

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Taking Possession and Passage of Title
in Eminent Domain Proceedings

October 1960

LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens. The Commission herewith submits its recommendation and a study on a portion of this subject—taking possession and passage of title in eminent domain proceedings. The study was prepared by the Commission's research consultant, the law firm of Hill, Farrer and Burrill of Los Angeles.

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings

Some of the principal problems in the field of eminent domain are those involved in determining when possession of or title to the condemned property should pass to the condemner. Related problems involve the determination of the time when the condemnee loses the right to place improvements on the property for which he may be compensated, when the risk of loss of the improvements shifts to the condemner, when interest on the award should commence and abate and when taxes should be prorated.

After studying these matters, the Law Revision Commission has concluded that in many instances the existing law is unfair either to condemnees or to condemning agencies or to both. In other instances, the law is uncertain or difficult to ascertain. To remedy these defects, the Commission recommends the following revisions in the law.

Immediate Possession

Among the most important questions in this area of eminent domain law are those involving the respective rights of the parties in immediate possession cases. The Constitution of this State, in Section 14 of Article I, grants certain specified public agencies the right to take possession of property sought to be condemned immediately upon commencement of eminent domain proceedings, or any time thereafter, if the condemnation is for right of way or reservoir purposes. The Constitution requires the condemning agency to deposit a sum of money, in an amount determined by the court, sufficient to secure to the owner payment of the compensation he is entitled to receive for the taking "as soon as the same can be ascertained according to law."

The statutes implementing the constitutional provision provide that, at least three days prior to the taking of possession, the condemner must either personally serve on or mail to the owners and occupants of the property a notice that possession is to be taken. The names and addresses of the owners may be ascertained from the latest secured assessment roll of the county in which the property is located. If the condemnation is for highway purposes, the condemnee may withdraw 75 per cent of the deposit.

The Commission has concluded that the law relating to the taking of immediate possession needs to be revised to protect more adequately the rights of persons whose property is taken. Accordingly, the Commission makes the following recommendations.

1. *Order of Immediate Possession.* There are now no statutes specifying the procedure to be followed in obtaining an order of immediate possession, but in practice the order of immediate possession is issued upon ex parte application by the condemner. The Commission believes that this procedure does not need to be changed, but it should be explicitly set forth in the statutes. Therefore, the Commission recommends the enactment of statutes providing that the condemner, after issuance of summons, may apply ex parte to the court for an order authorizing immediate possession. However, the statutes should indicate that the order is not to be granted routinely; the court should not issue the order unless it determines that the plaintiff is entitled to take the property by eminent domain and is entitled to obtain immediate possession of the property.

2. *Notice of Order to Owners and Occupants.* At the present time, both the record owners of the property being taken and the occupants must be notified that possession is to be taken. But the condemner is permitted to give this notice as little as three days before possession is actually taken. The notice may be given either by personal service or by certified mail. If the mail is delayed or if there is an intervening weekend or holiday, an owner or occupant may be deprived of possession without any advance notice. Moreover, under existing law, the condemner is permitted to determine the names and addresses of the owners of the property from the latest secured assessment roll in the county in which the property is located. If the property was sold to a new owner after the tax lien date (the first Monday in March) preceding the commencement of the condemnation proceeding, the actual owner of the property might be sent no notice at all, for his name would not be on the "latest secured assessment roll."

The Commission believes that the present law does not provide assurance that reasonable efforts will be made to notify an owner or occupant in sufficient time to enable him to prepare to vacate the property or to seek relief against the taking.

Accordingly, the Commission recommends that the condemner should not be able to take possession of the property unless the record owners and the occupants of the property are notified thereof at least 20 days prior to the date possession is to be taken. But the court should have the power to shorten the required notification time if emergencies arise. If the person to be served has not been served with summons and has not appeared, notice should be given by personal service of a copy of the order authorizing immediate possession or, if personal service cannot be made, by mailing a copy of the order to the last known address of the person to be served. Service of the order should be made on the persons revealed by the records to be the owners of the property, whether or not their names appear on the "latest secured assessment roll."

3. *Delay in Effective Date of Order.* Within the 20-day period after notice is given, the owner or an occupant of the property to be taken should be able to apply to the court for an order postponing the date that immediate possession may be taken if he can demonstrate to the court that the hardship to him of having immediate possession taken

clearly outweighs the hardship that a delay may cause the public. There is no provision in existing law that permits the court to relieve a condemnee from such hardship. A condemnee should not have the right to appeal from an order denying such a request because the questions involved would become moot by the time the appeal is decided unless the order of immediate possession were stayed pending the appeal. The order of immediate possession should not be stayed in this situation, for a stay would nullify the right of immediate possession. On the other hand, the condemner should have the right to appeal from an order granting a stay of the order of immediate possession; the right to obtain the possession of the property before the completion of the proceeding would remain valuable to the condemner and, therefore, the question whether the lower court erred in granting the stay should be subject to review.

4. *Withdrawal of Deposit.* Although the Constitution requires the condemner to make a deposit and gives the condemnee the right to challenge the amount deposited, the right is of little practical value because, unless the property is taken for highway purposes, there is no right to withdraw any of the deposit. If the property is taken for highway purposes, the condemnee is permitted to withdraw only 75 per cent of the *original* deposit, but this often leaves nothing for the owner after lienholders are paid. Thus, in many cases, the condemnee must vacate the property, locate new property to replace that taken and move to the new location at a time when there is little or no money available from the condemnation. To remedy this situation the Commission recommends that the condemnee be authorized to withdraw the entire deposit that has been made by the condemner. This will make the money deposited available to the condemnee at the time he most needs it. There may in some cases be a danger that the amount ultimately awarded the condemnee will be less than the amount deposited and withdrawn, and the condemner may have difficulty in recovering back the difference. For this reason, the court should have the power in appropriate cases to require the filing of an undertaking to secure the condemner against loss.

5. *Vacating the Order of Immediate Possession.* There is no provision in the existing law that permits the condemnee to contest the right of the condemner to take the property prior to the time possession is taken. Legally, the condemnee has the right to raise the question whether the condemnation is for a public use in every condemnation proceeding. The question of the necessity for the taking of the particular property involved may be raised by a condemnee under certain limited circumstances. But the right to raise these questions may be a meaningless right if, at the time the questions are raised, the condemner has already demolished all improvements on the property, denuded the site of all vegetation, constructed pipes, flumes and conduits and inundated the property with water. The Commission recommends, therefore, that the owner or the occupant of the property to be taken be given the right to contest the condemner's right to take the property by eminent domain or his right to obtain immediate possession of the property, or both, by a motion to vacate the order for immediate possession made prior to the time possession is taken. An order vacating or refusing to

vacate an order of immediate possession should be appealable. An appeal should not automatically stay proceedings under the order of immediate possession, but either the trial or appellate court should have the right to stay proceedings until the appeal is decided.

Possession Pending Appeal

Under existing law, any condemner is permitted to take possession of the property to be condemned after entry of judgment even though an appeal is pending. However, it has been held that the condemner waives his right of appeal by taking possession of the property. This rule seems unfair to the condemner: if the condemner takes possession, it will have to pay the award even though it is based upon an error by the trial court, but if it chooses to attack the award by appeal, a needed public improvement may be delayed for a period of years or even have to be abandoned if rising costs exceed the amount available for the construction of the improvement.

The present law may cause hardship to condemnees also. The condemner may refuse to take possession of the property and may withhold payment of the judgment in order to preserve its right of appeal. If so, the period during which the condemnee must go without compensation and is effectively precluded from renting, selling or improving his property will be prolonged until the appeal—and perhaps a new trial—is finally decided. On the other hand, if the condemner may take possession after depositing the amount of the judgment in court and still appeal, the condemner will often do so to avoid further delay in the commencement of the project. This deposit will then be available for the condemnee to use in contesting the condemner's appeal and in carrying out the condemnee's plans for the future.

The Commission recommends that the statutes permitting the condemner to take possession pending appeal be revised to provide that the condemner does not waive its right of appeal by the taking of possession.

Passage of Title

Related to the question of possession is the question of title. At the present time, if immediate possession is not taken, title passes upon the recording of the final order of condemnation. However, if possession is taken prior to that time under an order of immediate possession, title passes to the condemner upon withdrawal of the deposit by the condemnee. There is no similar provision for the passage of title when possession is taken after judgment but pending appeal under Section 1254. To make the rules relating to passage of title uniform, the Commission recommends that title should pass in all condemnation proceedings upon the recording of the final order of condemnation.

Compensation for Improvements

The present law relating to compensation for improvements on condemned property is uncertain. First, while Section 1249 of the Code of Civil Procedure provides that the condemnee is not entitled to compensation for any improvements placed upon the property after the service of summons, there is no explicit provision that the condemnee is entitled to compensation for improvements that are on the property

at that time. Second, the first sentence of Section 1249 is open to the interpretation that the value of the real property as enhanced by its improvements is fixed as of the date summons is issued, even though the improvements are destroyed prior to the time the property is actually taken.

The Commission recommends that legislation be enacted providing that the condemnee is entitled to compensation for the improvements on the property on the date of service of summons unless they are removed or destroyed prior to the date the condemner takes title to or is entitled to take possession of the property.

Abandonment by the Condemner

Under existing law, even though the condemner has taken possession and constructed the contemplated improvement on the property, the condemner may abandon the proceedings at any time until 30 days after final judgment and get back the money it deposited. It is true that the condemner must compensate the owner for the use of the property and any damage to it. But the land owner who has been forced to give up his home or his business and to relocate in another area may find that it is as great a hardship to be forced, in effect, to buy back the original property as it was to be forced to move initially. The deposit may have been withdrawn and expended in the acquisition of a new location; the good will of the business may have been re-established in the new location; or the original property may be so altered that it is no longer useful to the condemnee.

The Commission recommends that if the condemnee has substantially changed his position in justifiable reliance upon the condemnation proceeding and cannot be restored to his original position, the condemner should not have the right to abandon the condemnation. If in other cases the condemnation is abandoned or is not completed for any other reason, provision should be made for compensating the condemnee for the damage he has suffered and for any loss or injury to his property that may have occurred while the plaintiff was in possession.

Interest

Interest upon the award in eminent domain cases runs from the date of entry of judgment unless possession is taken prior to entry of judgment, in which case interest is computed from the effective date of the order for possession. After judgment, interest ceases upon payment of the judgment to the condemnee or into court for his benefit. Of course, if any portion of a deposit is withdrawn, interest ceases to accrue on the portion withdrawn on the date of its withdrawal. These rules have been established both by cases and statutes but some of them are difficult to find and others have been questioned by some writers.

The Commission recommends the enactment of legislation which would gather the rules on interest in eminent domain cases into one section.

Property Taxes

Property taxes are prorated from the date the condemner either takes title to or takes possession of the property if the condemner is a public agency. However, under present law the condemnee loses the benefit

of this proration if he has already paid the taxes, for there is no provision for refund by the taxing authority or reimbursement by the condemner. To remedy this, the Commission recommends that a provision for refund be added to the Revenue and Taxation Code.

A condemnee should also be entitled to a proration of property taxes even though the condemner is not a public agency. In such cases, the condemner should be required to reimburse the condemnee for the pro rata share of the taxes that have been paid and are attributable to the portion of the tax year following the date the condemner acquires the title to or the possession of the property.

Constitutional Revision

The Commission has concluded that the provisions of Section 14 of Article I of the State Constitution that grant the right of immediate possession should be revised. These provisions grant the right of immediate possession only to specified public agencies in right of way and reservoir cases. As has been shown above, they do not assure the property owner that he will actually receive compensation at the time his property is taken.

