. (a) The answer shall state both (1) the right or interest the defendant claims in the property described in the complaint and (2) the name and address of the defendant or the person designated as agent for service of notices of all proceedings affecting the defendant's property.

(b) The answer may state objections to the right to take.

Comment. Section 2060 prescribes the contents of the answer to the complaint. The rules governing answers to cross-complaints are the same as for civil actions generally. See Section 201.

The answer is the basic responsive pleading to the complaint. The answer is similar in form and effect to the notice of appearance provided in federal condemnation proceedings in that it amounts basically to a formal appearance of the defendant in the action. See Rule 71A(e) of the Federal Rules of Civil Procedure.

Unlike former Code of Civil Procedure Section 1246, which Section 2060 supersedes, Section 2060 does not require a defendant to specify items of damages that he claims for the proposed taking. The answer merely registers the defendant's claimed interest in the proceeding. Allegations as to valuation are specified at a later stage in the proceedings. See Section .

Objections to the complaint are raised by a separate responsive pleading, the demurrer. See Section 2050. Objections to the right to take may be raised in the answer or by separate pleading filed with or after an answer has been filed in the action. See Section 2100 et seq.

The answer must also include the name and address of the defendant or a person designated as his agent for service of notice of all proceedings affecting his property and a verification where the plaintiff is a public entity. See Code Civ. Proc. § 446.

The answer need only be filed and served on the plaintiff. There is no requirement that a defendant serve copies of his answer on other defendants even if the defendant is a person unknown to the other defendants and claiming interests adverse to theirs. See Redevelopment Agency v. Penzner, 8 Cal. App.3d 417, 87 Cal. Rptr. 183 (1970); County of Santa Cruz. v. MacGregor, 178 Cal. App.2d 45, 12 Cal. Rptr. 727 (1960). Cf. Code Civ. Proc. § 465 (pleadings served on "adverse" parties).

Amendments to the answer are made as in civil actions generally. See Code Civ. Proc. §§ 472, 473.

Article 4. Cross-Complaint

§ 2070. Cross-complaints

2070. A party to an eminent domain proceeding may by cross-complaint assert any cause of action that he has against any other person affecting property described in the complaint.

Comment. Section 2070 makes clear that a cross-complaint is available in certain circumstances in an eminent domain proceeding. Cf. Code Civ. Proc. § 428.10. That is, Section 2070 permits only claims affecting property described in the complaint to be asserted by cross-complaint. This continues prior law. See People v. Buellton Dev. Co., 58 Cal. App.2d 178, 136 P.2d 793 (1943); People v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967); People v. Los Angeles County Flood etc. Dist., 254 Cal. App.2d 470, 62 Cal. Rptr. 287 (1967).

The issue of just compensation is not raised by cross-complaint. Cf. Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941); California Pac. R.R. v. Central Pac. R.R., 47 Cal. 549 (1874). Conflicting claims to the property are asserted by answer, not by cross-complaint (see Section 2060). Contrast People v. Buellton Dev. Co., supra. Failure of a party with an interest in the property to be joined or to appear voluntarily renders any judgment in the proceeding ineffective against that party. See Section 2300.

A cross-complaint is available to allege damages to the property caused by a trespasser. People v. Clausen, supra. And a claim against actions of third parties that affect the use or value of the property would be appropriate. Contrast El Monte School Dist. v. Wilkings, 177 Cal. App.2d 47, 1 Cal. Rptr. 715 (1960).

CHAPTER 6. COMMENCEMENT OF PROCEEDING

Article 1. Commencing the Proceeding

§ 2080. Complaint commences proceeding

2080. An eminent domain proceeding is commenced by filing a complaint with the court.

Comment. Section 2080 supersedes a portion of former Code of Civil Procedure Section 1243, which provided that eminent domain proceedings were commenced by filing a complaint and issuing summons. Section 2080 makes clear that the filing of a complaint alone is sufficient to commence an eminent domain proceeding and confers subject matter jurisdiction on the court. See Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). See also Section 2200 (effect of judgment in eminent domain).

Section 2080 is comparable to Code of Civil Procedure Section 411.10 which provides that "a civil action is commenced by filing a complaint with the court."

§ 2082. Lis pendens

2082. The plaintiff, at the time of the commencement of an eminent domain proceeding, or at any time thereafter, may record a notice of the pendency of the proceeding in the office of the county recorder of any county in which property described in the complaint is located.

Comment. Section 2082 makes clear that the plaintiff in an eminent domain proceeding may file a lis pendens after the proceeding is commenced. This provision supersedes a portion of former Code of Civil Procedure Section 1243 that required the plaintiff to file a lis pendens after service of summons.

Failure to file such a notice of pendency of the eminent domain proceeding does not deprive the court of subject matter jurisdiction, but relieves innocent third parties from the operation of a judgment affecting the property in dispute. See Bensley v. Mountain Lake Water Co., 13 Cal. 306 (1859); Housing Authority v. Forbes, 51 Cal. App.2d 1, 124 P.2d 194 (1942).

Section 2082 is analogous to Section 409 of the Code of Civil Procedure (obligation to file lis pendens and consequences of failure to do so). See also Roach v. Riverside Water Co., 74 Cal. 263, 15 P. 776 (1887)(Section 409 applicable to condemnation proceedings prior to adoption of former Code of Civil Procedure Section 1243).

Article 2. Response

§ 2090. Time to respond

2090. (a) Except as provided in subdivision (b), a defendant shall respond to the complaint within 30 days after he is served with process.

(b) A person not named as a defendant or served with process may appear in the proceeding by responding to the complaint within 30 days after the last named defendant is served or such later time as may be allowed by the court upon a finding of no substantial prejudice to any party.

Comment. Section 2090 provides the basic time limit for responding to the complaint. The 30-day provision is consistent with the requirement for civil actions generally. See Section 201 and Code of Civil Procedure Sections 412.20(a) and 430.40.

Although the normal responsive pleading is the answer (Section 2060), such other responsive pleadings as demurrers or motions to strike may satisfy the requirements of this section. An objection to the right to take (Section 2100 et seq.) is not a responsive pleading, but may be filed along with the answer. Failure to file a responsive pleading within the specified time may lead to entry of default. See Code Civ. Proc. §§ 585 and 586.

Subdivision (a). In most cases, the defendant has 30 days after he is served to respond. If the defendant is named as a "person unknown" in the

complaint, or is served by publication for some other reason, he must respond within 30 days of the final day of publication. Cf. Code Civ. Proc. § 415.50(c) (service complete on last day of publication).

Subdivision (b). In rare cases, where a claimant has not been served by any means, he may appear within the time allowed for the other defendants or such greater time as granted by the court upon application. Failure to appear within the required time causes the right to appear to lapse. However, unless such a person is the successor in interest of another defendant and has actual or constructive notice of the proceeding, the judgment will not bind him. See Section 2300.

CHAPTER 7. CONTESTING RIGHT TO TAKE

Article 1. Objections to Right to Take

§ 2100. Time and manner of objection

2100. (a) Only a party who has filed an answer may object to the right to take. Such objection may be stated in the answer or by a separate pleading filed with the court and served on the plaintiff in the same manner as pleadings in civil actions generally.

(b) An objection to the right to take shall be made no later than the time within which the party is permitted to answer or such longer time as he is allowed by stipulation of the parties.

(c) An objection to the right to take not raised within the time specified in this section is waived unless the court for good cause determines otherwise.

Comment. Section 2100 prescribes the time and manner and indicates the proper persons for contesting the right to take. The contents and grounds for objection are specified in Sections 2102-2103. Provisions for hearing the objections are contained in Section 2120 et seq.

Subdivision (a). Only a party who has filed an answer may object to the right to take. Such a person may either be named in the complaint and served or may appear in the proceeding by filing an answer if he has or claims an interest in the property sought to be acquired. See Chapter 3 (Parties).

Objections may be filed with the answer or in a separate pleading. Such a pleading is new to California eminent domain law. It supplants the demurrer and the answer as the means to challenge the taking of property. See People v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968)(answer); People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959) (answer); Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955)(demurrer).

Under the Eminent Domain Code, the objection is the mechanism, whether contained in the answer or a separate pleading, whereby the defendant raises defenses he may have to the complaint other than defects on the face of the complaint which are raised by demurrer. See Section 2050. Whereas both the answer and demurrer are pleadings responsive to the complaint, an objection is not a responsive pleading and may be filed with or apart from the answer, but not in lieu of the answer. Questions as to just compensation for the taking are raised at a later stage in the proceeding. See Section .

An objection to the right to take, if made separately from the answer, must be filed and served within the time limits specified in subdivision (b). The manner of service is provided in Section 465 and Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure. See Section 201.

Subdivision (b). Subdivision (b), in conjunction with subdivision (a), provides the basic time limits within which objections to the right to take must be raised.

Objections to the right to take may not be made until the defendant has answered the complaint. If the defendant answers within the 30-day period prescribed for responsive pleadings by Section 2042, he may object concurrently with the answer, either in the answer or in a separate pleading. Or, he may object at some later time within the 30-day period by separate pleading. If, on the other hand, the defendant files a responsive pleading other than an answer within the 30-day period and is then permitted to answer at some time beyond that period, the defendant must object concurrently with the answer.

If the parties have stipulated some longer period either to answer or object, or both, the defendant has until the end of that period to object. He may do so, of course, only concurrently with or after answering.

In an appropriate case, the court may grant the defendant additional time to object after filing an answer. See Section 201 and Code Civ. Proc. § 1054: Subdivision (c). Failure to timely object is a waiver of the objection except where judicial relief is granted upon a showing of good cause. An example of such cause might be where the defendant has been misled by a plaintiff's failure to properly plead its statutory authority.

It should be noted that a judgment may be vacated for lack of right to take pursuant to Section 2450.

§ 2101. Content of objection

2101. An objection to the right to take shall include (1) the the ground for each objection and (2) the specific facts upon which each ground is based. The grounds stated may be inconsistent.

Comment. Section 2101 prescribes the content of an objection to the right to take.

The possible grounds for objection are set out in Sections 2102-2103. The grounds for objection may be inconsistent, but each should be specifically stated. This requirement is generally consistent with decisional law that, for example, required the defendant to affirmatively allege how, or in what manner, a proposed use would not be public. See, e.g., People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959); People v. Olsen, 109 Cal. App. 523, 293 P. 645 (1930).

The facts supporting each objection must be specifically stated. This requirement is generally consistent with former law that, for example, required the defendant to allege specific facts indicating an abuse of discretion such as an intention not to use the property as resolved. See, e.g., County of San Mateo v. Bartole, 184 Cal. App.2d 422, 433, 7 Cal. Rptr. 569, (1960):

> Facts constituting abuse of discretion, fraud on the landowners' rights, or arbitrary action, must be specifically alleged to attack the resolution of public interest and necessity. (People v. Lagiss, 160 Cal. App.2d 28, 33 [324 P.2d 926]; People ex rel. Department of Public Works v. Schultz Co., 123 Cal. App.2d 925, 941 [268 P.2d 117]; People v. Thomas, 108 Cal. App.2d 832, 836 [239 P.2d 914].) Similar allegations

should be pleaded where property owners seek to raise the issue of "public use" in a case where the condemning body has specified the use as one which has been declared proper for eminent domain proceedings by the state. It is also true that the courts will not interfere unless the facts pleaded show that the use is clearly and manifestly of a private character. (Stratford Irrigation District v. Empire Water Co., 44 Cal. App.2d 61, 67 [111 P.2d 957].)