When they were adopted these provisions reversed a long-standing policy of this State that property may not be taken unless compensation has *first been made*, which was originally adopted as a part of the present Constitution in 1879. Prior to that time, the Constitution had merely required that the owner of property taken for public use be given just compensation, and it was held that payment might be made within a reasonable time after the taking. In 1879, the present Constitution was adopted with the provision that private property may not be taken or damaged for public use "without just compensation having first been made." In *Steinhart v. Superior Court*¹ the Supreme Court held, in reliance upon this provision, that a statute authorizing a condemner to take possession of property after depositing a sum of money in court was unconstitutional because there was no provision for the payment of any portion of this money to the owner. The provisions of the Constitution that now authorize immediate possession without payment to the owner "having first been made" were adopted to overcome the *Steinhart* case.

The Commission believes that the policy underlying the *Steinhart* decision and the original provisions of the 1879 Constitution is sound and the contrary policy of the present provisions of the Constitution is undesirable. A person's property should not be taken from him unless he has the right to be paid concurrently for the property, for it is at the time of the taking that he must meet the expenses of locating and purchasing property to replace that taken and of moving to the new location.

Another defect in the present constitutional provisions is that they severely limit the agencies by which and the purposes for which immediate possession may be taken. The right of immediate possession is of great value to the public, for it permits the immediate construction of needed public projects. The Legislature should, therefore, have the power to decide from time to time what agencies are to have the power and for what purposes the power may be exercised. It should not be

¹ 137 Cal. 575, 70 Pac. 629 (1902).

necessary to amend the Constitution each time a change in the needs of the people of the State warrants either an extension or contraction of the purposes for which the right of immediate possession may be exercised.

Accordingly, the Commission recommends that Section 14 of Article I of the Constitution of the State of California should be amended as follows:

1. The Constitution should guarantee the owner the right to be compensated promptly whenever immediate possession of his property is taken.

2. The Legislature should be given the power to determine what agencies should have the right to take immediate possession and the procedure to be followed in such cases, subject to the constitutional right of the owner to be promptly compensated. It should not be necessary to amend the Constitution to alter procedures every time that it is found that the existing immediate possession procedures are faulty.

3. The phrase "irrespective of any benefits from any improvement proposed by such corporation" should be stricken from the Constitution. This phrase is applicable only to private corporations² and precludes such entities, in condemnations for rights of way or reservoirs, from setting off the benefits which would result to the condemnee's remaining land against the condemnee's claim for damages to such land.³ The phrase is discriminatory in that it is not applicable to unincorporated condemners⁴ and may be unconstitutional under the equal protection clause of the Federal Constitution.⁵ The phrase is uncertain in meaning, for some courts have held that it merely states a rule that is applicable to all condemners that "general" benefits may not be set off,⁶ while others have indicated that it refers to "special" benefits which all other condemners are permitted to set off.⁷

Supplementary Legislation

The Commission recommends that legislation be enacted extending the right of immediate possession to all condemners to become effective if and when the Constitution is amended to permit the Legislature to determine who should have the right of immediate possession and the conditions under which the right may be exercised. The right of the condemner to take the property is rarely disputed. But despite the fact that the only question for judicial decision in virtually all condemnation actions is the value of the property, present law permits possession to be taken prior to judgment only when certain public agencies are condemning property for right of way or reservoir purposes. Because

² *Moran v. Ross*, 79 Cal. 549, 21 Pac. 958 (1889); *People v. McReynolds*, 31 Cal. App.2d 219, 223, 87 P.2d 734, 737 (1939).

³ *San Bernardino etc. Ry. v. Haven*, 94 Cal. 489, 29 Pac. 875 (1892); *Pacific Coast Ry. v. Porter*, 74 Cal. 261, 15 Pac. 774 (1887).

⁴ *Moran v. Ross*, 79 Cal. 549, 21 Pac. 958 (1889).

⁵ See dissenting opinion of McFarland, J., in *Beveridge v. Lewis*, 137 Cal. 619, 626, 70 Pac. 1083, 1086 (1902), and the opinion of Department Two, referred to in the dissenting opinion of Mr. Justice McFarland, see 67 Pac. 1040 (1902); see also concurring opinion of Beatty, C. J., in *Moran v. Ross*, *supra* note 4, at 552, 21 Pac. at 959.

⁶ *Beveridge v. Lewis*, *supra* note 5; *cf. People v. Thompson*, 43 Cal.2d 13, 28, 271 P.2d 507, 516 (1954), and *People v. McReynolds*, 31 Cal. App.2d 219, 223, 87 P.2d 734, 737 (1939).

⁷ *Cf. Collier v. Merced Irr. Dist.*, 213 Cal. 554, 571, 2 P.2d 790, 796 (1931); *People v. McReynolds*, *supra* note 6.

possession cannot be obtained in other condemnation actions until judgment, many vitally needed public improvements are delayed even though there is no real issue in the case of the public's right to take the property. Many public improvements are financed by bond issues, and an undue delay in the acquisition of the property may delay construction to a sufficient extent that the improvement cannot be constructed at all with the funds realized by a particular bond issue or must be drastically curtailed in scope.

Moreover, expanding the right of immediate possession will often benefit the landowner. Upon commencement of condemnation proceedings, a landowner is deprived of many of the valuable incidents of ownership. He can no longer place improvements upon the property for which he may be compensated. He is practically precluded from selling or renting the property for few persons wish to purchase a law suit. Yet, no compensation is given for this inconvenience and the compensation for the taking of the property is not paid in the ordinary case until the conclusion of the litigation. But if the condemner takes the property upon the commencement of the proceedings and the condemnee is given the right to withdraw the deposit made by the condemner in order to take possession, the condemnee will have a substantial portion of the compensation available immediately and will be able to make his plans for the future promptly.

The Commission's recommendation would be effectuated by the enactment of the following measures: *

I

An act to amend Sections 1243.5, 1249, 1253, 1254, 1255a and 1255b of, to renumber and amend Sections 1254.5 and 1254.7 of, and to add Sections 1243.4 and 1249.1 to, the Code of Civil Procedure, relating to eminent domain.

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

SECTION 1. Section 1243.4 is added to the Code of Civil Procedure, to read:

1243.4. In any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the plaintiff may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought, in the manner and subject to the conditions prescribed by law.

SEC. 2. Section 1243.5 of the Code of Civil Procedure is amended to read:

* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted from the present law.

1243.5. (a) In any case proceeding in eminent domain, if which the State, a county, a municipal corporation, a public corporation, or a district takes immediate possession of lands to be used for reservoir purposes, or a right-of-way, pursuant to Section 14 of Article I of the Constitution of this State, plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the probable just compensation, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

(b) If the court determines that the plaintiff is entitled to take the property by eminent domain and to take immediate possession thereof, and if the court determines that the plaintiff has deposited the probable just compensation, the court shall by order authorize the plaintiff to take immediate possession of and to use the property sought to be condemned. The order authorizing immediate possession shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(2) State the purposes of the condemnation.

(3) State the amount of the deposit.

(4) State the date after which the plaintiff is authorized to take possession of the property.

(c) the State, or such county, municipal corporation, public corporation, or district, as the case may be, shall, At least three 20 days prior to the time possession is taken, the plaintiff shall personally serve a copy of the order on or mail to the record owner or owners of the property, if known, and on the person or persons in possession of the property occupants, if any; either a copy of the order of the court authorizing such possession or a notice thereof. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If it appears by affidavit to the satisfaction of the court that a person upon whom a copy of the order authorizing immediate possession or notice is mailed it required to be personally served under this section resides out of the State, or has departed from the State or cannot after due diligence be found within the State, the court may order that in lieu of such personal service the plaintiff send a copy of the order shall be sent by registered or certified mail and, if sent to the owners, it shall be addressed to them such person at their his last known address. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be

sufficient. The latest secured assessment roll in the county where the property is located may be used to ascertain the names and addresses of the owners of the property. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name the legal title to the fee appears by deeds duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

(d) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the amount that the plaintiff is required to deposit pursuant to this section if the court determines that the probable just compensation which will be made for the taking of the property and any damage incident thereto is different from the amount of the probable just compensation therefore deposited.

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

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

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

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

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

(h) The amount required to be deposited by the plaintiff and the amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

(i) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by taking possession of the property pursuant to this section.

SEC. 3. Section 1254.5 of the Code of Civil Procedure is renumbered and amended to read:

~~1254.5.~~ 1243.6. When money is paid into court required to be deposited as provided by Section 14 of Article I of the Constitution ~~1243.5,~~ the court shall order the money to be deposited in the State

Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.

SEC. 4. Section 1254.7 of the Code of Civil Procedure is renumbered and amended to read:

~~1254.7. 1243.7.~~ (a) At any time after money has been deposited as security as provided in Section 14 of Article I of the Constitution 1243.5, for the condemnation of any property or interest in property for state highway purposes, upon application, in the manner hereinafter provided, of the party whose property or interest in property is being taken, may apply to the court, in the manner hereinafter provided, for the withdrawal of all or any portion of the amount deposited for his property or property interest. Upon such application, the court may shall order that portion of the amount applied for, which the applicant is entitled to withdraw under the provisions of this section, to be paid to such applicant from the money deposited in connection with such property or property interest an amount not exceeding 75 percent of the amount originally deposited for the respective property or interest to be paid to such party.

(b) If the amount sought to be withdrawn by an applicant exceeds the amount originally deposited for his particular property or property interest or 75 percent of the final amount deposited for his particular property or property interest, whichever is greater, the court may require the applicant, before withdrawing any of such excess, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in such amount as is fixed by the court, but not to exceed double the amount of such excess, for the return of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

(c) ~~Such~~ The application shall be made by affidavit wherein the applicant shall set forth his interest in the property and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff and no withdrawal shall be made until at least ~~twenty~~ (20) days after such service of the application, or until the time for all objections has expired, whichever is later.

(d) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground that an undertaking should be filed or that the amount of, or the sureties upon, such an undertaking are insufficient.

(e) Within ~~said twenty~~ (20) days the 20-day period, the plaintiff may object to such withdrawal by filing an objection ~~thereof~~ thereto in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within ~~ten~~ (10) days after such service and object

to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in ~~its~~ *such* objection the names and last known addresses of other persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within ~~said twenty~~ *(the 20)* -day period, said money shall not be withdrawn until the applicant causes such personal service to be made.

(f) If ~~such~~ *the* persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom . ~~; to a total amount not exceeding 75 percent of the amount deposited.~~ No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served.

(g) If withdrawn, the receipt of any such money shall constitute a waiver by operation of law ~~to~~ *of* all defenses in favor of the person receiving such payment except with respect to the ascertainment of the value of the property or interest in the manner provided by law; ~~and title to the property or interest as to which money is received pursuant to this section shall vest in the State as of the time of such payment.~~ Any amount so paid to any party shall be credited upon ~~any~~ *the* judgment ~~providing for payment and shall be considered payment upon the judgment as of the date the withdrawal is made so that no interest shall be payable upon the amount so withdrawn after the date of its withdrawal in the eminent domain proceeding.~~

(h) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the ~~condemnation eminent domain~~ *eminent domain* proceeding shall be returned to the party who deposited it ~~together with legal interest thereon from the date of its withdrawal,~~ and the court in which the ~~condemnation eminent domain~~ *eminent domain* proceeding is pending shall enter judgment therefor against the defendant. *If the defendant does not pay the judgment within 30 days after the judgment is entered, the court may, on motion, enter judgment against the sureties for such amount together with the interest that may be due thereon.*

SEC. 5. Section 1249 of the Code of Civil Procedure is amended to read:

1249. For the purpose of assessing compensation and damages the right ~~thereof~~ *thereto* shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section ~~one thousand two hundred forty-eight~~ *1248* ; provided, that in any case in

which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. ~~Nothing in this section contained shall be construed or held to affect pending litigation.~~

~~If an order be made letting the plaintiff into possession, as provided in section one thousand two hundred fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.~~

SEC. 6. Section 1249.1 is added to the Code of Civil Procedure, to read:

1249.1. All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation, damages and special benefits unless they are removed or destroyed before the earliest of the following times:

- (a) The time the title to the property is taken by the plaintiff.
- (b) The time the possession of the property is taken by the plaintiff.
- (c) The time the plaintiff is entitled to take possession of the property under an order authorizing the plaintiff to do so.