See also People v. Chevalier, supra; People v. Nahabedian, 171 Cal. App.2d 302, 340 P.2d 1053 (1959); People v. Olsen, supra.

§ 2102. Grounds for objection where resolution conclusive

2102. Grounds for objection to the right to take, regardless whether the plaintiff has duly adopted a resolution of necessity that satisfies the requirements of Chapter 2 of Division 4, include:

(a) The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.

(b) The stated purpose is not a public use.

(c) The plaintiff does not intend to devote the property described in the complaint to the stated purpose.

(d) There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within seven years or such longer period as is reasonable.

(e) The described property is not subject to acquisition by the power of eminent domain for the stated purpose.

(f) The described property is sought pursuant to Sections 401, 412, 421, or Chapter 8 of Division 4, but the acquisition does not satisfy the requirements of those provisions.

(g) Any other ground provided by law.

Comment. Section 2102 prescribes the grounds for objection to the right to take that may be raised in any eminent domain proceeding regardless whether the plaintiff has adopted a resolution of necessity that is given conclusive effect on other issues. See Section 2103 for a listing of grounds for objection that may be raised only where there is no conclusive resolution of necessity.

Subdivision (a). The power of eminent domain may be exercised to acquire property for a public use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use. Section 301.

Subdivision (b). The power of eminent domain may be exercised only to acquire property for a public use. Section 300. Cal. Const., Art. I, § 14. U.S. Const., Amend. XIV.

Subdivision (c). This subdivision codifies the classical test for lack of public use: whether the plaintiff intends to apply the property to the proposed use. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). Once the acquisition has been found initially proper, the plaintiff may thereafter devote the property to any other use, public or private. See Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958). It should be noted, however, that, where the condemnation judgment is procured by fraud or bad faith, the judgment may be subject to attack in a separate proceeding. See Section 201; Capron v. State, 247 Cal. App.2d 212, 55 Cal. Rptr. 330 (1966). The statute of limitations for collateral attack on the basis of fraud in acquisition is three years from discovery of the fraud. See Code Civ. Proc. § 338(4). In addition, the judgment may be subject to attack on the basis of newly discovered evidence. See Section 2450.

Subdivision (d). This subdivision adds a test for public use new to California law. If the defendant is able to demonstrate that there is no reasonable probability that the plaintiff will apply the property to the

proposed use within seven years or within a reasonable period of time, the plaintiff may not take the property. Cf. Section 401 (future use).

Subdivision (e). Certain property may not be subject to condemnation for specified purposes. For example, a city may not acquire by eminent domain an existing golf course for golf course purposes. Govt. Code § 37353(c). Property appropriated to a public use may not be taken except for more necessary or compatible uses. Sections 450 and 470. Cemetery land may not be taken for rights of way. Health & Saf. Code §§ 8134, 8560, 8560.5. Certain land in the public domain may not be taken at all. Pub. Res. Code § 7994. An industrial farm may not be established by a county on land outside the county. Penal Code § 4106. The Department of Commerce may not condemn for World Trade Centers. Govt. Code § 8324. The Department of Aeronautics may not take an existing airport owned by local entity. Pub. Util. Code § 21632. See also Section 301 and Comment thereto (eminent domain only for purposes authorized by statute); cf. subdivision (f) infra (more necessary public use).

Subdivision (f). Property may be taken for future use only if there is a reasonable probability that its date of use will be within seven years from the date the complaint is filed or within such longer period as is reasonable. Section 401(b).

Property may be taken for substitute purposes only if: (1) the owner of the property needed for the public use has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money;

(2) the property to be exchanged is in the vicinity of the public improvement for which the property needed is taken; and (3) taking into account the relative hardship to the owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the needed property may be compensated by such property rather than by money. Section 412(a).

Property excess to the needs of the proposed project may be taken if it would be left as a remainder in such size, shape, or condition as to be of little market value or to give rise to a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the whole parcel. Section 421(a).

Property appropriated to a public use may be taken by eminent domain if the proposed use is compatible with or more necessary than the existing use. See generally Chapter 8 of Division 4 for the hierarchy of uses.

[N.B. The provisions listed in this subdivision have yet to be reviewed for conformity with the scheme of objections.]

Subdivision (g). While the provisions of Section 2102 catalog the objections to the right to take available under the Eminent Domain Code, there may be other grounds for objection not included in the code. Instances where subdivision (g) might allow objection are where there exist federal or constitutional grounds for objection, or where prerequisites to condemnation are located in other codes.

§ 2103. Grounds for objection where resolution not conclusive

2103. Grounds for objection to the right to take where the plaintiff has not duly adopted a resolution of necessity that satisfies the requirements of Chapter 2 of Division 4 include:

(a) The plaintiff is a public entity and has not duly adopted a resolution of necessity that satisfies the requirements of Chapter 2 of Division 4.

(b) The public interest and necessity do not require the proposed project.

(c) The proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(d) The property described in the complaint, or right or interest therein, is not necessary for the proposed project.

Comment. Section 2103 lists the grounds for objection to the right to take that may be raised only where there is not a conclusive resolution of necessity. Thus, they may be raised against a nonpublic-entity plaintiff in all cases, and against a public-entity plaintiff in cases where it has not duly adopted a resolution or where the resolution is not conclusive. See Section 313 for the effect of the resolution.

Subdivision (a). This subdivision applies only to public entities. A public entity may not commence an eminent domain proceeding until after it

has passed a resolution of necessity that meets the requirements of Chapter 2 of Article 4. Section 310. A duly adopted resolution must contain all the information required in Section 311 and must be adopted by a vote of a majority of all the members of the governing body of the local public entity. Section 312.

Subdivision (b). The power of eminent domain may be exercised to acquire property for a proposed project only if the public interest and necessity require the proposed project. Section 302(a).

Subdivision (c). The power of eminent domain may be exercised to acquire property for a proposed project only if the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. Section 302(b).

Subdivision (d). The power of eminent domain may be exercised to acquire property for a proposed project only if the property and particular interest sought to be acquired are necessary for the proposed project. Section 302(c). See also Sections 101 and 303.

Article 2. Response to Objections

§ 2110. Response to objections

2110. (a) The plaintiff within 10 days after service of an objection to the right to take may respond to the objection upon either or both of the following grounds:

(1) The objection to the right to take does not state facts sufficient to constitute a ground for objection.

(2) The objection to the right to take is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(b) Any objection to the right to take is deemed controverted by the plaintiff.

Comment. Like the answer, the objections to the right to take are deemed denied. See Code Civ. Proc. § 431.20(b). However, they may be demurred to by the plaintiff, either because they do not state a ground for objection or because their import is not sufficiently clear to enable the plaintiff to prepare its case. Compare Code Civ. Proc. § 430.20(a) and (b). The demurrer must be made within 10 days after service of objections. Compare Code Civ. Proc. § 430.40.

The procedures for hearing the demurrer to the objections are the same as those for a demurrer to an answer. The objections may be amended in the same manner as other pleadings. See Code Civ. Proc. §§ 472, 473.

Article 3. Hearing of Objections

§ 2120. Hearing

2120. (a) Objections to the right to take shall be heard on motion and notice by either party to the adverse party.

(b) Until all such objections are resolved, there shall be no further action before the court in the proceeding with regard to the determination of compensation.

Comment. Section 2120 makes provision for bringing to trial the objections, if any, that have been raised against the plaintiff's right to take the property it seeks. It should be noted that no time limits are specified in this section.

Subdivision (a). Either party may set the issues for hearing. Failure to bring them to trial within the time specified in Code of Civil Procedure Section 583 is ground for dismissal of the proceeding. See Section 201.

Subdivision (b). Disposition of the right to take is a prerequisite to further proceedings relating to just compensation. This does not preclude such activities as depositions and discovery related to the right to take.

§ 2121. Evidentiary burdens

2121. Except as otherwise provided by statute, the plaintiff has the burden of proof on all issues of fact raised by an objection to the right to take. This burden is one of clear and convincing proof.

Comment. Section 2121 specifies the allocation of the burden of proof in hearings on right to take issues. Generally, the burden to plead or raise such issues is on the defendant. Sections 2102 and 2131. The issues must be raised specifically and factual allegations stated. Section 2100. The issues thus raised are of two general types, legal and factual. Legal issues--such as whether the use alleged is a public use, whether the plaintiff is authorized by law to condemn the particular property for the particular purpose alleged, and what the requisite formalities are for proper adoption of the resolution of necessity--have no specific burdens assigned other than those that may be applicable in civil actions generally.

Factual questions--such as whether the plaintiff intends to use the property as alleged or whether the property is necessary for the proposed project--must be proved by the plaintiff by clear and convincing proof. Under prior law, the plaintiff bore the burden of demonstrating necessity issues generally by a "preponderance" of the evidence. See, e.g., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). But the issues whether the plaintiff intended to use the property for the purpose alleged and whether the project was located in a manner most compatible with the greatest public

good and least private injury were required to be proved by the defendant. People v. Lagiss, 160 Cal. App.2d 28, 324 P.2d 926 (1958); Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891). Section 2101 places a uniform burden of all factual right to take issues on the plaintiff and raises the evidentiary standard to one of "clear and convincing" proof.

The plaintiff may be aided in satisfying this burden by presumptions if the plaintiff is a public entity. A public entity must enact a resolution of necessity before it may condemn. Section 310. But once it has enacted such a resolution, the resolution may be conclusive on many of the issues of of necessity. Section 313. Of course, the resolution must have been properly adopted if it is to be given any effect at all. Section 2103(a). In addition, it is presumed that official duty has been regularly performed. Evidence Code § 664. Plaintiffs that are not public entities do not have the advantage of any such presumptions but must prove the right to take issues on the basis of the evidence they present.

The burden specified in Section 2121 is applicable generally to right to take issues, absent express statutory provisions indicating other burdens or other quanta of proof required. Other express statutory provisions include: Sections 401 (future use), 421 (remnants), 455 (more necessary public use), 471 (consistent public use).

[NB. The above provisions have yet to be reviewed and integrated in this scheme.]

§ 2122. Court orders

2122. (a) The court shall hear and determine all objections to the right to take brought before it pursuant to Section 2120.

(b) If the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it shall dismiss the proceeding as to that property. Such dismissal is a final judgment.

(c) If the court determines that the plaintiff does have the right to acquire by eminent domain the property described in the complaint, the court shall so order. Such order is an interlocutory judgment.

Comment. Section 2122 provides for a court determination of right to take issues.

Subdivision (a). Court determination of the right to take is consistent with the California Constitution and with prior law. Cal. Const., Art. I, § 14 (jury determination of compensation) and People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

The court has general authority to determine all issues and make all orders necessary and appropriate to its determinations. See also Section 2002 (general authority of court in aid of its jurisdiction).