No improvements put upon the property subsequent to the time of the service of summons shall be included in the assessment of compensation, damages or special benefits.

SEC. 7. Section 1253 of the Code of Civil Procedure is amended to read:

1253. ~~Final order of condemnation, what to contain. When filed, title vests.~~ When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two Sections 1251 and 1252, the court ~~must shall~~ make a final order of condemnation, which ~~must shall~~ describe the property condemned, *the estate or interest acquired therein* and the purposes of such condemnation. A certified copy of the order ~~must shall~~ thereupon be filed in the office of the recorder of the county *in which the property is located.* ; ~~and thereupon~~ *The title to the property described therein in the final order of condemnation shall vest s in the plaintiff for the purposes described therein specified upon the date that a certified copy of the final order of condemnation is filed in the office of the recorder of the county .*

SEC. 8. Section 1254 of the Code of Civil Procedure is amended to read:

1254. (a) *In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment to the Supreme Court, whenever the plaintiff shall have paid and after payment into court ; for the defendant of ; the full amount of the judgment ; and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said the proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, apply ex parte for an order authorizing it to take possession of and to use the property sought to be condemned.*

(b) *If in the judgment the court determined that the plaintiff is entitled to acquire the property by eminent domain and if the court determines that the plaintiff has made the required payment into court, the superior court in which the proceeding was tried may, upon notice of not less than 10 days, shall by order authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may shall, if necessary, stay all actions and proceedings against the plaintiff on account thereof. In an action for condemnation of property for the use of a school district, an order so authorizing possession or continuation of possession by such school district is not appealable.*

(c) *At least 10 days prior to the time possession is taken, the plaintiff shall serve upon the defendants and their attorneys, either personally or by mail, a copy of the order of the court authorizing it to take possession of the property. A single service upon or mailing to those at the same address is sufficient.*

(d) *At any time after the court has made an order authorizing the plaintiff to take possession pursuant to this section, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the amount that the plaintiff is required to pay into court as a further sum pursuant to this section.*

(e) *The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by paying into court the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this section.*

(f) *The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same full amount of the judgment at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of The court, or a judge thereof, upon application being made by such defendant, to shall order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be is granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate.*

(g) *Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be returned without interest to the party who paid it into court, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against such party.*

(h) *The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceeding s), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally*

settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Sections 16430, 16431 and 16432, Government Code, or deposited in banks as provided in Chapter 4 (*commencing with Section 16500*) of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations.

(i) For the purposes of this section, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

(j) Interest earned and other increment derived from investments or deposits made pursuant to this section, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under this section, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

(k) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

SEC. 9. Section 1255a of the Code of Civil Procedure is amended to read:

1255a. (a) *The plaintiff may abandon the proceedings at any time after the filing of the complaint and before the expiration of ~~thirty~~ 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and 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 ~~express or implied~~, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and during trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within ~~thirty~~ (30) days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the ~~said~~ action is dismissed ~~forty~~ 40 days or more prior to the time set for the ~~trial of~~ pre-trial conference in the ~~said~~ action or, if no pretrial conference is set, the time set for the trial of the action.*

(d) *If the plaintiff has been authorized to take possession of the property sought to be condemned and it is determined that the plaintiff does not have the authority to take such property, or a portion thereof, by eminent domain, or if the plaintiff abandons the proceeding as to such property or a portion thereof, 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 the land and improvements may have suffered after the date the plaintiff was entitled to take possession of the property under the order authorizing the plaintiff to do so.*

SEC. 10. Section 1255b of the Code of Civil Procedure is amended to read:

1255b. *If the plaintiff in a condemnation proceeding obtains an order from the court for possession of the property sought to be condemned prior to the trial of the action, then (a) The compensation and damages awarded in an eminent domain proceeding shall draw lawful legal interest from the effective date of ~~said order~~. earliest of the following dates:*

(1) *The date of the entry of judgment.*

(2) *The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.*

(3) *The date stated in an order authorizing the plaintiff to take possession as the date after which the plaintiff may take possession of the property, except that if such order is vacated or stayed the compensation and damages shall draw legal interest from the date the plaintiff is entitled to take possession.*

(b) *If after the date that interest begins to accrue the defendant continues in actual possession of or receives rents, issues and profits from the property, the value of such possession and of such rents, issues and profits shall be offset against the interest that accrues during the period the defendant continues in actual possession or receives such rents, issues or profits.*

(c) *The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates:*

(1) *As to any amount deposited pursuant to Section 1243.5, the date that such amount is withdrawn by the person entitled thereto.*

(2) *As to any amount paid into court pursuant to Section 1254, the date of such payment.*

(3) *As to any amount paid to the person entitled thereto, the date of such payment.*

(4) *If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the defendant after entry of judgment, the date of such payment.*

SEC. 11. All sections of this act other than Sections 5 and 6 apply to all actions or proceedings in eminent domain pending in the courts at the time this act takes effect in which no order authorizing the plaintiff to take possession of the property sought to be condemned prior to the final order of condemnation has been made prior to the effective date of this act. Sections 5 and 6 of this act do not apply to any action or proceeding pending in the courts on such effective date.

II

An act to amend Section 1248 of, and to add Section 1252.1 to, the Code of Civil Procedure, and to add Section 5096.3 to the Revenue and Taxation Code, relating to taxes.

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

SECTION 1. Section 1248 of the Code of Civil Procedure is amended to read:

1248. The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs; and if the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property;

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences, along the line of such railroad, and the cost of cattle-guards, where fences may cross the line of such railroad; and such court, jury or referee shall also determine the necessity for and designate the number, place and manner of making such farm or private crossings as are reasonably necessary or proper to connect the parcels of land severed by the easement condemned, or for ingress to or egress from the lands remaining after the taking of the part thereof sought to be condemned, and shall ascertain and assess the cost of the construction and maintenance of such crossings;

6. If the removal, alteration or relocation of structures or improvements is sought, the cost of such removal, alteration or relocation and the damages, if any, which will accrue by reason thereof;

7. As far as practicable, compensation must be assessed for each source of damages separately.

8. When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid; *except that if such lien is for ad valorem taxes upon the property, the amount of such taxes for which, as between the plaintiff and the defendant, the plaintiff is liable under Section 1252.1 may not be deducted from the judgment.*

SEC. 2. Section 1252.1 is added to the Code of Civil Procedure, to read:

1252.1. As between the plaintiff and defendant, the plaintiff is liable for the payment of any ad valorem taxes upon the property sought to be condemned that (a) are allocable to that part of the fiscal year that begins on the date that the title to the property vests in the plaintiff or the plaintiff takes possession of the property, whichever is earlier, and (b) are not subject to cancellation under Chapter 4 (commencing with Section 4986) of Part 9 of Division 1 of the Revenue and Taxation Code or refund under Chapter 5 (commencing with Section 5096) of Part 9 of Division 1 of the Revenue and Taxation Code.

If the defendant has paid any taxes for which, as between the plaintiff and defendant, the plaintiff is liable under this section, the plaintiff shall pay to the defendant a sum equal to the amount of such taxes for which the plaintiff is liable.

If the title to the property vests in the plaintiff or if the plaintiff takes possession of the property prior to judgment, the amount the defendant is entitled to be paid under this section shall be claimed at the time and in the manner provided for claiming costs. If title to the property does not vest in the plaintiff and if the plaintiff does not take possession thereof prior to judgment, the amount the defendant is entitled to be paid under this section shall be claimed within 30 days after the title vests in the plaintiff or within 30 days after payment of such taxes, whichever is later, and shall be claimed in the manner provided for claiming costs.

SEC. 3. Section 5096.3 is added to the Revenue and Taxation Code, to read:

5096.3. On order of the board of supervisors, there shall be refunded that portion of the taxes paid before or after delinquency which is allocable to that part of the fiscal year which began on the date the property was acquired (a) by the United States of America, if such property upon such acquisition became exempt from taxation under the laws of the United States, or (b) by the State or by any county, city, school district or other public agency, and because of such public acquisition became not subject to sale for delinquent taxes. If the property was acquired by eminent domain, the property shall be deemed to have been acquired on the date that the title to the property vests in the plaintiff or the plaintiff takes possession of the property, whichever is earlier.

SEC. 4. This act becomes operative on July 1, 1962.

III

A resolution to propose to the people of the State of California an amendment to the Constitution of the State by amending Section 14 of Article I thereof, relating to eminent domain.

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 1961 Regular Session commencing on the second day of January, 1961, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the State be amended by amending Section 14 of Article I thereof, to read:

SEC. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. ; and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which *Such just compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law. The Legislature may by statute authorize the plaintiff in a proceeding in eminent domain to take immediate possession of and title to the property sought to be condemned, whether the fee thereof or a lesser estate, interest or easement be sought, and may by statute prescribe the manner in which, the time at which, the purposes for which, and the persons or entities by which, immediate possession of property sought to be condemned may be taken. Any such statute shall require that the plaintiff shall first deposit such amount of money as the court determines to be the probable just compensation to be made for the taking and any damage incident thereto and that the money deposited shall be paid promptly to the person entitled thereto in accordance with such procedure and upon such security as the Legislature may prescribe. ; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.*

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

IV

An act to amend Section 1243.4 of the Code of Civil Procedure as proposed to be added by Senate Bill No. ---, relating to eminent domain.

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

SECTION 1. Section 1243.4 of the Code of Civil Procedure as proposed by Senate Bill No. ---- is amended to read:

1243.4. In any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the plaintiff may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought, the property sought to be condemned in the manner and subject to the conditions prescribed by law.

SEC. 2. This act shall become operative only if Senate Constitutional Amendment No. ---- of the 1961 Regular Session of the Legislature is approved by the vote of the electors, and in such case this act shall become operative on January 1, 1963.



A STUDY RELATING TO TAKING POSSESSION AND PASSAGE OF TITLE IN EMINENT DOMAIN PROCEEDINGS *

INTRODUCTION

California, along with most other states, has in recent years been confronted with vexing questions concerning the problems of possession and title in condemnation cases. The gamut of problems includes foremost the power, limitations, efficacy and ramifications of immediate possession. Germane to immediate possession are the questions of the propriety of ex parte orders and the period of time allowable before physical possession may be taken. Another unsettled problem, particularly in immediate possession cases and to some extent in other cases, is that of "risk of loss." And it is far from clear whether an owner has the right to improve his property after receiving notice of pending condemnation and to be reimbursed for such improvements if the property is subsequently taken.

While California presently follows the rule that title passes to the condemnor upon the recording of the final order of condemnation,¹ questions often arise whether an earlier date might be more appropriate. A related problem is whether the date of valuation should also be changed from the date of issuance of summons or the date of trial (if trial is not commenced within one year) as presently fixed by statute.² Questions of tax liability and the payment of interest are directly connected with the problem. Also tied in with these problems are the problems involved in abandonment situations, particularly when abandonment follows immediate possession.

Some of these problems have not been decided or acted upon by either the courts or the Legislature. This is to some extent because they have not yet presented themselves clearly in reported cases. Many other of these problems, however, have arisen repeatedly; and although the courts and Legislature have attempted to remedy them, there has been no complete and integrated review of the over-all problems. As a result, the entire area is still far from clear.

The efforts to resolve these problems have been only partially successful both because of the piecemeal methods utilized and the use of language that is often ambiguous. Further, the problems here, as in most other areas of eminent domain, have been aggravated by the accelerated pace of condemnation takings. In addition, both the layman and the lawyer have been confused by the different solutions given these problems depending upon the particular body doing the condemning. As will be seen, for both constitutional and practical reasons, a variation in method is often necessary because of the nature of the

* This study was made at the direction of the Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles.

¹ CAL. CODE CIV. PROC. § 1253.

² CAL. CODE CIV. PROC. § 1249.

taking. Nonetheless, these problems require a plenary review for the purpose of clarifying the areas of confusion, safeguarding the rights of all concerned and facilitating condemnation proceedings.

IMMEDIATE POSSESSION

The right of a condemnor to take immediate possession at the time of the commencement of the condemnation proceeding is currently one of the most crucial factors in the field of eminent domain. In California the right of immediate possession is limited to right of way and reservoir acquisitions.³ Although such takings comprise a substantial percentage of the entire number of acquisitions throughout the State, there are numerous takings that do not carry with them the right of immediate possession.⁴

At the turn of the century when the use of the power of eminent domain began to be exercised extensively throughout the country, the takings—particularly in the western part of the country—involved few properties that were privately owned and even fewer properties that were highly developed. Although the concept of just compensation was then, as it is now, the keystone to the vast majority of condemnation actions, then, in the course of propounding broad policies in this field, the concept of public use was also a major factor.⁵ Indeed, the application of the concept of public use was the principal method of controlling arbitrary and wholesale disregard of the rights of private property owners.⁶ There developed, therefore, a strict interpretation of “public use.” This concept not only limited the condemnor but preserved the rights of the individual in light of the dictates of the Fifth Amendment and the various state constitutional provisions qualifying the use of the power of eminent domain. The issues of “just compensation” and immediate possession were not debated as much as the issue of public use. Furthermore, the economic climate of the country at that time did not make immediate possession a crucial question in this area of the law. Commercial activity did not proceed at the accelerated pace that has become normal and natural in the most recent part of the twentieth century.

Concurrent with the increasing utilization of the power of condemnation has been the increasing importance of the factor of “timing” in these takings. The condemnor has found it increasingly necessary to shorten the period between the commencement of the condemnation proceeding and the taking of possession. It has become apparent that delay in the construction of the needed facility—whether a road, school or urban renewal project—caused by the postponement of possession, adversely affects the condemnor and the public in several ways. The need for additional highways has been accelerating at a tremendous rate; the exploding school population, combined with a dangerous lag in school facilities, has become a national concern; and rapidly deteriorating areas of our cities have placed a blight upon the entire economy.

³ CAL. CONST. art. I, § 14.

⁴ Among major type takings that do not have the right of immediate possession are schools, colleges, urban renewal, many public utilities and municipal improvements.

⁵ See Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 67, 69 (1957); Comment, 58 YALE L.J. 599, 602 (1949).

⁶ *Ibid.*

While the need for public improvements of all kinds has become increasingly clear, the construction of these improvements has often been delayed for excessive periods of time, largely because of the inability of the condemnor to expedite the taking of possession. These problems are being compounded at an alarming rate.⁷

The delay in carrying these public improvements from vision to fruition is not the only loss caused by failure to provide adequate immediate possession procedures. Under present economic conditions, with ever-rising costs of labor and material, delays in commencing a project reflect themselves in the increased cost of the public improvement which cost is, in turn, reflected in increased taxes.⁸ Moreover, since so many of our modern public improvements are financed by bond issues, the inability to take immediate possession may cause inability to meet the bonding requirements and, consequently, may not only retard but completely prevent the construction of the improvement.⁹ Often under bonding provisions, delays in the construction of the improvement increase already heavy interest rates even before the construction has begun.

These vital considerations involved in the immediate possession problem formerly were not fully appreciated, for the prime issue, aside from compensation, was the question of "public use." It is apparent to all those in the field, however, that court decisions within the past decade have made the issue of public use a relatively minor consideration in the application of the power of eminent domain since the grounds for attacking the necessity of the taking and for questioning whether the proposed use is a public use have been greatly limited.¹⁰ The right of a condemnor to take for almost any reason can hardly be challenged successfully in the courts in our day and age. There are exceptions, to be sure, but one of the major reasons—the problem of public use—which stood as a barrier to immediate possession no longer is of any great importance.

It follows, therefore, that the condemnor will almost invariably be sustained in his right to take the property under almost all circumstances. The true and almost only realistic question that presents itself is that of insuring the property owner just compensation. If the property owner can be insured just compensation, there is little, if any, justification for delaying public improvements and, thereby, increasing the tax burden on the public.

There are additional advantages which the public would gain if condemnors were permitted to take immediate possession more frequently:

1. Foremost, of course, is that early possession permits early construction.

⁷ HIGHWAY RESEARCH BD., NAT'L ACADEMY OF SCIENCES—NAT'L RESEARCH COUNCIL, SPEC. REP'T NO. 33, CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES 1 (1953) [hereinafter cited as HIGHWAY RESEARCH BD.]; Johnstone, *The Federal Urban Renewal Program*, 25 U. CHI. L. REV. 301 (1958); Note, 72 HARV. L. REV. 504 (1959).

⁸ See generally HIGHWAY RESEARCH BD. at 3; Jacobs & Levine, *Redevelopment: Making Misused and Disused Land Available and Usable*, 8 HASTINGS L.J. 241, 258 (1957); Note, 69 YALE L.J. 321, 327 (1959).

⁹ *Schenck v. Pittsburgh*, 364 Pa. 31, 70 A.2d 612 (1950) (by implication); Note, 69 YALE L.J. 321, 327 n.41 (1959).

¹⁰ See *Berman v. Parker*, 348 U.S. 26 (1954). Compare *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959), with *Bahr Corp. v. O'Brien*, 146 Conn. 237, 149 A.2d 691 (1959). See generally Marquis, *Constitutional and Statutory Authority To Condemn*, 43 IOWA L. REV. 170 (1958); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

2. Early possession allows condemnors to take better advantage of federal aid that is involved in many projects, *e.g.*, Federal Aid Highway Act of 1956, the Urban Renewal Act and various housing and irrigation undertakings.¹¹

3. Immediate possession would, on occasion, have the beneficial effect of preventing the harassment of the condemnor. At the present time, a condemnor that cannot take immediate possession is often forced to pay an excessive price for land in order to meet a construction deadline.¹² Immediate possession would often lead to settlements for it would prevent the use of litigation for such harassment.

4. If immediate possession statutes include adequate deposit and withdrawal provisions, the property owner will receive partial or full payment for his property many months or even years before he would receive such money in the absence of immediate possession provisions.

5. A well-drafted immediate possession statute may serve to stop the accrual of heavy and unnecessary interest charges, thus saving the public unnecessary costs.

6. Since set-off of benefits is a major factor in the ascertainment of just compensation, the expediting of the construction of the facility by early possession may aid in a more accurate estimate of the amount of benefits involved.

The following disadvantages to an immediate possession provision should, of course, be considered:

1. Condemnors may be afforded an opportunity to harass the condemnee or abuse this administrative power.¹³

2. Subsequent abandonment of the acquisition may create difficult problems after possession of the property is taken.¹⁴

3. At times, especially when structures have been razed, it is difficult to determine compensation because the court or jury is unable to obtain a clear picture of what the property actually looked like prior to the taking.¹⁵

4. The condemnee often suffers inconvenience because he is given only short notice to vacate the premises.¹⁶

5. Unless there are proper deposit and withdrawal provisions, the condemnee loses possession of his property without receiving compensation for a prolonged period.

It is believed that these disadvantages, which are real and troublesome, are outweighed by the advantages to be obtained under an immediate possession statute, provided, of course, proper precautions are taken to minimize and alleviate the hardships involved.

¹¹ HIGHWAY RESEARCH Bd. at 2; Johnstone, *The Federal Urban Renewal Program*, 25 U. CHI L. REV. 301 (1958).

¹² *Ibid.*; "In addition, no workable redevelopment program can tolerate delay. . . . [It results in] rising construction and interest costs [and] . . . encourages 'holdup' suits by property owners for the purpose of forcing a higher settlement price." Note, 69 YALE L.J. 321, 327-28 (1959). See also *State Roads Comm'n v. Franklin*, 201 Md. 549, 95 A.2d 99 (1952).

¹³ See generally *Central Contra Costa etc. Dist. v. Superior Court*, 34 Cal.2d 845, 850, 215 P.2d 462, 465 (1950) (Carter, J. dissenting opinion). Interview between George C. Hadley and authors, November 25, 1959.

¹⁴ HIGHWAY RESEARCH Bd. at 2.

¹⁵ *Id.* at 3.

¹⁶ Section 1243.5 of the Code of Civil Procedure allows the condemnee only a three-day notice before he may be made to vacate the condemned property.

History and Constitutionality of Immediate Possession in California

The history of immediate possession from a constitutional, case law and legislative point of view presents a fascinating, though somewhat bewildering, picture. In order to portray correctly the rights and limitations that now exist in immediate possession cases, it is necessary to review the evolution of the law in this area for the past one hundred years.

The development of the law of immediate possession in California has taken a most peculiar and unusual path. To begin with, the State Constitution originally provided only that private property should not be taken for public use without just compensation.¹⁷ Apparently there were other statutory provisions at that time insuring "the payment on reasonable terms as to delay and difficulty in the enforcement of the right."¹⁸ In 1879 the first major constitutional change regarding eminent domain was enacted. It seems clear that the reason for this change was to insure that the property owner would receive not only just compensation for the property taken, but also damages for injury to his property, even though there was no physical taking. That is, he would be compensated for what would otherwise be *damnum absque injuria*. The language used to facilitate this end, however, read that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into Court for, the owner."¹⁹

Thus the 1879 revision strongly implies that the owner must be paid just compensation for the property taken *before* the condemnor may possess the property, the inference therein being that immediate possession without compensation would be unconstitutional. Nonetheless, further examination tends to negate such a conclusion. First, the primary aim of the constitutional change of 1879, as indicated above, was to expand the area of compensation to include damages. Second, it is to be emphasized that in 1872—prior to the constitutional change of 1879—Code of Civil Procedure Section 1254 was enacted to allow for immediate possession at any time after service of summons. Although this statute was subsequently limited in scope in 1877-78, it still allowed the condemnor to take possession prior to the final adjudication of the rights of the parties.

The next step in the evolution of the immediate possession policy was taken, as indicated above, in 1877-78. At that time, the original Section 1254 of the Code of Civil Procedure was amended to frame it somewhat, along its present wording, *i.e.*, limiting the taking of possession prior to final payment to instances where an appeal is taken from the judgment, and the taking of possession at the commencement of the proceedings was not included.²⁰

Events took a peculiar twist when, in 1897, the Legislature reversed the 1877-78 possession "pending appeal" amendment and once again adopted the terminology existing in 1872.²¹ The 1897 revision of Sec-

¹⁷ *Steinhart v. Superior Court*, 137 Cal. 575, 578, 70 Pac. 629, 630 (1902).

¹⁸ *Ibid.*

¹⁹ CAL. CONST. art. I, § 8 (1879).

²⁰ Cal. Stat. Amend. 1877-78, ch. 651, § 1, at 108.