Subdivision (b). A determination that the plaintiff has no right to condemn the defendant's property requires an order of dismissal. In case the complaint alleges alternative grounds for condemnation, a dismissal as to one ground does not preclude a finding of right to take on another ground. An order of dismissal is a final judgment as to the property affected and is appealable. See Code Civ. Proc. § 904.1. Contrast People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). Such order also entitles the defendant to recoverable costs and fees. See Section 2510.

Subdivision (c). A determination that the plaintiff may condemn the defendant's property is not a final judgment. An appeal must await the conclusion of the litigation. See Code Civ. Proc. § 904.1. Review by writ may be available in an appropriate case. See, e.g., Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955).

CHAPTER 9. TRIAL PRACTICE

Article 1. Preliminary Issues

§ 2200. Bifurcation of preliminary issues

2200. The court in its discretion may, upon motion of either party or upon its own motion, 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 the date set for trial of the issue of compensation, order the prior separate trial of severable nonjury issues related to compensation.

Comment. Section 2200 makes clear that the court has authority to sever nonjury issues related to compensation for trial prior to the trial of just compensation. Under prior law, the court was authorized generally to sever such issues for trial although not explicitly in an eminent domain proceeding. See Code Civ. Proc. § 1048(b)(authority of court to sever issues); City of Los Angeles v. City of Huntington Park, 32 Cal. App.2d 253, 89 P.2d 702 (1939)(Section 1048 applicable to eminent domain). See also Code Civ. Proc. §§ 597-598 (motion for bifurcated trial); San Mateo v. Bartole, 184 Cal. App.2d 442, 7 Cal. Rptr. 569 (1960)(separate trial on public use issue--compare Section 2120). Cf. Evidence Code § 320 (authority of court to control order of proof) and Cal. Const., Art. I, § 14 (just compensation a jury issue).

COMPREHENSIVE STATUTE § 2200

Staff recommendation November 1971

The purpose of Section 2200 is to provide an expeditious means to determine preliminary and foundational issues in the eminent domain proceeding. An order for severance will most likely come following the determination of any right to take issues but must be timely made.

Examples of types of issues that may be tried in advance of compensation are whether there is a severance of property involved in the proposed take, whether there exists a substantial impairment of access, and other matters subject to a court determination before the basic issue of compensation is submitted to the jury. Cf. Vallejo etc. R.R. v. Reed Orchard Co., 169 Cal. 545, 547 P. 238 (1913).

§ 2201. Resolution of issues

2201. The court shall hear and determine all issues bifurcated pursuant to Section 2200 and make any order necessary to effectuate such determinations. An order made pursuant to this section is an interlocutory judgment.

Comment. Issues bifurcated pursuant to Section 2200 are to be resolved by court hearing and determination. Only just compensation is a matter for jury determination. See Cal. Const., Art. I, § 14. See also Vallejo etc. R.R. v. Reed Orchard Co., 169 Cal. 545, 547 P. 238 (1913); Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 153 P. 705 (1915).

Any court order or determination of a bifurcated issue is interlocutory only and, hence, is not appealable. See Code Civ. Proc. § 904.1. The decision of the court on the preliminary issues governs the trial of the just compensation issue and merges with the issue for the purpose of judgment and any necessary appeals. The litigants may obtain speedy review of preliminary issues, if necessary, by stipulating to a judgment based on their determination and then prosecuting an appeal. See, e.g., People v. Lynbar, Inc., 253 Cal. App.2d 870, 62 Cal. Rptr. 320 (1967); People v. Vallejos, 251 Cal. App.2d 414, 59 Cal. Rptr. 450 (1967).

Article 2. Consolidation

§ 2210. Consolidation of proceedings

2210. (a) If more than one person has commenced an eminent domain proceeding to acquire the same property, the court, upon its own motion or upon motion of any party, shall consolidate the proceedings.

(b) In such consolidated proceedings, the court shall first determine whether the purposes for which the property is sought are compatible within the meaning of Article 3 of Chapter 8 of Division 4. If the court determines that the purposes are compatible, it shall permit the proceeding to continue with the plaintiffs acting jointly. The court shall apportion the obligation to pay any award in the proceeding in proportion to the use, damage, and benefits engendered by each plaintiff.

(c) If the court determines pursuant to subdivision (b) that the purposes are not all compatible, it shall further determine which of the purposes is most necessary within the meaning of Article 2 of Chapter 8 of Division 4. The court shall permit the plaintiff alleging the most necessary purpose, along with any other plaintiffs alleging compatible purposes under subdivision (b), to continue the proceeding. The court shall dismiss the proceeding as to the other plaintiffs. Such dismissal shall be treated as a partial dismissal for the purpose of assessing costs and damages pursuant to Sections 2510 and 2511.

Comment. Section 2210 provides the basic procedure for "intervention" by plaintiffs. Cf. Lake Merced Water Co. v. Cowles, 31 Cal. 215 (1866) (condemnor seeking to acquire same property in another proceeding may intervene). Rather than direct intervention by one person in the proceeding of another, however, Section 2210 provides for consolidation of the disparate proceedings. Cf. Code Civ. Proc. § 1048.

Subdivision (a). Subdivision (a) specifies the basic rule that consolidation is the proper procedure where there are two or more actions pending to acquire the same property. A person who seeks to acquire the property, whether or not he has filed a complaint, may not intervene directly in the other proceeding. Compare Section 2023 (defendant intervenors). Likewise, a defendant who has had several complaints filed against him may not demur on the basis that there is another proceeding pending but may move to consolidate. Compare Section 2050 (grounds for demurrer). A motion to consolidate may be made at any time prior to entry of final judgment.

Where the proceedings to acquire the property have been commenced in different jurisdictions (for example, because the property straddles a county line (Section 2010)), there must first be a change of venue (Section 2012) before the proceedings may be consolidated by one court.

Subdivision (b). The test for whether purposes are compatible is whether they would unreasonably interfere with or impair such uses as may reasonably be anticipated for each. See Section 470.

Subdivision (c). For costs and damages on dismissal, see Sections 2510 and 2511.

CHAPTER 10. JUDGMENT

§ 2300. Effect of judgment

2300. A judgment rendered in an eminent domain proceeding is binding upon all persons over whom the court has acquired personal jurisdiction and upon their successors in interest having actual or constructive notice of the proceeding.

Comment. Section 2300 makes clear that an eminent domain proceeding is basically a proceeding quasi in rem, affecting the interests of named persons in specified property. Section 2300 supersedes the final sentence of former Code of Civil Procedure Section 1245.3.

The court in an eminent domain proceeding obtains subject matter jurisdiction over the property by the filing of a complaint in the proper county. See Sections 2010 and 2080 and Comments thereto. However, it may adjudicate the rights and interests of persons in that property only if the persons are brought before the court. See, e.g., Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 573 (1964).

The court may acquire personal jurisdiction over the claimants to the property in several ways. The basic mode is service of process. In addition, a defendant or claimant to the property may confer jurisdiction by a general appearance or by waiver of jurisdictional defects as to himself. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). See

Section 2023. A successor in interest who is not served but who has actual or constructive notice (e.g., a purchaser after the filing of lis pendens) may appear, but whether or not he does so is concluded by the judgment in the proceeding. Cf. Harrington v. Superior Court, supra.

However, persons not named and served, and who have no actual or constructive knowledge of the proceeding, are not bound by the judgment, and their interest in the property is not affected. See, e.g., Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957). See Section 2082. It should be noted, though, that "all persons unknown" may be named and served as defendants in the proceeding. Sections 2022 and 2031. Service by publication and posting in this case, where reasonably diligent inquiry fails to reveal the names or locations of persons claiming an interest in the property, satisfies due process requirements. See Section 2031(a) and Comment thereto. A judgment rendered against such defendants is binding upon them and thus has the force and effect of a judgment in rem. See Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356 (1906), and former Code Civ. Proc. § 1245.3. Cf. Code Civ. Proc. §§ 749-751 (quiet title) and 751.01 et seq. (reestablishing destroyed land records).

In case title acquired by the plaintiff in the proceeding is defective, the plaintiff may bring a subsequent action to rectify the defect. See Section (former Code Civ. Proc. § 1250).

CHAPTER 12. NEW TRIALS AND APPEALS

Article 3. Attack on Judgment in Separate Proceeding

§ 2450. Vacating judgment on basis of new evidence

2450. (a) A person from whom property was taken by eminent domain may, upon discovering the facts described in subdivision (b) but no later than seven years after the judgment of condemnation became final, upon notice to the person who took the property, move the court to vacate the judgment or to award damages as provided in this section.

(b) If, upon hearing the motion, the court determines that the person from whom property was taken has presented evidence that (i) was unknown and not reasonably available to him at the time the judgment became final and (ii) would have required dismissal of the proceeding on any of the grounds specified in Sections 2102 and 2103, the court shall:

(1) Vacate the judgment and dismiss the prior proceeding as to any of the property still owned by the person who acquired the property and not devoted to public use.

(2) Award as damages the amount that would be recoverable under Section 2510 and the amount, if any, by which the market value of the property at the time the motion was filed exceeds the condemnation award as to any property not described in paragraph (1).

Comment. Section 2450 establishes a procedure new to California law, allowing for direct attack upon a final judgment of condemnation on the

basis of newly discovered evidence. The motion to vacate or award damages is analogous to the equitable bill of review for a new trial. See San Joaquin etc. Irr. Co. v. Stevinson, 175 Cal. 607, 166 P. 338 (1917). Contrast Walls v. System Freight Service, 94 Cal. App.2d 702, 211 P.2d 306 (1949). The motion to vacate must be brought as soon as the condemnee discovers the underlying facts, but within seven years after the time the judgment became final. The judgment will be vacated or damages awarded only if the newly discovered evidence is such that it would have required reversal on the right to take issues specified in Sections 2102 and 2103.

The procedure established by this section is in addition to and does not limit any other procedures to attack an eminent domain judgment, whether directly or collaterally, in the original or subsequent proceedings. Cf. 5 B. Witkin, California Procedure 2d Attack on Judgment in Trial Court (2d ed. 1971).

Subdivision (a). For "final judgment," see Section . The motion should be filed in the superior court that rendered judgment even though that court may have been a transfer court not located in the same county as the subject property. The motion should, of course, contain such essential information as identification on the judgment sought to be vacated, a description of the new evidence, and the reasons for its previous unavailability. The motion should be filed and served as are motions and papers in civil actions generally. Code Civ. Proc. § 1010 et seq. It is, of course, the obligation of the moving party to set the motion for hearing although either party may do so.

Subdivision (b). The new evidence alleged must have been unknown at the time of trial and not reasonably available to the condemnee. It must have been of the type that the moving party could not, with all proper diligence, have discovered.

Paragraph (1). A court order of vacation and dismissal is equivalent to a dismissal of the original proceeding. If the moving party is the defendant in the prior proceeding, he is entitled to be restored to possession of the property, to reimbursement for any damages suffered, and to his recoverable costs and expenses. See Sections 2511 and 2510. He must, of course, refund the award received.

Paragraph (2). If property is devoted to a public use or is no longer in the hands of the original condemnor, the condemnee may receive damages rather than return of his property. The measure of damages is the increased value of the property plus the recoverable costs that would have been available under Section 2510 were the proceeding dismissed at its conclusion.

CHAPTER 13. DISMISSAL

Article 1. Grounds for Dismissal

§ 2500. Abandonment

2500. (a) The plaintiff may totally or partially 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 the defendant and filing in court a written notice of such abandonment.

(b) The court may, upon motion made within 30 days after such abandonment, set the abandonment aside 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 denial of a motion to set aside such abandonment, or upon expiration of the time for filing such a motion, if none is filed, the court shall, on motion of any party, enter judgment totally or partially dismissing the proceeding.

Comment. Section 2500 is the same in substance as a portion of former Code of Civil Procedure Section 1255a.

Subdivision (a) is identical to the first sentence of former Section 1255a(a).

Subdivision (b) is identical to former Section 1255a(b).

Subdivision (c) is substantially the same as the first sentence of former Section 1255a(c).

The right to abandonment and dismissal of a proceeding granted by this section is not subject to limitation by the dismissal provisions of the Code of Civil Procedure. Thus, for example, the plaintiff may abandon the proceeding even though the defendant has filed a cross-complaint. Contrast Code Civ. Proc. § 581. See People v. Buellton Dev. Co., 58 Cal. App.2d 178, 136 P.2d 793 (1943).

§ 2501. Amended complaint

2501. After amendment of a complaint, the court shall, upon motion of any party, dismiss the original proceeding as to the superseded portion of the complaint.

Comment. Section 2501 is new. The plaintiff in an eminent domain proceeding may amend the complaint just as in any other civil action. See Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); Yolo Water etc. Co. v. Edmands, 50 Cal. App. 444, 195 P. 463 (1920); see also Eminent Domain Code Section 201; Code of Civil Procedure Sections 432, 472, 473.

Upon amendment of the complaint, either party may move to dismiss the proceeding as originally commenced. See County of Kern v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962); cf. County of Los Angeles v. Hale, 165 Cal. App.2d 22, 331 P.2d 166 (1958). Under Section 2501, the court must enter an order of dismissal.

A dismissal entitles the defendant to his recoverable costs and disbursements pursuant to Section 2510.

§ 2502. Failure to pay or deposit award

2502. If the plaintiff fails to pay or deposit the sum of money assessed in the eminent domain proceeding within the time specified in Code of Civil Procedure Section 1251, the court shall, upon motion of the defendant, enter judgment dismissing the proceeding, provided:

(a) The defendant has filed in court and served upon the plaintiff, by registered or certified mail, a written notice of the plaintiff's failure; and

(b) The plaintiff has failed for 20 days after such service to pay or deposit the money.

Comment. Section 2502 specifies the procedures by which the defendant in an eminent domain proceeding may have the proceeding dismissed upon plaintiff's failure to pay. This section supersedes a portion of the second sentence of former Code of Civil Procedure Section 1252 providing that the court may "set aside and annul the entire proceedings."

Section 2502 dispenses with the option formerly found in the first part of the second sentence of Code of Civil Procedure Section 1252 and the second sentence of subdivision (a) of former Code of Civil Procedure Section 1255a. Those provisions gave the defendant the option either to enforce the judgment as best he might or to treat nonpayment as an implied abandonment. See Southern Pub. Util. Dist. v. Silva, 47 Cal.2d 163, 301 P.2d 841 (1956).

COMPREHENSIVE STATUTE § 2502

Staff recommendation November 1971

Section 2502 makes dismissal the sole remedy for failure to pay or deposit within the time specified in Code of Civil Procedure Section 1251. Section 2502 continues the requirement that dismissal may occur after 20 days' notice to the plaintiff. This provision is included to protect the plaintiff in case of an inadvertent failure to pay the judgment within the time specified. See, e.g., County of Los Angeles v. Bartlett, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963).

Article 2. Costs and Damages

§ 2510. Recoverable costs and disbursements

2510. (a) When any eminent domain proceeding is totally or partially dismissed for any reason, the court shall award the defendant his recoverable costs and disbursements.

(b) Recoverable costs and disbursements may be claimed in and by a cost bill to be prepared, served, filed, and taxed as in civil actions. If the judgment is dismissed upon motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

(c) Any award made pursuant to subdivision (a) shall be paid by the person for whose benefit the condemnation proceeding was commenced.

(d) Except as provided in subdivision (e), recoverable costs and disbursements include:

(1) All expenses reasonably and necessarily incurred in preparing for the condemnation trial, during trial, and in any subsequent judicial proceedings in the condemnation proceeding; and

(2) Reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, and in any subsequent judicial proceedings in the condemnation proceeding, whether such fees were incurred for services rendered before or after the filing of the complaint.

(e) In case of a partial dismissal or a dismissal pursuant to Section 2501, recoverable costs and disbursements include only those recoverable costs and disbursements, or portions thereof, that would not have been incurred had the property sought to be acquired following the dismissal been the property originally sought to be acquired.

Comment. Section 2510 requires the plaintiff to reimburse the defendant for all expenses reasonably and necessarily incurred in preparing for trial, during trial, and on appeal and retrial of the proceeding if it is dismissed for any reason. This section allows recovery of fees even though they were incurred before the filing of the complaint in the eminent domain proceeding. See La Mesa-Spring Valley School Dist. v. Otsuka, 57 Cal.2d 309, 369 P.2d 7, 19 Cal. Rptr. 479 (1962)(attorney's fees); Port San Luis Harbor Dist. v. Port San Luis Transp. Co., 213 Cal. App.2d 689, 29 Cal. Rptr. 136 (19)(engineer's fees); Decoto School Dist. v. M. & S. Tile Co., 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964)(attorney's fees allowed under former Section 1255a for services in connection with an appeal). Section 2510 permits recovery of fees and expenses only if a complaint is filed and the proceeding is later dismissed. The subdivision has no application if the efforts or resolution of the plaintiff to acquire the property do not culminate in the filing of a complaint. For parallel provisions allowing payment of costs and fees, see Code of Civil Procedure Section 1255; cf. County of Los Angeles v. Ortiz, Cal.3d , , (1971).

Subdivision (a). Subdivision (a) continues the rule previously found in former Code of Civil Procedure Section 1255a that the plaintiff must reimburse the defendant when the plaintiff abandons. See former Section 1255a and the Legislative Committee Comment thereto, printed in the Assembly Journal, March 20, 1968; see also subdivision (a) of former Government Code Section 7265.5.

Subdivision (a) codifies the holding in County of Los Angeles v. Bartlett, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963), that an implied abandonment has the same consequences as an abandonment on motion of plaintiff with regard to reimbursement of expenses and fees. See also former Code of Civil Procedure Section 1255a(a)(second sentence) and Capistrano Union High School Dist. v. Capistrano Beach Acreage Co., 188 Cal. App.2d 612, 10 Cal. Rptr. 750 (1961).

Subdivision (a) codifies the holding of numerous cases that costs and disbursements are recoverable where plaintiff amends the complaint so that the nature of the property or property interest being taken is substantially changed, amounting to a "partial abandonment." See Metropolitan Water Dist. v. Adams, 23 Cal.2d 770, 147 P.2d 6 (1944); People v. Superior Court, 47 Cal. App.2d 393, 118 P.2d 47 (1941); Yolo Water etc. Co. v. Edmands, 50 Cal. App. 444, 196 P. 463 (1920). Under subdivision (a), however, costs and disbursements are recoverable whenever there is any amendment of the complaint, subject to limitations prescribed in subdivision (e).

Subdivision (a) continues the rule that the plaintiff must reimburse the defendant for expenses and fees when the right to take is defeated. See subdivision (a) of former Government Code Section 7265.5; see also federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646) § 304. In addition, where the proceeding is dismissed for lack of right to take pursuant to Sections 1269.01 or 2130, the costs must be awarded.

Subdivision (a) provides that the plaintiff must pay fees and expenses if the action is dismissed pursuant to Code of Civil Procedure Section 583 (dismissal for failure to prosecute action within certain time limits). This provision is new. Contrast Bell v. American States Water Service Co., 10 Cal. App.2d 604, 52 P.2d 503 (1935).

Subdivision (b). Subdivision (b) is the same in substance as the fourth and fifth sentences of former Code of Civil Procedure Section 1255a(c).

Subdivision (c). Subdivision (c) is the same as subdivision (b) of former Government Code Section 7265.5.

Subdivision (d). Subdivision (d) is the same in substance as the second sentence of former Code of Civil Procedure Section 1255a(c). See Eminent Domain Code Section 101 ("property" defined). See also Legislative Committee Comment, Assembly Journal, March 20, 1968.

Subdivision (e). Subdivision (e) is the same in substance as the third sentence of former Code of Civil Procedure Section 1255a(c). It codifies the concept of "partial abandonment" so as to cover those cases in which the nature of the property or property interest being taken is substantially

changed by the condemnor after the proceeding is begun. See Metropolitan Water Dist. v. Adams, 23 Cal.2d 770, 147 P.2d 6 (1955); People v. Superior Court, 47 Cal. App.2d 393, 118 P.2d 47 (1941); Yolo Water etc. Co. v. Edmands, 50 Cal. App. 444, 196 P. 463 (1920). Recoverable costs and disbursements do not include any items that would have been incurred notwithstanding the "partial abandonment." County of Kern v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). See also Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, P.2d , Cal. Rptr. (1971); Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co., 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965).

§ 2511. Damages caused by possession

2511. If, after the defendant moves from property sought to be condemned in compliance with an order of possession, the proceeding is dismissed with regard to the property for any reason, the court shall:

(a) Order the plaintiff to deliver possession of the property to the persons entitled to it; and

(b) Make such provision as shall be just for the payment of (1) damages arising out of the plaintiff's taking and use of the property and (2) damages for any loss or impairment of value suffered by the land and improvements. Such damages shall be measured from the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is earlier.

Comment. Section 2511 provides for property of which the plaintiff took possession prior to the time the eminent domain proceeding was dismissed.

Subdivision (a). Subdivision (a) supersedes the final portion of the second sentence of former Code of Civil Procedure Section 1252. Whereas the prior provision required possession to be restored to the defendants when the plaintiff failed to deposit the award in a condemnation proceeding, subdivision (a) makes clear that this rule applies as well where the proceeding is dismissed, e.g., because of delay in trial, because the plaintiff abandons the proceeding, or because the right to take is defeated.

Subdivision (b). Subdivision (b) supersedes subdivision (d) of former Code of Civil Procedure Section 1255a. Whereas the prior provision required payment of damages when the plaintiff abandoned or the right to take was defeated, subdivision (b) makes clear that this rule applies as well where the proceeding is dismissed, e.g., because the plaintiff fails to prosecute or because the plaintiff fails to deposit the award in a condemnation proceeding.

Memorandum 71-78

EXHIBIT II

COMPREHENSIVE STATUTE § 111

Staff recommendation November 1971

DIVISION 2. WORDS AND PHRASES DEFINED

§ 111. Tract

111. "Tract" means land owned in fee by one person, or by several persons, in concurrent and undivided ownership, without physical interruption by any other fee ownership, and includes any right or interest in such land or other property situated thereon.

Comment. Section 111 is intended to give content to the common sense notion of a "parcel," "tract," or like division of property. Compare former Code of Civil Procedure Sections 1242 ("piece or article of property") and 1244(5)("parcels of land"). Although the common sense notion of a "tract" includes land only, Section 111 incorporates any type of property and any interest in land. See Section 101 ("property" defined).