²¹ Cal. Stat. 1897, ch. 127, § 1, at 186.

tion 1254 permitted any condemnor to take possession upon the commencement of the proceedings after making an appropriate deposit. No provision was made, however, for withdrawal of the deposit by the owner.²² Following this labyrinthian metamorphosis, the question of the constitutionality of the 1897 statute came before the California Supreme Court in *Steinhart v. Superior Court*.²³ In that case the condemnor sought to take immediate possession under Section 1254. The property owner sought a writ to prohibit the trial court from putting the condemnor into possession under that section. The Supreme Court upheld the condemnee's contention that Section 1254, as it was then worded, was unconstitutional as applied to the petitioner.²⁴ The opinion of the court in that case presents a curious and interesting study.

The court nullified Section 1254 (as it existed in 1897), basing its decision on two principal grounds. It is upon these grounds, regardless of their validity, that it is presently believed by some that in order for all condemnors to be given the right to immediate possession another constitutional amendment would have to be enacted. The reasoning of the court in the *Steinhart* case, however, leads us to conclude that a constitutional amendment to authorize this extension of immediate possession may not be necessary and that such an extension may be provided for by ordinary legislative enactment.

The basic ground of the *Steinhart* decision was that the property owner was unable to withdraw the security put into court by the condemnor under Section 1254.²⁵ A strong argument can be made, following the reasoning of the court, that it would be unconstitutional to allow either immediate possession or possession pending appeal without making provision permitting the condemnee to withdraw the amount of security advanced by the condemnor. Indeed, this point has been stressed by one of the leading writers in the field of eminent domain. Lewis, in his treatise *Eminent Domain*, stated:

[An amount] must be deposited subject to the order of the owner. This being so, a law which permits the party condemning to take possession pending an appeal by him, upon depositing the amount of the first award to be held until the appeal is determined, would be unconstitutional and void, at least so far as it withheld the money deposited from the owner. . . . *Where the constitution expressly requires prepayment . . . the owner is entitled to the award deposited, if possession has been taken, and may enforce such right by appropriate proceedings.* [Emphasis added.]²⁶

Therefore, if there is a statutory provision allowing the condemnee to withdraw the security deposited into court by the condemnor, the principal ground for denying immediate possession to all condemnors would not exist and thus a constitutional amendment would not be necessary. Indeed, statutes allowing immediate possession have been

²² *Ibid.*

²³ 137 Cal. 575, 70 Pac. 629 (1902).

²⁴ Section 1254 was again amended in 1903 to restore the text as it appeared in 1880, thereby eliminating all of the changes made in 1897. Cal. Stat. 1903, ch. 98, § 1, p. 109.

²⁵ *Steinhart v. Superior Court*, 137 Cal. 575, 579, 70 Pac. 629, 630-31 (1902).

²⁶ 2 LEWIS, EMINENT DOMAIN § 836, pp. 1465-66 (3d ed. 1909).

upheld on constitutional grounds in at least 16 states which have constitutional provisions similar to those in the California Constitution.²⁷ The courts in most of these states have asserted that the deposit provisions or the deposit and withdrawal provisions are adequate security within the meaning of the constitutional provisions providing for just compensation.²⁸

Another argument supporting the view that a constitutional amendment requiring prior payment in full is not a barrier to an immediate possession statute concerns the somewhat anomalous situation created by Section 1254. Under the present Section 1254, the condemnor may take possession either after trial and judgment but before judgment is final, or pending an appeal from the judgment, by paying the full amount of the judgment into court plus any further sum required by the court to cover additional damages and costs. Although the present statute permits the condemnee to withdraw the amount of the judgment and still appeal, the statute has been upheld simply on the ground that the constitution requires only that the judgment be paid into court.²⁹ Consequently, possession can be taken in instances where the condemnee has not received just compensation *first*. There is, therefore, an incongruous situation created by the belief that the condemnee must first receive full and just compensation in immediate possession cases but need not first receive full and just compensation in cases where there is a judgment that has not become final. It would appear that if the payment of full and just compensation is not a necessary prerequisite to taking possession pending appeal, such payment should not be a constitutional prerequisite to the taking of possession at the commencement of the action, for in neither case is the very strict interpretation of the word "first" necessarily binding.

There is still another point, this one advanced by the Illinois Supreme Court in upholding an immediate possession statute,³⁰ which indicates that the terminology "first paid" may not have the limitation asserted by the *Steinhart* court. The 1879 constitutional amendment, which quite clearly was aimed primarily at expanding the area of compensation to include damages, provides, "that the property shall not be taken or *damaged* for public use." Now, damage may and does at times occur without formal commencement of proceedings to condemn, but it is impossible in such instances to grant just compensation first. Therefore, it should follow that, since damages cannot first be given in those cases, the proper constitutional interpretation to be given to the 1879 amendment would be that the amendment was not established as a bar to immediate possession.

²⁷ See discussion in Department of Pub. Works v. Gorbe, 409 Ill. 211, 215, 98 N.E.2d 730, 733 (1951). See also Department of Pub. Works v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958), *overruling*, Department of Pub. Works v. Gorbe, *supra*.

²⁸ See HIGHWAY RESEARCH Bd. at 3-4.

²⁹ In Spring Valley W.W. v. Drinkhouse, 95 Cal. 220, 30 Pac. 218 (1892), the court upheld Section 1254 where the condemnor took possession pending appeal. The court merely recited the need to deposit the judgment, making no mention that a withdrawal provision need be necessary. In Heilbron v. Superior Court, 151 Cal. 271, 278, 90 Pac. 706, 708 (1907), the court said, in a like situation, that:

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

³⁰ Department of Pub. Works v. Butler Co., 13 Ill.2d 537, 547, 150 N.E.2d 124, 129-30 (1958).

In concluding our analysis of the first major premise of the *Steinhart* decision we cannot escape the conclusion that statutory and constitutional history, both before and after the *Steinhart* case, makes the analysis of the Supreme Court on this point a dubious one. Furthermore, even if the *Steinhart* court were correct in its analysis, the court based its conclusion primarily upon the inability of the condemnee to withdraw the security. If (as is now the case to a limited extent under Section 1254.7) the condemnee has such a right, then the basic prop supporting the argument for unconstitutionality no longer exists.

The second point advanced by the *Steinhart* court has some, although limited, validity. The court drew upon the second clause of Section 14 of Article I of the State Constitution which guarantees a jury trial in eminent domain cases in order to ascertain compensation. A literal reading of the provision would indicate that the jury trial must come "first," i.e., before possession. As indicated above, this terminology should, on re-examination, constitute no bar to immediate possession.

Two western jurisdictions, Idaho and Washington, have recently ruled that an immediate possession statute is unconstitutional on the ground that it does not provide for determination of compensation by a court or jury. For example, the Idaho court stated:

The real vice in the 1953 amendment is that it does not provide *due process of law* for the determination of the value of the land sought to be condemned and the damages arising from such condemnation and the payment thereof prior to the making of an order for possession, which results *in the taking of the property before just compensation is paid therefor*. Due process of law envisions an opportunity upon reasonable notice for a fair hearing before an *impartial tribunal*.³¹

The Washington court in *State ex rel. Eastvold v. Yelle*³² also held that the lack of a prior jury determination of just compensation was a bar to immediate possession by the state for highway purposes under its constitution.

On the other hand the Arizona Supreme Court, in *Bugbee v. Superior Court*,³³ after considering a constitutional provision that was identical to Washington's provision, held that the state could take immediate possession despite the lack of a previous jury trial. It is important to note that Idaho does not have a provision permitting a preliminary court determination nor does it have any other safeguard to insure just and adequate compensation; the amount of deposit is unilaterally determined by administrative decision. By the same token, the State of Washington has no provision for a preliminary judicial determination of just compensation. It is more than likely that if either of these states had made provision for a preliminary judicial determination of compensation in their immediate possession statutes, the statutes would have been upheld.³⁴ Indeed, the concurring opinion in the Washington case, *State ex rel. Eastvold v. Yelle*, states as much. Discussing the *Bugbee* case, the concurring justice states:

A somewhat comparable statutory procedure was approved by the supreme court of Arizona in *Bugbee v. Superior Court*, 34

³¹ *Yellowstone Pipeline Co. v. Drummond*, 77 Idaho 36, 41, 287 P.2d 288, 291 (1955).

³² 46 Wash.2d 166, 279 P.2d 645 (1955).

³³ 34 Ariz. 38, 267 Pac. 420 (1928).

³⁴ See HIGHWAY RESEARCH BD. at 23.

Ariz. 38, 267 Pac. 420. The significant difference in the Arizona statutory procedure is the fact that thereunder the trial judge, without a jury, takes evidence as to *probable damages or compensation*, and thereupon determines or fixes the amount of *probable damages or compensation*. [Emphasis by the court.]³⁵

* * *

If legislation of the latter-mentioned type, comparable to that involved in the *Bugbee* case, *supra*, had existed, it is my best judgment, and I am strongly convinced, that the court in the early Washington cases could, and probably would, have decided the basic questions involved in the same manner, but without being compelled to advert to the broad, sweeping language with reference to the matter of prepayment of compensation or damages.³⁶

* * *

In my judgment, the defects just mentioned significantly distinguish our existing legislation from that involved in the *Bugbee* case. These defects render our legislation invalid constitutionally (Art. I, § 3, state constitution), strictly upon the ground of a lack of acceptable due process safeguards for property owners in eminent domain proceedings, where the state is seeking immediate possession of property for *right-of-way* purposes. *The defects in the eminent domain procedure, as I see them, may be corrected by appropriate legislation, without the necessity of constitutional amendment.* [Emphasis added.]³⁷

California does not have a clear provision for judicial determination of the "probable value" of the property to be taken, and the present constitutional provision is somewhat less than clear.³⁸ It is possible, however, that other safeguards to insure just and adequate compensation can be adopted. We shall later direct our attention to that point.

For now, it is sufficient to note that the majority of states that have ruled on the jury trial requirement have sustained the right of immediate possession. For example, the Illinois, Arkansas and Mississippi courts have held that the provision for jury trial insured by their state constitutions should be interpreted to require a final determination by a jury.³⁹ Thus it should not necessitate a *preliminary* determination by a jury.

In conclusion, therefore, it is the opinion of the authors that the arguments advanced in the *Steinhart* case are no longer relevant or

³⁵ 46 Wash.2d 166, 175, 279 P.2d 645, 651 (1955).

³⁶ *Id.* at 176-77, 279 P.2d at 651.

³⁷ *Id.* at 179, 279 P.2d at 653.

³⁸ While HIGHWAY RESEARCH Bd. at 35, lists California among ten states requiring a preliminary hearing in which testimony is taken relative to probable damages, no such requirement presently exists in this State. Rather such a hearing is *ex parte*, usually limited to affidavits and at least by the constitution, limited to ascertaining adequate "security" rather than "probable damages."

³⁹ Department of Pub. Works v. Butler Co., 13 Ill.2d 537, 547-48, 150 N.E.2d 124, 130 (1958):

"After an exhaustive study of the authorities, we are of the opinion that section 13 of article II of the Illinois constitution does not prohibit the taking, possession, and use of private property by the State prior to the fixing and payment of compensation, provided of course, that the authorizing statute adequately safeguards the right of the owner of such property to just compensation therefor." See also *Ex parte Reynolds*, 52 Ark. 330, 12 S.W. 570 (1889); *State Highway Comm'n v. Buchanan*, 175 Miss. 157, 165 So. 795 (1936).

binding, even assuming the validity of the rationale of the opinion at that time. A strong case can be made that statutory revision, and not a constitutional amendment, is all that is necessary to enable all condemnors to take immediate possession. Of course, it is to be expected that any such statutory revision would be quickly challenged in the courts.

Because of the decision in the *Steinhart* case the Legislature in 1903 restored Section 1254 to read as it appeared in 1880—that is, allowing for possession pending appeal instead of at the commencement of the action. The amendment eliminated the changes made in 1897 which were objected to by the *Steinhart* court. As a result, Section 1254 has existed down to the present time allowing for possession pending appeal but having no provision for immediate possession.

But the need for immediate possession could not be permanently buried by the *Steinhart* decision of 1902. In 1918 Article I, Section 14 of the State Constitution was amended to allow immediate possession in right of way cases.⁴⁰ This provision and later additions did not provide for the withdrawal of the security placed into court by the condemnor. It was not until 1957 that such a provision was enacted and that provision will be examined in greater detail in a later portion of this study. The 1918 amendment was obviously made in light of the pronouncement of the court in the *Steinhart* case, and from that time on the *Steinhart* decision has apparently been considered to be the barrier to immediate possession in the absence of a further constitutional amendment. As indicated, this should not necessarily be the case.

In 1934, another amendment was made to Article I, Section 14, permitting immediate possession of lands to be used for reservoir purposes and extending the right of immediate possession to several additional public agencies.⁴¹ This amendment was broadly construed by the Supreme Court in *Cent. Contra Costa etc. Dist. v. Superior Court*,⁴² in 1950 to include sanitary districts even though such districts were not named specifically in the amendment. The court's recent tendency to expand the right of immediate possession wherever possible exemplifies its recognition of the modern need for immediate possession procedures. Even Mr. Justice Carter's cogent dissent in this case implies that the area of immediate possession ought to be expanded wherever possible;⁴³ but he apparently would have limited this extension to constitutional change. However, the Legislature, it seems, could accomplish the same end by statutory enactment.

Whether the result is achieved by one method or another is not of critical importance. What appears desirable, however, is that the result be achieved. And since a constitutional referendum, as indicated by the recent refusal of the voters to grant school districts the right of imme-

⁴⁰ CAL. CONST. art. I, § 14. The amendment essentially added the provision that "in an action in eminent domain brought by the State, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district" for right of way purposes, immediate possession may be taken providing adequate security is deposited in the court.

⁴¹ The 1934 change expanded the right of immediate possession to those who needed such right for "reservoir" purpose. It included "metropolitan water district, municipal utility district, municipal water district . . . or similar public corporation." CAL. CONST. art. I, § 14.

⁴² 34 Cal.2d 845, 215 P.2d 462 (1950).

⁴³ *Id.* at 850, 215 P.2d at 467.

mediate possession, tends to be rejected⁴⁴ (in part, perhaps, because the voters do not fully appreciate the factors involved in this area of the law), the end may better be achieved by legislation. The rule of stare decisis should not be an impregnable barrier. The Illinois court, for example, in 1958 had little difficulty in upholding on constitutional grounds the validity of its immediate possession statute and in overruling its prior holding that a similar statute was unconstitutional.⁴⁵

Immediate Possession Provisions in Other Jurisdictions

The vast majority of states, including California, provide for immediate possession in right of way takings. But while California limits immediate possession to right of way and reservoir cases, the majority of states are far more liberal in allowing the exercise of this right for many other purposes.

To begin with, in eight states (mostly located on the east coast) an administrative rather than a judicial method is used for condemning property in most types of takings.⁴⁶ This procedure not only has the effect of making the condemnee the plaintiff in the action, but allows the condemnor at the beginning of the proceedings to take immediate possession merely by filing the proper papers in accordance with the administrative procedure. Title passes immediately upon the filing of these papers and the right of possession inures to the condemnor. Though there are various differences in the procedures involved in these states, by and large the procedure is comparatively simple.

Only a few states prohibit immediate possession under any circumstances, and even in these states repeated efforts have been made and are being made to overcome this detrimental barrier.⁴⁷

Aside from those states proceeding under an administrative condemnation procedure and the few that deny immediate possession in all cases, the majority of the remaining states permit immediate possession in most instances. Ten states include an immediate possession provision as a part of their general condemnation law and apply it generally.⁴⁸

Five other jurisdictions provide that immediate possession may be taken whenever the condemning party is the state, one of its agencies or subdivisions or a municipality.⁴⁹ The trend in the remaining states

⁴⁴ Interested groups often find it difficult to educate the public on these and similar proposals, largely because of the great expense and time involved; this may be particularly true regarding the attempt to influence such legislation by public bodies.

⁴⁵ *Department of Pub. Works v. Butler Co.*, 13 Ill.2d 537, 150 N.E.2d 124 (1958), *overruling*, *Department of Pub. Works v. Gorbe*, 409 Ill. 211, 98 N.E.2d 730 (1951).

⁴⁶ CONN. GEN. STAT. § 22-66 (1958); ME. REV. STAT. ch. 23, §§ 21 to 23 (1954); MASS. ANN. LAWS ch. 79, §§ 1, 2 (1953); N.Y. HIGHWAY LAW § 30; OHIO REV. CODE ANN. § 5519 (1954); PA. STAT. ANN. tit. 36, § 670-210 (Cum. Supp. 1960); R.I. GEN. LAWS § 37-6-1 (1956); WIS. STAT. § 83.07 (county) and § 84.09 (state) (1957). Only in Massachusetts does this procedure apply to all takings; most of the other states limit this procedure to roads and highways.

⁴⁷ Idaho, South Dakota, Vermont, Washington. In Idaho and Washington the courts have voided legislative attempts to grant immediate possession in certain instances. See notes 31, 32 *supra*.

⁴⁸ ARIZ. REV. STAT. ANN. § 12-1116 (1956); COLO. REV. STAT. ANN. § 50-1-6(3) (1953); DEL. CODE ANN. tit. 10, § 6110 (1953); FLA. STAT. § 74.05 (1959); HAWAII REV. LAWS § 8-26 (1955); NEV. REV. STAT. § 37.100 (1959); N.Y. CONDEMNATION LAW § 25; ORE. REV. STAT. §§ 366.390 to 393 (1959); UTAH CODE ANN. § 78-34-9 (1953); WYO. COMP. STAT. ANN. § 1-805 (1957).

⁴⁹ N.M. STAT. ANN. § 22-9-18 (1953); TENN. CODE ANN. § 23-1526 (Cum. Supp. 1960); W. VA. CODE ANN. § 5385 (1955). Similar limitations are found in the District of Columbia and Puerto Rico statutes. See HIGHWAY RESEARCH Bd. at 34.

is to expand the area of immediate possession particularly to include housing and urban renewal projects.⁵⁰

Although the federal condemnation procedure is discussed later in more detail, it is well to make reference to it at this time. The Federal Declaration of Taking Act⁵¹ has served as a prototype for several state statutes and it is probably the clearest and simplest method of condemning that exists. It is essentially an administrative method of condemnation.

The federal act, originally patterned after an earlier statute which was limited to the District of Columbia,⁵² has, since 1946, been enlarged to include all takings made by the federal government.⁵³ The act requires the filing of a petition to condemn, a declaration that such a taking is for a public use, a statement of the authority under which the condemnor is proceeding, a description of the lands involved, a list of the various interests existing therein, the plans for the taking and a statement of the sum of money estimated by the acquiring authority as the just compensation for the property taken. Once a deposit has been made in the court and the declaration of taking is filed, title to the property vests in the condemnor. The taking of physical possession may then be aided by a court order if necessary.

The purposes of the Federal Declaration of Taking Act are:

1. To allow the government to take immediate possession of the property.
2. To permit the land owner to receive an immediate cash payment to the extent of the government's estimate of the value of the property.
3. To reduce the interest on the final award.

In summary, therefore, it can be said that the California statute, while in large part efficacious, is too limited in its scope when compared with the immediate possession statutes of the majority of jurisdictions and, more particularly, when compared with the trend the law is taking.

Analysis and Recommendations Pertaining to the Procedure Involved in Immediate Possession

Since the problems of deposit, the method of determining the amount of deposit, the right of and procedure for withdrawing the amount deposited or a part thereof are all interwoven, these factors will be considered together.

Deposit Provisions

Although California only recently enacted a provision for the withdrawal of a deposit by the property owner in immediate possession cases and this provision is limited to state highway takings, the constitutionality of statutes granting immediate possession, or at least expanding this right, is largely dependent upon the right to withdraw

⁵⁰ See e.g., CONN. GEN. STAT. §§ 8-129, 8-130 (1958).

⁵¹ 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958).

⁵² Act of March 1, 1929, ch. 416, § 10, 45 Stat. 1417 (now D.C. CODE ANN. § 16-628 (1951)).

⁵³ See generally Dolan, *Federal Condemnation Practice—General Aspects*, 27 APPRAISAL J. 15 (1959).

the amount deposited. Accordingly, the necessity of deposit and the amount of the deposit and the method of determining such amount are the first phases of the problem that need specific study. Consideration of the withdrawal and adjunct problems will then follow.

Necessity for a Deposit

It was not until Sections 1254.5 and 1254.7 of the Code of Civil Procedure were adopted in 1957 that the question of deposit became an acute problem in even a limited number of immediate possession cases. These new sections allow the property owner in state highway condemnation cases to withdraw a portion of the security placed into court under the terms of Article I, Section 14 of the California Constitution. Prior to 1957, except for the times when the condemnee had reason to fear that the condemnor might prove to be insolvent, the condemnee was not particularly concerned whether a nominal sum was deposited or the fair market value, for he could not withdraw the amount deposited in any event. Presently, the question of the amount of and the need for a deposit is of greater importance, and it will become a paramount consideration in the event the right to immediate possession is expanded.

Under the terms of the constitutional amendment those with the right of immediate possession must deposit an amount "reasonably adequate" to insure the owner immediate payment of compensation for the taking and any incidental damages, including damages caused by abandonment, as soon as the amount of such compensation and damages is ascertained. Whether the "security" called for is the equivalent of fair market value is far from clear. The amount required to be deposited could be, and has been, a good deal less. Nonetheless, most condemnors assert that they usually deposit the fair market value, *i.e.*, the fair market value as they determine it, which is usually determined upon the basis of staff appraisals.⁵⁴ In most instances, however, the final award is in excess of the deposit.

Almost all states have a provision for a deposit or a tender of compensation, usually in the form of money but in some instances in the form of a bond.⁵⁵ Apparently only four states have no deposit provision within their statutes.⁵⁶

Who Determines Amount To Be Deposited

Aside from the question of what is actually deposited—a nominal amount, the condemnor's concept of fair market value or some other sum—it is quite clear that in California the amount deposited is determined more administratively than judicially. The condemnor generally submits to the court by affidavit in an *ex parte* hearing some evidence as to the value of the property to be taken and the estimated damages. In some cases, depending upon who is the condemnor, this amount is based upon staff appraisals and in others it is based upon appraisals made by independent experts. These appraisals usually accompany the petition for immediate possession.⁵⁷

⁵⁴ Interviews between George C. Hadley and authors, November 25, 1959; Russell Jarvis, Peyton Moore and authors, December 11, 1959.

⁵⁵ HIGHWAY RESEARCH Bd. at 23-29, 35.

⁵⁶ Minnesota, North Carolina, Pennsylvania and West Virginia; see note 55 *supra*.

⁵⁷ See note 54 *supra*.