The term "tract" is intended as a neutral term to convey the notion of property that is owned in fee by a single person or by several persons holding undivided interests in the same property at the same time, and that extends continuously until physically interrupted by property not owned by that person or those persons. A tract may be composed of smaller portions designated as lots, parcels, and the like so long as they are all contiguous and owned by the same people. The term parallels, but is not to be interpreted synonymously with, "parcel" as used in former subdivision (2) of Section 1248 of the Code of Civil Procedure (property part of a "larger parcel").

COMPREHENSIVE STATUTE

DIVISION 3. GENERAL PROVISIONS

§ 200. Exercise of eminent domain

200. The power of eminent domain may be exercised only as provided in this code unless otherwise specifically provided by statute.

Comment. Section 200 is the same in substance as the second sentence of former Code of Civil Procedure Section 1237. The Eminent Domain Code provides a uniform procedure for the exercise of the power of eminent domain, applicable to all acquisitions by condemnation except the following:

§ 201. Rules of practice

201. Except as otherwise provided in this code, the rules of practice that govern civil actions generally are the rules of practice for eminent domain proceedings.

Comment. Section 201 provides the general rule that eminent domain proceedings are to be governed by the same general principles as other civil actions. See Felton Water Co. v. Superior Court, 82 Cal. App. 382, 256 P. 255 (1927). It supersedes the more restrictively worded provision of former Code of Civil Procedure Section 1256. The general object of Section 201 is to give a trial by jury on the damage issue in every case, if demanded, and when not demanded and on nonjury issues, a trial by the court; and to conform the practice in these proceedings as nearly as practicable to that in civil actions. Cf. People v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967); People v. Buellton Dev. Co., 58 Cal. App.2d 178, 136 P.2d 793 (1943); Holman v. Toten, 54 Cal. App.2d 309, 128 P.2d 808 (1942). The advantage to having the practice in different proceedings in the courts as nearly uniform as possible is manifest. See Code Commissioners' Note to former Code of Civil Procedure Section 1256.

Generally speaking, the rules of practice that govern civil actions may be found in Part 2 of the Code of Civil Procedure (Sections 307-1062a). In addition, provisions in other portions of the Code of Civil Procedure and many nonstatutory rules of procedure may be applicable to eminent domain proceedings if they are applicable to civil actions generally. The test of

whether such general rules of practice are incorporated by Section 201 is whether the Eminent Domain Code provides a different rule. Express rules specifically applicable to eminent domain proceedings may be found in Division 8 of the Eminent Domain Code. Some of these rules may be inconsistent with general rules of practice, and some may be consistent. As to rules not expressly covered in Division 8 of the Eminent Domain Code, the test whether a general rule of practice applies is whether it would be consistent with the other provisions of this code. Cf. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 P. 1123 (1903)(dissenting opinion). As a rule, the mere fact that a provision of the Code of Civil Procedure utilizes the term "action" rather than "proceeding," and the fact that a provision has not been applied to other special proceedings, does not preclude its applicability in eminent domain proceedings. The intent of Section 201 is to include as many rules of practice as would be consistent with the efficient administration of the provisions of this code.

There follows below an indication of some of the major rules of civil practice that are incorporated in the Eminent Domain Code by Section 201.

Commencement of the proceeding. An eminent domain proceeding is commenced by the filing of a complaint. See Code Civ. Proc. § 411.10. This provision supersedes a portion of former Code of Civil Procedure Section 1243, which provided that eminent domain proceedings were commenced by filing a complaint and issuing summons. Section 1243 is repealed. Section 411.10

makes clear that the filing of a complaint alone is sufficient to commence an eminent domain proceeding with its attendant consequences.

The filing of a complaint in the proper court confers subject matter jurisdiction on the court. See Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). See also Section 2200 (effect of judgment in eminent domain).

Service of process. The Code of Civil Procedure provisions relating to the form of summons and manner of service apply to eminent domain proceedings. See Code Civ. Proc. §§ 412.10 and 412.20. See also Section 2032(a). Failure of a party to respond to summons may result in a default judgment against him. See Code Civ. Proc. §§ 585 and 586.

Lis pendens. The plaintiff in an eminent domain proceeding should file a lis pendens after the proceeding is commenced in order to assure that it acquires full title to the property that it seeks. See Code Civ. Proc. § 409. This provision supersedes a portion of former Code of Civil Procedure Section 1243 requiring the plaintiff to file a lis pendens after service of summons. Section 1243 is repealed. Section 409 makes clear the obligation to file a lis pendens and the consequences of failure to do so.

Failure of the plaintiff to record a notice of the pendency of the proceeding pursuant to the provisions of Section 409 of the Code of Civil

Procedure does not deprive the court of subject matter jurisdiction, but relieves innocent third parties from the operation of a judgment affecting the property in dispute. See Bensley v. Mountain Lake Water Co., 13 Cal. 306 (1859); Housing Authority v. Forbes, 51 Cal. App.2d 1, 124 P.2d 194 (1942). See also former Code Civ. Proc. § 1243 (duplicating the requirements of Section 409) and Roach v. Riverside Water Co., 74 Cal. 263, 15 P. 776 (1887)(Section 409 applicable to condemnation proceedings).

Change of venue. The change of venue provisions of the Code of Civil Procedure are generally applicable to eminent domain proceedings. See § 2012 and Yolo Water & Power Co. v. Superior Court, 28 Cal. App. 589, 153 P. 394 (1915). But see Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 P. 1123, 1136 (1903).

Pleadings, amendments, time extensions. The rules governing pleadings and motions generally are applicable to eminent domain proceedings, subject to several major exceptions. The contents of the complaint, demurrer, answer, and cross-complaint are specified in Division 8. See §§ 2040, 2050, 2060, and 2070. However, the rules governing pleadings and motions generally are applicable. Thus, the provisions of Code of Civil Procedure Section 1010 et seq., relating to notices and filing and service of papers, are fully applicable.

Code of Civil Procedure Section 1054, relating to time extensions for filing pleadings, is applicable to pleadings in eminent domain. See Bottoms v. Superior Court, 82 Cal. App. 764, 256 P. 422 (1927). Likewise, Code of

Civil Procedure Sections 432, 472, and 473, governing pleading amendments, are applicable. See Kern County Union High School v. McDonald, 180 Cal. 7, 179 P. 180 (1919).

Pretrial activities. Between the time of pleading and trial, there may be many activities specified in and controlled by the Code of Civil Procedure. The parties may proceed with depositions and other discovery techniques. Code Civ. Proc. § 1985 et seq. The judge may be subject to disqualification due to financial interest or prejudice. Code Civ. Proc. §§ 170 and 170.6. See John Heinlen Co. v. Superior Court, 17 Cal. App. 660, 121 P. 293 (1911); Kohn v. Superior Court, 239 Cal. App.2d 428, 48 Cal. Rptr. 785 (1966). Code of Civil Procedure Section 594, regarding setting the action for trial, applies in eminent domain as does Section 1048, severance and consolidation of causes and issues for trial. See Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933); City of Oakland v. Darbee, 102 Cal. App.2d 493, 227 P.2d 909 (1951). And, of course, the court has the power to grant a continuance where necessary. See, e.g., Code Civ. Proc. § 594a.

Jury or court trial. The provisions of the Code of Civil Procedure that specify a court determination of questions of law and jury determination of questions of fact, unless waived, are incorporated in the Eminent Domain Code. See Code Civ. Proc. §§ 309 and 592. See also California S.R.R. v. Southern Pac. R.R., 67 Cal. 59, 7 P. 123 (1885); Wilmington Canal & Reservoir Co. v. Dominguez, 50 Cal. 505 (1875); Vallejo & N.R.R. v. Reed

Orchard Co., 169 Cal. 545, 147 P. 238 (1915). It should be noted, however, that the court in an eminent domain proceeding may try preliminary issues related to the right to take and foundational matters related to compensation as well as other incidental issues. §§ 2100 and 2150. Trial of just compensation is left to the jury where demanded. See § ; Cal. Const., Art. I, § 14; People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

During the trial, the court has all its normal and usual powers, including the authority to control the number of expert witnesses and to appoint its own expert. See Evidence Code §§ 352 and 730.

Upon trial of the eminent domain proceeding, judgment must be rendered and entered as in other civil actions. See, e.g., Code Civ. Proc. §§ 632 and 668. Fountain Water Co. v. Dougherty, 134 Cal. 376, 66 P. 316 (1901).

Attacking judgments. A judgment in an eminent domain proceeding may be attacked in the same manner as judgments in civil actions generally. Relief from default may be obtained. Code Civ. Proc. § 473. Also, equitable relief from judgment on the basis of fraud may be available. See generally 5 B. Witkin, California Procedure 2d Attack on Judgment in Trial Court §§ (2d ed. 1970). The applicable statute of limitations in such a case is prescribed in Code of Civil Procedure Section 338(4) as three years from discovery of the fraud.

Civil writs may be available to attack interlocutory orders and judgments of the court. See, e.g., Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); Weiler v. Superior Court, 188 Cal. 729, 207 P. 247 (1922); People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966).

The provisions regulating appeals in civil actions apply to eminent domain proceedings. See Code Civ. Proc. §§ 901- ; San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954).

Dismissal. Although some specific grounds for dismissal are listed in Chapter 12 of Division 8 of the Eminent Domain Code, these grounds should not be construed to be the exclusive grounds. Thus, for example, dismissal may occur where there is a finding of no right to take pursuant to Section 1269.01 or 2110. Certain provisions of the Code of Civil Procedure relating to dismissal are also applicable in eminent domain proceedings. E.g., Section 581a (failure to timely procecute); Section 583 (failure to timely bring to trial). See Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 468 (1941); City of San Jose v. Wilcox, 62 Cal. App.2d 224, 144 P.2d 636 (1944); Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964); Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924).

§ 203. Effect of enactment of code

203. No proceeding to enforce the right of eminent domain, or judgment rendered pursuant thereto, commenced prior to the enactment of this code and the repeal of Title 7 of Part 3 of the Code of Civil Procedure, is affected by such enactment and repeal.

Comment. Section 203 has a dual effect. It makes clear that the repeal of the eminent domain provisions of the Code of Civil Procedure and the enactment of new provisions in the Eminent Domain Code in no way affect the validity of proceedings and judgments rendered prior thereto. In addition, it makes clear that pending proceedings are to be completed under old law and are not affected by enactment of the Eminent Domain Code. For a comparable provision, see former Code of Civil Procedure Section 1261.

[Note: This provision is tentative only, and is subject to further Commission review.]

COMPREHENSIVE STATUTE

Staff recommendation November 1971

REPEALS AND AMENDMENTS

Code of Civil Procedure § 1237 (repealed)

Sec. . Section 1237 of the Code of Civil Procedure is repealed.

~~1237.--Eminent domain is the right of the people or Government to take private property for public use.--This right may be exercised in the manner provided in this Title.~~

Comment. Code of Civil Procedure Section 1237 is superseded in whole by various provisions of the Eminent Domain Code.

The first sentence of former Section 1237 is not continued. It was misleading in that the right of eminent domain could be exercised by private persons as well as by the people or government. See former Civil Code § 1001. The right could be exercised to acquire property appropriated to a public use as well as private property. See, e.g., former Code Civ. Proc. §§ 1240 and 1241. To the extent that the first sentence limited the right of eminent domain to property taken for public use, the limitation is continued in Section 14 of Article I of the Constitution and in Section 300 of the Eminent Domain Code.

The second sentence of former Section 1237 is superseded by Section 200 of the Eminent Domain Code.

Code of Civil Procedure § 1243 (repealed)

Sec. . Section 1243 of the Code of Civil Procedure is repealed.

~~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;-provided,-that-where,-of-any-one-piece-or-article-of property,-or-of-any-one-interest-in-or-to-property,-sought-to-be-taken, a-portion-thereof-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-such-piece-or-article-of property,-or-interest-in-or-to-property,-is-situated,-and-the-county so-selected-is-the-proper-county-for-the-trial-of-such-proceedings; and-provided,-further,-that-when-the-plaintiff-is-a-county,-city-and county,-incorporated-city-or-town,-or-a-municipal-water-district,-and the-property-sought-to-be-taken-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;-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.--All-such-proceedings-must-be~~

CODE OF CIVIL PROCEDURE § 1243

Staff recommendation November 1971

~~commenced by filing a complaint and issuing a summons. The provisions of this code of the change of place of trial of actions shall apply to proceedings under this title except as in this section otherwise provided. 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. 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.~~

Comment. Former Section 1243 of the Code of Civil Procedure is superseded in whole by provisions of the Eminent Domain Code. The disposition of the various portions of former Section 1243 is indicated below:

Section 1243	Eminent Domain Code
First sentence	Sections 2000(a) and 2010
Second sentence	Section 2080
Third sentence	Section 2011
Fourth sentence	Section 2000(b)
Fifth sentence	Section 2082

§ 1244 (repealed)

Sec. . Section 1244 of the Code of Civil Procedure is repealed.

~~1244. The complaint must contain:~~

~~1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled the plaintiff;~~

~~2. The names of all owners and claimants, of the property, if known, or a statement that they are unknown, who must be styled defendants;~~

~~3. A statement of the right of the plaintiff;~~

~~4. If a right of way be sought, the complaint must be accompanied by a map showing the location, general route, and termini of said right of way, so far as the same is involved in the action or proceeding;~~

~~5. A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property, but the nature or extent of the interests of the defendants in such land need not be set forth. 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, but the court may consolidate or separate them to suit the convenience of the parties. 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 incorporated village or town, the board of supervisers of the county may be named as plaintiff.~~

Comment. Former Section 1244 of the Code of Civil Procedure is superseded in whole by provisions of the Eminent Domain Code. The disposition of the various subdivisions of former Section 1244 is indicated below:

Section 1244	Eminent Domain Code
Subdivision 1	Sections 2040(a), 2020, and 2021
Subdivision 2	Sections 2040(a), 2020, and 2022
Subdivision 3	Section 2040(c)
Subdivision 4	Section 2040(d)
Subdivision 5	
First sentence	Section 2040(b)
Second sentence	1st part: Section 2041 2nd part: Section 201; see also Code Civ. Proc. § 1048
Third sentence	Section 2021

Code of Civil Procedure § 1245 (repealed)

Sec. . Section 1245 of the Code of Civil Procedure is repealed.

~~1245.--The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, or specific descriptions of the parcels to be taken, a statement of the public use for which it is sought, and, where a general description is used, a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. Except as otherwise specified in this title, it must be in the form of a summons in civil actions, and must be served in like manner.~~

Comment. Section 1245 is superseded by various provisions of the Code of Civil Procedure. See Section 201.

The first portion of the first sentence, requiring the clerk to issue a summons, is superseded by Code of Civil Procedure Section 412.10 (plaintiff may have clerk issue one or more summons for any defendant).

The remainder of the first sentence, prescribing the contents of an eminent domain summons, is superseded by Section 2030. Compare Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356 (1907).

The first portion of the last sentence, requiring the summons to be in the same form as in civil actions, is continued in Section 2030. The Judicial Council may prescribe the form of summons in an eminent domain proceeding. Code Civ. Proc. § 412.20(b).

The final portion of the last sentence, requiring the summons to be served as in civil actions, is continued in Section 2032(a).

CODE OF CIVIL PROCEDURE § 1245.2

Staff recommendation November 1971

Code of Civil Procedure § 1245.2 (repealed)

Sec. . Section 1245.2 of the Code of Civil Procedure is repealed.

~~1245.2.--A-summons-may-be-issued-which-contains-only-the-names-of the-defendants-to-be-served-therewith-and-a-description-or-descriptions of-only-the-property-sought-to-be-condemned-against-the-defendants. Judgment-based-on-failure-to-appear-and-answer-after-service-of-such summons-shall-be-conclusive-against-such-defendants-in-respect-only to-the-property-described-in-such-summons.~~

Comment. Section 1245.2 is superseded by various provisions of the Code of Civil Procedure and Eminent Domain Code. See Section 201.

The first sentence of Section 1245.2, authorizing the issuance of separate summons to separate defendants, is continued in Section 2032. See Code Civ. Proc. § 412.10. See also approved Judicial Council Comment to Section 412.10.

The second sentence of Section 1245.2, limiting the default to the property described in the summons, is not continued because the property is no longer described in the summons. See Section 2030; former Code Civ. Proc. § 1245 and Comment; see also Code Civ. Proc. § 412.20. In general, a default judgment, properly taken, is a complete adjudication of the matters stated in the complaint. See, e.g., Brown v. Brown, 170 Cal. 1, 147 P. 1168 (1915), and Barrow v. Santa Monica B.S. Co., 9 Cal.2d 601, 71 P.2d 1108 (1937).

Code of Civil Procedure § 1245.3 (repealed)

Sec. . Section 1245.3 of the Code of Civil Procedure is repealed.

~~1245.3.--In-any-action-brought-under-this-title-the-plaintiff-may name-as-defendants,-in-addition-to-these-persons-who-appear-of-record or-are-known-to-plaintiff-to-have-or-claim-an-interest-in-the-property, "all-persons-unknown-claiming-any-title-or-interest-in-or-to-the property,"-naming-them-in-that-manner,-and-if-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-by-the-superior-court-of-the county-in-which-the-property-is-located-who-is-then-duly-qualified, and-if-no-certified-copy-of-an-order-of-the-superior-court-of-any other-county-appointing-an-executor-or-administrator-of-the-estate of-said-person-who-is-then-duly-qualified-and-acting-has-been-recorded-in-the-county-in-which-the-property-is-located,-and-if-plaintiff-knows of-no-other-duly-qualified-and-acting-executor-or-administrator-of the-estate-of-said-person-and-said-facts-are-averred-in-the-complaint or-in-an-affidavit-by-the-plaintiff-or-its-attorney-filed-with-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.--If-it-appears-to-the-satisfaction-of-the-court-by-affidavit that-after-due-diligence-the-plaintiff-is-unable-to-ascertain-the identity-and-whereabouts-of-any-person-or-persons-sued-as-the-heirs and-devisees-of-a-deceased-claimant-or-one-believed-to-be-dead-or the-identity-and-whereabouts-of-any-person-or-persons-sued-as-persons claiming-by,-through-or-under-said-deceased-claimant-or-one-believed to-be-dead-or-the-identity-and-whereabouts-of-any-person-or-persons sued-as-persons-unknown-claiming-any-title-or-interest-in-the-property, the-court-shall-make-its-order-directing-that-process-be-served-upon such-persons-by-posting-a-copy-of-the-summons-on-the-property-within 10-days-after-the-making-of-the-order-and-by-publication-of-the-same in-some-newspaper-of-general-circulation-published-in-the-county-in which-the-property-is-located-and-designated-by-the-court-as-most likely-to-give-notice-to-such-persons-once-a-week-for-four-successive weeks.

Upon-the-trial-the-court-shall-determine-the-extent-of-and-the value-of-the-interest-or-damages-thereto-of-any-person-whom-it-is alleged-is-dead-or-believed-by-plaintiff-to-be-dead-whose-interest-or claim-appears-of-record-or-is-known-to-plaintiff-and-unless-such-person or-a-duly-qualified-and-acting-executor-or-administrator-of-the-estate of-said-person-appears-in-the-action,-shall-order-the-amount-thereof paid-to-the-county-clerk-to-be-held-by-him-for-the-account-of-the-

~~persons-entitled-thereto-and-shall-determine-the-extent-of-and-the value-of-the-interest-or-damages-thereto,-if-any,-of-all-persons-sued as-persons-unknown,-whether-or-not-they-are-in-being,-and-shall-order the-amount-thereof-paid-to-the-county-clerk-to-be-held-by-him-for-the account-of-the-persons-entitled-thereto.--Any-person-claiming-any-title or-interest-of-any-character-in-or-to-said-property,-whether-legal-or equitable,-may-appear-in-said-action.~~

~~Any-judgment-rendered-in-such-a-proceeding-shall-be-binding-and conclusive-not-only-upon-the-persons-named-as-defendants-and-served with-process-but-upon-the-heirs-and-devisees-of,-and-all-persons claiming-by,-through,-or-under,-any-decedent-sued-and-served-as herein-provided-and-upon-all-persons-unknown-claiming-any-right,-title, estate-or-interest-in-the-property-described-in-the-complaint-and-shall have-the-force-and-effect-of-a-judgment-in-rem.~~

Comment. Former Code of Civil Procedure Section 1245.3 is superseded by various provisions of the Eminent Domain Code. Disposition of this section is set out below.

Section 1245.3	Eminent Domain Code
First sentence	Section 2022
Second sentence	Section 2032
Third sentence	[Not yet drafted]
Fourth sentence	Section 2023
Fifth sentence	Section 2300

Code of Civil Procedure § 1246 (repealed)

Sec. . Section 1246 of the Code of Civil Procedure is repealed.

~~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.~~

~~All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.~~

Comment. Section 1246 is superseded by various provisions of the Eminent Domain Code.

The requirement formerly found in the first sentence that each defend- any answer, is continued in Section 2042. The requirement that the answer allege the interest claimed is continued in Section 2060. The requirement that the answer allege items of damage is not continued. Allegations as to damages are specified at (later stage of proceedings). See Section .

The substance of the second sentence of former Section 1246, permitting third parties claiming an interest to participate, is continued in Section 2023.

Code of Civil Procedure § 1252 (amended)

Sec. . Section 1252 of the Code of Civil Procedure is amended, to read:

1252. Payment may be made to the defendants entitled thereto, or the money may be deposited ~~in Court for the defendants, and be distributed to those entitled thereto.~~ as provided in Chapter 3 commencing with Section 1270.01) of Division 7 of the Eminent Domain Code and withdrawn by those entitled thereto in accordance with that chapter. ~~If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the Court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.~~

Comment. Section 1252 is amended to eliminate any distinction between the kinds of deposits that may be made after entry of judgment. This amendment and enactment of Eminent Domain Code Sections 1270.01-1270.07 make it clear that withdrawal of any deposit does not result in a waiver of appeal or a right to new trial on the issue of compensation if that issue is preserved in accordance with Section 1270.05. In this respect, the prior law is continued. See People v. Neider, 55 Cal.2d 832, 361 P.2d 916, 13 Cal. Rptr. 196 (1961); People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

The former second sentence of Section 1252 is repealed. Portions of it are superseded by the following provisions:

Portion of Second Sentence	Eminent Domain Code
First portion	Section 2502(a)
Middle portion	Section 2502(c)
Last portion	Section 2511(a)

Code of Civil Procedure § 1255a (repealed)

Sec. . Section 1255a of the Code of Civil Procedure is repealed.