It is true that the California constitutional provision allows the condemnee to move for additional deposit if he feels the amount deposited by the condemnor is insufficient security, but this procedural opportunity is rarely exercised. Of course, the main reason for this is that there is little incentive for the condemnee to challenge the deposit; for he can withdraw none of the deposit unless the condemnation is for a state highway, and even in highway cases he may withdraw only 75 per cent of the *original* deposit. Furthermore, where a small property owner is involved, the condemnee often is unaware of the existence of this provision or cannot afford the expense of proving that the deposit is inadequate. In the case of larger takings, quite often the property owner is content to ignore a small deposit, since the interest which will be paid at the rate of seven per cent on the award from the effective date of the order of possession⁵⁸ will cease to accrue on any amount withdrawn.⁵⁹ Moreover, it has been stated that the courts on occasion, have refused to order an increase in the deposit because they did not believe the condemnor would prove insolvent upon final judgment;⁶⁰ and, since the basic reason for the deposit provision originally was to safeguard the condemnee against an impecunious condemnor, this position at that time was sound. Now, however, the prime purpose of the deposit, at least in highway cases, is to enable the condemnee to withdraw the deposit and to use it to his best advantage. Thus, the methods of determining the amount to be deposited become considerably more important.

As indicated, in California the condemnor usually establishes the amount that is to be deposited and this amount is almost invariably approved by the court in an *ex parte* hearing. This is essentially the method utilized under the Federal Declaration of Taking Act and in many other jurisdictions, including those using the administrative method of condemning.

A number of other states, however, have adopted a procedure which allows the condemnee to present evidence at a preliminary hearing on the question of value. For instance, Arizona provides for a hearing after notice to the property owner rather than an *ex parte* hearing. At the hearing, the court receives evidence from all parties upon the amount of the "probable damages" that each owner will receive. Upon the basis of this evidence, the court orders a deposit to cover such probable claims.⁶¹ The new Illinois statute calls for a preliminary hearing five days after the filing of a motion for immediate possession.⁶² The court then hears "such evidence as it may consider necessary and proper for a preliminary finding of just compensation." The court may appoint three independent appraisers, costs paid by the plaintiff, to aid it in its preliminary finding. Florida, too, has made provision

⁵⁸ CAL. CODE CIV. PROC. § 1255b.

⁵⁹ The present language of Section 1254.7 of the Code of Civil Procedure would seem to allow interest to run until withdrawal even if the property owner refuses to withdraw. The provision is not entirely clear, however. It reads: "Any amount so paid to any party shall be credited upon any judgment providing for payment and shall be considered payment upon the judgment as of the date the withdrawal is made so that no interest shall be payable upon the amount so withdrawn after the date of its withdrawal."

⁶⁰ See note 54 *supra*; and interview between Judge John Shea and authors, December 16, 1959.

⁶¹ ARIZ. REV. STAT. ANN. § 12-1116 (1956).

⁶² ILL. ANN. STAT. ch. 47, § 2.2 (Cum. Supp. 1960).

for court-appointed appraisers to assist in a preliminary determination of just compensation in these situations.⁶³

The Arkansas procedure represents a compromise between those states that fail to provide any machinery for a judicial determination and those states that make such a preliminary hearing automatic. Arkansas requires that a preliminary hearing be held if, but only if, the condemnee requests one.⁶⁴ The advantage of this procedure lies in the fact that the condemnor is not subjected to the heavy burden of preparing a "full-blown" case at the commencement of every action. At the same time, this procedure enables the condemnee to be heard on the matter at an early date whenever he has reason to feel the deposit is insufficient.

The present constitutional provision in California, in effect, accomplishes the same result as the Arkansas statute. Article I, Section 14, gives the court, on motion of the property owner, the power to "alter" the amount of security deposited by the condemnor in immediate possession cases. Thus, this provision grants the condemnee the right to be heard upon a preliminary determination of just compensation.

It is true, as stated above, that Article I, Section 14, has rarely been used by condemnees. As indicated, the principal reason for their failure to do so in the past has been that the deposit provisions do not assume great importance unless adequate withdrawal provisions are enacted. Nonetheless, while this constitutional provision should help to safeguard the rights of the condemnee in these circumstances, more explicit statutory language should be adopted to state in clearer terms the exact method by which the condemnee may take advantage of the constitutional provision. In its present general form, the constitutional provision provides vague answers as to the necessary steps that have to be taken to effectuate its purposes. Proper statutory language to supplement this provision will alert condemnees and their attorneys to this vital right.

A provision for a hearing to increase the deposit should include the right to such a hearing not only prior to the time the condemnor has the right to take physical possession of the property but also at any subsequent stage in the proceedings. With adequate safeguards clearly spelled out, most of the possible administrative abuse that might arise from the proposed expansion of the right of immediate possession would be curbed.

Still another reason for clarifying and effectuating the right of the property owner to be heard in regard to the amount of deposit is that it may facilitate the distribution and apportionment of the deposit among the various property interests being taken. Under present practice, the condemnor merely deposits the amount that it believes the entire property is worth—the market value of the fee interest. Thereafter, the various interest holders must fight among themselves as to the amount of the deposit allocable to their particular interests. The condemnor finds support for its action both in Section 1246.1 of the Code of Civil Procedure and in the concept that the sum of the parts

⁶³ FLA. STAT. § 74.03 (1959).

⁶⁴ ARK. STAT. ANN. § 76-541 (1957).

cannot be greater than the whole.⁶⁵ Though there are exceptions, as a general rule this latter proposition is correct. Although Section 1246.1 does not deal with the amount the condemnor is required to deposit in immediate possession cases, condemnors have construed this section to prescribe the amount of the deposit and the manner in which it must be deposited; for, under this section, at the time of trial they need only argue the question of just compensation for the property taken and they are not involved in the apportionment of the award among the various interests involved. Apparently this procedure has not been challenged in the courts.

The problems involved in Section 1246.1 will be discussed in greater detail in a subsequent study on apportionment and allocation of the award. While Section 1246.1 should not be the sole authority for deciding the question of whether the condemnor should earmark the value of various interests for immediate possession purposes, the authors believe it would be unfair to require the condemnor to make this preliminary determination. But the constitutional provision permitting interest holders to seek an increase in the amount of deposit, if supplemented by a statute permitting withdrawal of the entire deposit, should greatly alleviate the problem in immediate possession cases. Any particular interest holder, upon adequate showing to the court, could then probably bring about an increase in the amount of deposit which would enable the various interest holders to receive a more adequate apportionment, at least as to amount, when the question of withdrawal is decided.

Amount of Deposit

As stated above, almost all states require a deposit in immediate possession cases. Most states require the estimated just compensation to be deposited either in money or in bond, depending upon whether there are provisions for withdrawal. California, as explained above, provides for a "security" deposit, which usually amounts to the fair market value as seen by the condemnor.

A number of states have enacted statutes that call for a deposit considerably in excess of the probable just compensation. For example, Florida requires a deposit of no less than double the value as fixed by the court-appointed appraisers.⁶⁶ Arizona, too, provides that the court may require double the probable damages to be deposited in money, although the parties may stipulate to a lesser figure.⁶⁷ Utah law provides for a bond of not less than double the amount of estimated compensation to be placed in court.⁶⁸ Illinois, by its recent statute, requires the condemnor in immediate possession cases to deposit 125 per cent of the estimated just compensation.⁶⁹

⁶⁵ The relevant parts of Section 1246.1 of the Code of Civil Procedure read as follows:
Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly.

This statute was enacted in 1939. Cal. Stat. 1939, ch. 210, p. 1456.

⁶⁶ FLA. STAT. § 74.05 (1959).

⁶⁷ ARIZ. REV. STAT. ANN. § 12-1116 (1956).

⁶⁸ UTAH CODE ANN. § 78-34-9 (1953).

⁶⁹ ILL. ANN. STAT. ch. 47, § 2.3(a) (Cum. Supp. 1960).

Undoubtedly, the principal reason for the provisions requiring a deposit greater than the estimated amount of compensation is the recognition that the final award is generally in excess of the deposit, whether the amount of the deposit is administratively determined or judicially determined in a preliminary hearing. Nonetheless, it does not seem proper to hamper governmental agencies by imposing on them the often impossible task of raising sums of money in excess of a fair determination of just compensation. Furthermore, it is rare that the condemnor abandons the property after taking immediate possession; consequently, the condemnee will eventually receive the entire just compensation, including any amount in excess of that deposited, and the entire award—except the portion of the deposit withdrawn by the condemnee—bears interest from the effective date of the order of possession. Accordingly, the amount of deposit required should not be greater than the amount likely to be subsequently awarded.

Withdrawal Provisions

Right To Withdraw

As indicated before, only since 1957 has there been any provision in California for a withdrawal of the deposit in immediate possession cases, and this provision—Section 1254.7 of the Code of Civil Procedure—has a very limited scope. First of all, provision for withdrawal is even more restricted in coverage than the right to immediate possession itself. The only time the condemnee may withdraw any part of the deposit is when the property is being taken for state highway purposes.⁷⁰ There appears to be no justification for this discrimination. The second major limitation is that even in these restricted instances where there is a right to withdraw, the court is not compelled to release any part of the deposit and is prohibited from releasing more than 75 per cent of the *original* deposit.

These restrictions on the right of withdrawal are not found in the vast majority of states that provide for deposit and withdrawal.⁷¹ Almost all states permitting immediate possession allow the property owner to withdraw the deposit regardless of who is condemning. Moreover, as discussed above, there is a possible question of constitutionality if the immediate possession statute lacks an adequate withdrawal provision. This problem presents itself despite the fact that the California Supreme Court stated in *Metropolitan Water Dist. v. Adams*⁷² that withdrawal provisions are not necessary under Article I, Section 14. Last, only with a broad application of the right of withdrawal is it possible to expand the right of immediate possession by *statutory* enactment. The *Steinhart* opinion made that clear. Inasmuch as the expansion of the right of immediate possession is recommended, and since there is neither logic nor merit for discriminating between condemnors in regard to withdrawal, a withdrawal provision of general application should be enacted.

⁷⁰ Section 1254.7, adopted in 1957, does not appear to be an all inclusive statute, *i.e.*, it appears merely to be a temporary stopgap provision.

⁷¹ See HIGHWAY RESEARCH Bd. at 37.

⁷² 16 Cal.2d 676, 107 P.2d 618 (1940) (dictum).

Amount That May Be Withdrawn

Section 1254.7 permits the court, when the taking is for state highway purposes, to release 75 per cent of the amount deposited. Perhaps because occasionally additional persons having an interest in the property subsequently join in the action, the statute expressly restricts the amount that can be initially withdrawn. Only California and New York (Port of New York Authority)⁷³ limit the amount which can be withdrawn by the condemnee.

All other states allow the various property holders to withdraw 100 per cent of the amount preliminarily determined to be just compensation.⁷⁴ The basic limitation that is generally imposed is that no particular holder of an interest in the property may withdraw more than the amount he is likely to receive in the final determination of compensation. This amount is presumably established either in a preliminary hearing of the kind discussed above or a subsequent hearing.

Apparently, there are those who believe that a 75 per cent withdrawal will "tide over" the condemnee, particularly the small home owner, until he receives the final award. While this may often be true, it is, generally, far from sufficient. Quite often, particularly in residential takings, this amount goes to satisfy the trust deed holder. After property is condemned, both the small home owner and the large corporation usually go into the market place to purchase property equivalent to that taken. This is a costly investment. To make them finance a 25 per cent differential at today's interest rates is to impose an undue and unjust hardship upon them. It is advanced that only by granting the condemnee the right to withdraw 100 per cent of the deposit is he given "just" compensation.

It might be added that in those jurisdictions where the condemnee has the right to withdraw the full amount of the estimated compensation, condemnors have apparently not experienced any undue difficulty in recovering any amount that may have been withdrawn in excess of the final judgment. Of course, the condemnor has the right to obtain a judgment ordering the condemnee to repay this excess amount, but even that procedure is not often needed.

Vesting of Title

While the problems of vesting of title run throughout this study, they first appear in connection with immediate possession cases. The question presented is whether title should pass at the time of the order granting the condemnor immediate possession, at the time of actual possession, at the time of withdrawal of the deposit or upon the final order in the action. These different dates may affect the question of tax and special assessment liability, interest, risk of loss and other matters. These questions will be discussed later in some detail.