~~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, appraisal-fees,-and-fees-for-the-services-of-other-experts-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.

CODE OF CIVIL PROCEDURE § 1255a

Staff recommendation November 1971

Comment. Former Code of Civil Procedure Section 1255a is repealed. The disposition of the various portions of former Section 1255a is indicated below:

Section 1255a	Eminent Domain Code
Subdivision (a)(first sentence)	Section 2500(a)
Subdivision (a)(second sentence)	Section 2502
Subdivision (b)	Section 2500(b)
Subdivision (c)(first sentence)	Section 2500(a)
Subdivision (c)(second sentence)	Section 2510(d)
Subdivision (c)(third sentence)	Section 2510(e)
Subdivision (c) (fourth and fifth sentences)	Section 2510(b)
Subdivision (d)	Section 2511

Code of Civil Procedure § 1256 (repealed)

Sec. . Section 1256 of the Code of Civil Procedure is repealed.

~~1256.--Except-as-otherwise-provided-in-this-Title,-the-provisions of-Part-2-of-this-Code-are-applicable-to-and-constitute-the-rules-of practice-in-the-proceedings-mentioned-in-this-Title.~~

Comment. Section 1256 is superseded by Section 201 of the Eminent Domain Code.

CODE OF CIVIL PROCEDURE § 1261

Staff recommendation November 1971

Code of Civil Procedure § 1261 (repealed)

Sec. . Section 1261 of the Code of Civil Procedure is repealed.

~~1261. No proceeding to enforce the right of eminent domain commenced before this Title takes effect, is affected by the provisions of this Title.~~

Comment. With the repeal of Title 7 of Part 3 of the Code of Civil Procedure, Section 1261 is no longer necessary. For a comparable provision in the Eminent Domain Code, see Section 203.

Code of Civil Procedure § 1262 (repealed)

Sec. . Section 1262 of the Code of Civil Procedure is repealed.

~~1262.--Until the first day of January, one thousand eight hundred and seventy-three, at twelve o'clock noon, the provisions of Sections 1256 and 1257 of this Title are suspended, and until then, except as otherwise provided in this Title, the rules of pleading and practice in civil actions now in force in this State are applicable to the proceedings mentioned in this Title, and constitute the rules of pleading and practice therein.~~

Comment. Cf. Sections 201 and 203 of the Eminent Domain Code.

EXHIBIT III

[1 Chadbourn, Grossman, Van Alstyne, California Pleading]

§ 367. Actions by a City or a County

The second sentence of section 394 of the Code of Civil Procedure provides as follows:

> "Whenever an action or proceeding is brought by a county . . . or city, against a resident of another county . . . or city, or a corporation doing business in the latter, the action or proceeding must be, on motion of either party, transferred for trial to a county . . . other than the plaintiff, if the plaintiff is a county . . . and other than that in which the plaintiff is situated, if the plaintiff is a city, and other than that in which the defendant resides, or is doing business, or is situated." [42]

The substance of this provision (except for the concluding clause which was added in 1915,[43] precluding transfer to the defendant's home county) was first enacted in 1891.[44] Evidently the legislative objective was to provide relief for defendants. What could the needs of such defendants have been? Under section 395 they already possessed the right, as a general rule, to trial on home grounds.[45] In real actions, however, they were required to stand trial where the land was situated.[46]

triable in Sonoma under West's Ann.Cal.Code Civ.Proc. § 393; and the defendants were residents of Sonoma and entitled to venue there under West's Ann.Cal.Code Civ. Proc. § 395, even if the other cited sections were inapplicable.

41. Fitzpatrick v. Sonoma County, 97 Cal.App. 588, 595, 276 P. 113, 116 (1929).

42. The omissions indicated in the quoted provision are, in each instance, the words "or city and county." San Francisco, the only consolidated city and county in California, is treated in all respects as a county for venue purposes.

43. Cal.Stat.1915, c. 434, § 1, p. 721.

44. Cal.Stat.1891, c. 61, § 1, p. 56.

45. See § 251, supra. As to corporation defendants, see § 331, supra.

46. See § 262, supra.

The Legislature apparently thought that when the plaintiff in a real property action is the county or city in which the land lies, local influences adverse to the defendant are sufficiently likely to warrant bestowing a privilege upon the defendant to remove the action for trial away from the possibly hostile forum. In Yuba County v. North America Consol. Gold Mining Co.,[47] which was a case of this type, the provision was invoked and its constitutionality tested. Yuba County had commenced an action in the Superior Court of Yuba County against non-residents to enjoin them from depositing mining debris in a river to the injury of the county's property. The defendants were held entitled to a change of venue. The county's attempt to challenge the constitutionality of the legislation was rejected with the following pronouncement: [48]

> "The further point that section 394 is obnoxious to the provisions of the constitution prohibiting special legislation . . . [because it accords venue] privileges to corporations doing business without the county where the action is commenced not accorded to corporations doing business within the county, is not, in our opinion, well taken. This discrimination is found in other sections where the right to have the place of trial changed is placed upon the distinct ground that the defendant resides in a county other than the county in which the action is commenced, and this although had the defendant been a resident of the latter county he could not have the venue changed. Such legislation has never been regarded as in any just sense special legislation within the meaning of the inhibitory provisions of the constitution."

In its original form, the above quoted provisions of section 394 allowed the court an unlimited range of choice with respect to the transferee county,[49] and accordingly the transfer could be made to the county of the defendant's residence. In 1915, the court's discretion was limited by an amendment requiring that the transferee county be one "other than that in which the defendant resides, or is doing business, or is situated".[50] Thus, although a non-resident could not be forced to submit to trial in a real property action brought by a city or county in the Superior Court of the plaintiff county or of the county in which the

47. 12 Cal.App. 223, 107 P. 139 (1909).

48. Id. at 227-28, 107 P. at 141.

49. Ibid.

50. Cal.Stat.1915, c. 134, § 1, p. 721.

plaintiff city was situated, neither could the defendant insist that the trial be in the county of his own residence. Instead, a neutral county was insisted upon by the statute as the place of trial.

The apparent policy of the statute to protect non-resident defendants from the niggardly verdicts of tax conscious juries drawn from citizens of the plaintiff in local real property actions, as well as to protect the plaintiff from depredations upon its treasury by unfriendly juries from the defendant's county, although possibly historically supportable, does not appear to be expressed in the language of the legislation. That language is not limited to real property situations. Indeed, as one court has pointed out, the quoted provision

> ". . . applies to any action or proceeding brought by a city against a non-resident, upon whatsoever kind of claim the city might have against him, including a claim that bears no relation to the taxing power, one that would have no tendency to arouse the prejudices of tax-conscious jurymen." [51]

The same court concluded that:

> "The purpose of the statute is that of protecting either party from local bias. . . . It gives either party the option of removal to a neutral county." [52]

Section 394 provides in terms that the motion for change of venue may be made by "either party". Although at first glance it might seem anomalous to permit the plaintiff to seek removal to a neutral county, thereby in effect impeaching his own choice of venue, the purpose is consistent with the basic objective of the statute as just indicated. Certain real property actions, as we have seen, are jurisdictionally required to be commenced in the county in which the land is located.[53] Thus, a plaintiff city or county may be required to commence such an action in a land-situs county in which the defendant resides or is doing business, and in which county, presumptively, at least, there might be local bias against the plaintiff and in favor of the defendant. Under such circumstances, although the defendant would theoretically have a right to a change of venue to a neutral county,[54] this right would seldom be invoked. Similarly, a motion by the plaintiff to change venue pursuant to section 397

51. City of Oakland v. Darbee, 102 Cal.App.2d 893, 898, 227 P.2d 109, 912 (1951).

52. Id. at 898, 227 P.2d at 912.

53. See § 201, supra.

54. See Arcularius v. City of Los Angeles, 24 Cal.App.2d 365, 75 P.2d 76 (1938).

of the Code of Civil Procedure (for convenience of witnesses or on the ground that an impartial trial cannot be had), would presumably be difficult to sustain. Thus, unless the plaintiff city or county were permitted to make a motion to change to a neutral county, the danger of local bias could in many cases not be remedied.

This option in the plaintiff to obtain a removal to a neutral county, it will be observed, is limited to cases in which the plaintiff is a city or county; and no comparable option is given to a private individual plaintiff, despite the fact that he might also be required to commence a real property action against a county in the Superior Court of the defendant county or against a city in the Superior Court of the county in which the city is situated.[55]

In view of this apparent discrimination, the constitutionality of the transfer procedure was assailed in City of Stockton v. Ellingwood,[56] in which the plaintiff city, after commencing a condemnation action in the county in which the real property was situated, had obtained a change of venue to a neutral county for purposes of the trial. Defendants, desiring to retain the real property situs county as the place of trial, since they were residents in that county, urged discrimination against private plaintiffs as a ground for holding the statutory provision to be unconstitutional. The argument was rejected.

"It is part of the current history of the state," said the court,[57]

> "that a number of municipalities have acquired valuable and, in some instances, extensive areas of land in counties other than those in which such municipalities are situated for the purposes of obtaining adequate water supplies and developing electric power. It is a matter of common knowledge that public opinion in such counties has been aroused at times in hostile opposition to such undertakings. Whether such opposition has been justified or not is beside the question. It must be presumed in favor of the constitutionality of the section that the legislature determined, upon sufficient investigation, that in a case such as this, in order to avoid any local bias which would probably affect the verdict of a jury, justice requires that the place of trial be changed

55. See §§ 364–65, supra.

56. 78 Cal.App. 117, 248 P. 272 (1926).

57. Id. at 121, 248 P. at 273.

> to a neutral county. It cannot be held . . . that a like bias would probably exist against an individual plaintiff in an action commenced by him in a county other than that of his residence against a municipality situated therein or against the county itself. As a rule there is no general public opinion at all respecting the merits of an action brought by an individual against a county or a municipality therein. There being a reasonable basis of distinction between the two classes of cases, the provision for a change of venue in the one class and not in the other cannot be deemed a special law within the constitutional inhibition."

It would seem from the quoted passage from Ellingwood, that the purpose to be served by granting a transfer from the real property situs county to the neutral county on motion of plaintiff is to protect the plaintiff from possible bias or prejudice *against* it by juries in the county where the action was commenced. Whether or not the defendants resided in that county was apparently regarded as irrelevant, for the possibility of local prejudice *in favor of* the defendants was not deemed a significant factor in the court's opinion.

An inconsistent viewpoint, however, was expressed in the contemporaneous case of City of Stockton v. Wilson,[58] in which an eminent domain action was commenced in the land-situs county against defendants who were not residents of nor doing business in either that county or the county in which the plaintiff city was situated. The trial court's order, on plaintiff's motion, transferring the proceeding to a neutral county was reversed on appeal. Although the court conceded that plaintiff's motion came within the literal language of section 394, it concluded that to grant the motion would be contrary to the spirit and intent of the legislation. Rejecting the position that the statute was intended merely to protect the plaintiff entity against adverse local bias, the court found the legislative purpose was "to guard against local prejudices which sometimes exist *in favor of* litigants within a county as against those from without and to secure to both parties to a suit a trial upon neutral ground."[59] But since the proceeding had in fact been commenced in a neutral county (that is, a county other than that in which the de-

58. 79 Cal.App. 422, 249 P. 885 (1926). 59. Id. at 424, 249 P. at 886. Emphasis added.

fendants resided or were doing business), the court could see no purpose in granting a transfer to still another neutral county.

> "To require a transfer under such circumstances would be to require an idle act. . . . [and] it is not to be presumed that the legislature intended by section 394 to give either party the right to a transfer in cases where no reason exists therefor." [60]

The short-sighted assumption that section 394 was thus intended to protect only against local biases favorable to the adverse party, and not against unfavorable biases adverse to the moving party (which, as Ellingwood points out, supra, could exist in the land-situs county, irrespective of whether defendant resided or did business there) thus led to the conclusion that section 394 was intended to apply solely to actions commenced in a plaintiff county (or county in which a plaintiff city is located) or in a county in which the defendant resides.

The Ellingwood and Wilson cases, which we have just discussed, are manifestly founded on inconsistent premises as to legislative intent. We submit that neither case is entirely sound, and that, in line with the general presumption in favor of constitutional validity, a more rational view would accept the notion that the legislature intended in section 394 to guard against both bias favorable to a local resident as against a non-resident plaintiff, and bias against a non-resident asserting an interest in or seeking to condemn local real property, regardless of the residence of the owner of such property.[61] If this view is sound, section 394 should be applied literally, and the unnecessary judicial limitation engrafted thereon by the Wilson case should, we submit, be disregarded. In the absence of a Supreme Court decision resolving the conflict, the Ellingwood decision is the preferable one.

The mandate of section 394, second sentence, it will be observed, is applicable only when a county or city brings an action against a resident of another county or city.[62] If the parties named as defendants are in part residents of the plaintiff and in part non-residents, the action should in strict theory be regarded as a mixed action to which section 394 is not applicable.[63] Dic-

60. Id. at 424-25, 249 P. at 836.

61. This view is supported by the fifth sentence of § 394, which authorizes assignment of a disinterested judge in lieu of transfer in nonjury cases or cases where a jury has been waived.

62. E.g., County of Los Angeles v. Craig, 52 Cal.App.2d 450, 126 P.2d 418 (1942).

63. On mixed actions generally, see § 375, infra.

tum in at least one case has suggested, however, that the nonresident defendants would have a right in such situation to a transfer under section 394 regardless of the fact that certain other defendants were residents of the plaintiff county or city.[64]

When a county brings an action solely against a resident of itself, on the other hand, it is clear that the defendant is not, within the meaning of the statute, "a resident of another county . . . or city".

> "The intent of the . . . statute is apparently, to permit the trial of an action brought by a county to be tried in that county when the defendants reside therein, on the assumption that where all parties are in effect residents therein no advantage to either would result".[65]

Accordingly, a transfer to a neutral county is not required.[66] In such cases venue is not governed by section 394 but by the ordinary rules relating to venue.

This limitation may lead to anomalous results in some cases. A county suing one of its own residents, for example, may be required to try the case in the judicial district in which the defendant resides, even though that judicial district (e.g., a municipal court judicial district) embraces the entire territory of a city in which the defendant resides, in which city there may be strong prejudices adverse to the plaintiff county.

On the other hand, if a city within a particular county were to sue a resident of another city within the same county, section 394 would seem to be applicable and to authorize a change of venue to a neutral county, since the action is now being brought by a city against a resident of another city. If such action were in a municipal or justice court in which local or municipal bias might be manifested, this result would be at least understandable; but the same result obtains even when the action is pend-

64. City of Oakland v. Darbee, 102 Cal.App.2d 433, 227 P.2d 900 (1951). See also County of Nevada v. Phillips, 111 Cal.App.2d 428, 244 P.2d 495 (1952).

65. County of Nevada v. Phillips, 111 Cal.App.2d 428, 430, 244 P.2d 495, 496 (1952).

66. Nevada County v. Phillips, 111 Cal.App.2d 428, 244 P.2d 495 (1952). By the same token, a corporation doing business in the county in which plaintiff city is situated cannot assert a right to change of venue as "a corporation doing business in [another county]", even though it does business in other counties than that of plaintiff. City of Los Angeles v. Pacific Telephone & Telegraph Co., 164 Cal.App.2d 253, 330 P.2d 888 (1958).

ing in the Superior Court of the entire county and the proceedings may be held in a courtroom situated in still a third city.

Again, if a plaintiff city were to commence an action against a resident of unincorporated territory within the county in which the city is situated, it would seem that section 394, at least literally, is inapplicable, since the action is not being commenced by plaintiff city against a resident of "*another* county" but against a resident of the *same* county as that in which the plaintiff is situated.

Thus, where litigation ensues between a county and a resident of a city located therein, or between a city and a resident of unincorporated territory of the county in which the city is situated, legislative policy appears not to favor a change of venue to a neutral county. On the other hand, when there is litigation between one city and a resident of another city within the same county, legislative policy does favor a change of venue on motion of either party. In view of the fact that these rules are applicable to actions in Superior Courts (as well as the Justice and Municipal Courts), and that Superior Court juries are drawn from the entire county without regard for judicial district boundary lines, the apparent policy distinctions involved in the operation of the statutory language are, to say the least, obscure.

Section 394, it should be noted, is not applicable to actions brought by independent entities other than cities or counties, even though such other entity may be closely related to a county fiscally and administratively.[67]

§ 367. Actions by a City or County

42. Under West's Ann.Cal.Pub.Util. Code, § 16404, public utility districts exercising the power of eminent domain are treated as cities within the meaning of Section 394. Georgetown Divide Public Utility Dist. v. Bacchi, 204 Cal.App.2d 194, 22 Cal.Rptr. 27 (1962).

64. See Georgetown Divide Public Utility Dist. v. Bacchi, 204 Cal. App.2d 194, 22 Cal.Rptr. 27 (1962), holding nonresident property owners in eminent domain proceeding had right to change of venue to neutral county, notwithstanding the presence of resident co-defendants, where resident defendants joined in motion and there were interlocking ownerships between resident and nonresident defendants as to some of the parcels of land involved. The court notes the problems which arise under Section 394, citing the text, but declines to treat the problem as one of a mixed action, in view of the united desire of all defendants for a change of venue, and follows the lead of the Darlee and Phillips cases, cited in the text.

Memorandum 71-78

EXHIBIT IV

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572-1931

October 7, 1971

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Re: Memorandum 71-68
Study 36.80 - Condemnation
(Procedural Aspects)

Dear Mr. DeMoully:

These comments are directed towards the recommendation contained in the above memorandum for changing some of the present presumptions and burdens relating to the right to take issues in a condemnation action. More specifically, they are directed toward a Staff recommendation that present law be changed so that in all cases where such issues may properly be raised, the condemnor shall have the burden of establishing the necessity for a proposed public use facility and the propriety of its location by "clear and convincing proof" (See proposed Section 2101 Evidentiary Burdens).

The reason given by the Staff for the suggested change is a desire to accomplish some kind of uniformity. They suggest in this regard that present law has developed on an "ad hoc basis in a rather haphazard manner" and that "the reasons for the present rules are unclear." While this observation may be true with respect to some of the rules, it is my judgment that it is not true as to others and that to change all rules for the sake of uniformity would be to overlook some very well reasoned decisions of the California courts.

Falling into the latter category are those rules that have developed with respect to the so-called "compatibility of location issues." In this area, present law is just the opposite of the Staff recommendation; i.e., the defendant-property owner, under present law, has the burden of prevailing on the basis of a clear and convincing evidence criterion. The California Supreme Court in the case of City of Pasadena vs. Stimson, 91 Cal. 238 (1891), explains the reason for this in this way:

> "The state, or its agents in charge of a public use, must necessarily survey and locate the land to be taken, and are by statute expressly authorized to do so. (Code Civ. Proc., sec. 1242). Exercising, as they do, a public function under express statutory authority, it would seem that in this particular their acts should, in the absence of evidence to the contrary, be presumed correct and lawful. The selection of a particular route is committed in the first instance to the person in charge of the use, and unless there is something to show an abuse of the discretion, the propriety of his selection ought not to be questioned; for certainly it must be presumed that the state or its agent has made the best choice for the public, and if this occasions peculiar and unnecessary damage to the owners of the property affected, the proof of such damage should come from them. And we think that when an attempt is made to show that the location made is unnecessarily injurious, the proof ought to be clear and convincing; for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so ad infinitum. The improvement could never be secured, because whatever location was proposed, it could be defeated by showing another just as good." (Emphasis added)

The foregoing language or excerpts thereof have been quoted with approval in a myriad of subsequent California decisions on the subject. One of the latest which applied the criteria to a public utility condemnor is San Diego Gas & Electric Company vs. Lux Land Company, 194 Cal.App.2d 472 (1961).

There are some very good practical reasons why this should remain the law. For example, those agencies faced with the problem of prevailing on an issue of location may not go into court in advance of the initiation of a large and sometimes very complicated right of way acquisition program to seek some sort of an advisory opinion about the propriety of the route they have selected. Rather, in most cases they must rely on their own judgment of the best route available. Substantial expenditures in right of way acquisition, engineering and other costs must then be made in reliance on this judgment at a time prior to condemnation actions being filed and the courts finally being presented with the problem (initially filing a condemnation action against all property owners

along a given route and forcing them into early litigation hardly being a satisfactory alternative). Under such circumstances, it seems altogether proper and in the public interest for the property owner who wishes to contest the location of the entire route to have the greater evidentiary burden.

This is particularly true when it is considered that right of way acquisition programs by agencies exposed to this issue extend across county lines. There is no rule that indicates the judge in one county must follow the decision of another judge in a sister county. If a property owner can prevail on the basis of slight or doubtful proof in one county, he could do so in another county with the result possibly being an unconnected right of way and the complete blockage of a much needed public improvement.

One final point--I wonder if the Staff really realizes just what kind of a change they are suggesting when they suggest that a condemning agency should prevail on the basis of "clear and convincing evidence." The California Supreme Court in the early case of Sheehan vs. Sullivan, 126 Cal. 189 (1899), has interpreted clear and convincing evidence as being that kind of evidence that would be "sufficiently strong to command the unhesitating assent of every reasonable mind." To my knowledge, this interpretation remains the law of California today. It doesn't take much familiarity with the greater environmental issues of the day to realize that no matter what the equities may be weighing in favor of one location over another, it will never be possible to secure the unhesitating assent of "every reasonable mind."

It is respectfully requested that these comments be given serious consideration and that if further clarification or amplification of the points made appears desirable that I and perhaps other representatives from other affected agencies be given the opportunity to appear at one of your meetings.

Respectfully submitted,

Tom P. Gilroy
Assistant Counsel

TPG:bjs