Now it is sufficient to note that in the ordinary condemnation case title passes when the final order of condemnation is recorded. In immediate possession cases, the title question is not quite as clear. For tax purposes, it seems that title passes at the time of possession.⁷⁵ If a

⁷³ N.Y. UNCONSOL. LAWS ch. 161, § 1(x) (60% limitation).

⁷⁴ See note 71 *supra*.

⁷⁵ See CAL. REV. & TAX. CODE § 4986. Compare *People v. Peninsula Title Guar. Co.*, 47 Cal.2d 29, 301 P.2d 1 (1956), and *People v. Joerger*, 12 Cal. App.2d 665, 671, 55 P.2d 1269, 1272 (1936), with *People v. Watkins*, 175 Cal. App.2d 182, 187, 345 P.2d 960, 964-65 (1959).

withdrawal of deposit is made, the title passes at the time of such payment by the terms of Section 1254.7. In accordance with Section 1255b, enacted in 1959, interest in immediate possession cases runs from the "effective date" of the order of possession. Exactly what is the "effective date" is not entirely clear. Presumably in those immediate possession cases where there is no withdrawal or right to withdraw (which would be in all cases except state highway takings) title does not pass until the final order is recorded.

Under the federal practice and in most states adhering to the administrative method of condemnation, title passes automatically when the declaration is filed and/or the deposit is placed in court.⁷⁶ While many state statutes are unclear as to the time title passes, in most states utilizing the judicial method, title passes at the time of deposit into court. This rule has recently been adopted in Illinois and is recommended by the Highway Research Board.⁷⁷

It is true that when the condemnor takes physical possession of the property, the property owner is stripped of most of his important rights therein. He cannot use, improve or sell the property. He has lost everything but paper title. Furthermore, it is equally true that if the condemnor fails to take physical possession after obtaining an order of immediate possession, the order itself is an effective block to the owner's use of the property. Since the condemnor may at any time thereafter enter upon and use the property, the cloud that hangs over the property clearly prevents the condemnee from doing anything with it. It is an exaggeration to state that he still "owns" the property.

Nonetheless, although the owner has lost most of the incidents of ownership, there is no need to have title vest in the condemnor until final judgment, provided the questions of risk of loss, taxes and interest are dealt with equitably. In other words, if the risk of loss falls on the condemnor at the time that it may enter upon the property, if the condemnee is relieved of paying taxes from that date on and if interest begins to accrue on such date, there is little necessity for vesting title in the condemnor until final judgment. Moreover, there are certain advantages in having title vest upon final judgment. From a constitutional point of view, the expansion of immediate possession by statute may be accepted more readily by the courts if the condemnee still retains some vestige of ownership. And a later abandonment of the proceedings may be facilitated if title has not already passed. Furthermore, it would be simpler and more consistent if title in all eminent domain cases passed upon recordation of the final order of condemnation rather than at various times.

Accordingly, assuming that the condemnee is not otherwise burdened with unnecessary hardships of "ownership," there appears to be no necessity nor justification for adopting a declaration of taking type statute in California, at least insofar as the vesting of title is concerned. It is therefore recommended that title vests, in immediate possession cases as in all other cases, upon the recordation of the final order.

⁷⁶ 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958).

⁷⁷ ILL. ANN. STAT. ch. 47, § 2.3 (Cum. Supp. 1960); HIGHWAY RESEARCH Bd. at 9.

Time at Which Condemnee Must Remove Himself From the Property

Presently, under the terms of Section 1243.5 of the Code of Civil Procedure, the condemnee is entitled to notice at least three days before he must vacate the premises in immediate possession cases. He is, however, usually given more time. Nonetheless, there is nothing to prevent the condemnor from taking physical possession three days after notice. As some condemnor experts have pointed out, however, these matters are usually "worked out in the field."⁷⁸ That is, the engineer and the condemning agency usually work out an arrangement with the property owner so that he may remain on the property as long as possible.

There may be times, however, when such an "arrangement" cannot be made, and yet under the particular circumstances it would create an undue hardship to dispossess the owner on such short notice. One way to alleviate the problem would be to give the court discretion to grant a delay in the vesting of title and right of possession in the condemnor. Similarly the statute might be worded to allow a "reasonable" time to vacate. Either of these provisions would probably serve to alleviate the problem in most instances. But, as in many instances where the terms "discretion" and "reasonable" have been adopted, there would remain considerable uncertainty as to the result of applying such criteria in many situations.

An alternative solution to this problem has been suggested by two experts in this field, both of whom represent the condemnor. Recognizing that the hardships in these cases involve improved property, they have suggested that a distinction be made for this purpose between improved and unimproved property. Their suggestion is that the three-day notice requirement should be extended to 20 or 30 days when improved property is being taken. While this suggestion has a good deal of merit, it would prevent the court from permitting a further delay in situations where a further stay would be necessary and proper. Furthermore, any date in this context, whether it be three or thirty, will often prove unnecessarily arbitrary.

In order to protect the property owner from undue duress and hardship and at the same time permit the condemnor in the vast majority of cases to take the property in the shortest possible time, the following suggestion is advanced. Presently, the condemnor in immediate possession cases obtains an order for possession in an ex parte hearing, subject only to the three-day notice requirement. Except for the three-day notice requirement, there is no need to make any other significant change in this procedure. However, by providing that the ex parte order is not to take effect until ten days following service of that notice upon the tenant or owner, a number of the troublesome problems involved in immediate possession would be largely resolved. First, the ten-day period would give the condemnee sufficient time in which to petition the court for an additional stay before being dispossessed. If the condemnee could show hardship and if the condemnor's need for immediate possession was not urgent, a stay could be granted for the necessary period of time. Second, while the condemnee should always be able to move the court to require the con-

⁷⁸ Interview between Russell Jarvis, Peyton Moore and authors, December 11, 1959.

demnor to increase the deposit, the initial ten-day delay before the ex parte order becomes effective would also enable the property owner, at his option, to have the question of an increased deposit decided before possession is taken and the improvements razed.

Abandonment

Under Code of Civil Procedure Section 1255a the condemnor may abandon the condemnation proceeding at any time after filing the complaint and before the expiration of 30 days after final judgment. Although there is no statutory restriction that precludes abandonment of the proceeding after the condemnor has entered upon the property under the power of immediate possession, case law prevents abandonment by the condemnor to a limited extent on an estoppel theory if the condemnee has relied upon the condemnor's prior action and incurred substantial costs.⁷⁹ Moreover, under Article I, Section 14 of the State Constitution and Code of Civil Procedure Section 1255a, the condemnor may be liable for the damages suffered and for certain costs incurred by the condemnee.⁸⁰ This protection, however, is very limited. Article I, Section 14, grants the condemnee a right to damages only when the abandonment is the result of a determination that there is no necessity for the taking; abandonment for any other reason apparently does not support a claim for damages. Section 1255a grants the condemnee the right to reimbursement only for attorney and appraisal fees and other costs of preparing for the action. There are cases, therefore, when an abandonment would work a particular hardship on a condemnee and yet the condemnee may be denied adequate relief. Furthermore, the problem becomes particularly acute when the property owner withdraws the deposit and reinvests or otherwise disposes of it. In California, unless the condemnor has done some additional act which would estop him, he can abandon with near impunity.

The strong weight of authority makes it exceedingly difficult for a condemnor to abandon the proceedings after taking immediate possession or else prevents abandonment entirely in such cases. Under the Federal Declaration of Taking Act, the proceedings cannot be abandoned without the consent of the party or parties whose property would thereby be affected.⁸¹ The same is true under the Illinois⁸² and Wyoming⁸³ statutes and by case law in Utah⁸⁴ and Tennessee.⁸⁵

Some authorities would not so tightly restrict the condemnor from abandoning following immediate possession.⁸⁶ They advocate instead a middle ground between the near carte blanche given condemnors in California and the absolute prohibition against abandonment that exists in the federal and majority jurisdictions. This "middle ground" would,

⁷⁹ See *Times-Mirror Co. v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547 (1935).

⁸⁰ Section 1255a reads in part that "Upon such abandonment, express or implied, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees."

⁸¹ See *United States v. Sunset Cemetery Co.*, 132 F.2d 163 (7th Cir. 1942).

⁸² ILL. ANN. STAT. ch. 47, § 2.3 (Cum. Supp. 1960).

⁸³ WYO. COMP. STAT. ANN. § 1-805 (1957).

⁸⁴ *Moyle v. Salt Lake City*, 111 Utah 201, 176 P.2d 882 (1947). In this case the court actually held that the condemnor was liable for possession of water rights even though it subsequently abandoned such rights. The decision may not go as far, however, as the HIGHWAY RESEARCH Bd. indicates on page 37 of its report.

⁸⁵ *Department of Highway & Pub. Works v. Gamble*, 18 Tenn. App. 95, 105, 73 S.W.2d 175, 181 (1934) (dictum).

⁸⁶ HIGHWAY RESEARCH Bd. at 10.

essentially, permit abandonment where (1) the inability to abandon would jeopardize the entire project proposed by the condemnor, (2) the condemnee is allowed to recover all damages done to the property by the condemnor and (3) any loss due to the taking can be adequately compensated by damages. The difficulty of ascertaining whether these factors actually exist and to what degree presents immediate doubt as to the efficacy of this "middle ground."

There are strong additional factors which lead us to reject both the California position and the "middle ground" and prompt us to suggest the federal and majority position on this point. First of all, the latter position should not be an undue burden upon the condemnor: there have been relatively few abandonments following immediate possession since the creation of this right in 1918;⁸⁷ and even with the proposed expansion of the right of immediate possession it is doubtful if there will be more than a nominal number of such instances in the future. Second, it must be emphasized that the right of immediate possession is an extraordinary power and as such its use should be controlled and the condemnee should be protected wherever possible. Third, not only is the character of the land often changed by the condemnor to the condemnee's detriment, but damages, even though they may make the condemnee "whole" in a legal sense, may not justly compensate the owner for lost business opportunities. Last, a rigid restriction against abandonment would establish a necessary check against any administrative abuse on the part of the condemnor who gains full dominion and control of the property. It should, of course, be noted that abandonment is always permissible by stipulation of the parties.

Interest and Tax Problems

Interest Problems

The difficulties presented by the problem of interest are exceedingly troublesome in the ordinary situation. Paradoxically, however, less of a problem is presented when the taking is one of immediate possession. This is primarily because, both by statute and generally accepted practice, interest in immediate possession cases accrues from the time of possession or entry of the order permitting the same. There is little, if any, disagreement over this policy, since all agree that if the property is physically taken, the condemnee has for all practical purposes lost his property and should be allowed legal interest until the time he is paid the award. For the same reasons, he should receive such interest from the date of the order since it is at that time that his rights in the property disappear. Code of Civil Procedure Section 1255b, enacted in 1959, would seem to be in accord. However, there is some ambiguity in its language. It speaks of interest accruing from the "effective date" of the order of possession. Exactly what date that is remains unclear. It would appear to mean the day the order was entered.

In accordance with the other recommendations made relating to the order of immediate possession, it is recommended that interest should commence on the date that the right of the condemnor to take physical possession of the property commences.

⁸⁷ Only two or three such cases of abandonment following possession could be recalled by Russell Jarvis and Peyton Moore. Interview, December 11, 1959.

Perhaps a more puzzling and important question is posed by the provision in present Section 1254.7. That statute states that "no interest shall be payable upon the amount so withdrawn after the date of its withdrawal." The difficulty presented by this provision is that, on its face, it would permit the property owner to leave the deposit or any part thereof in the court and thereby allow interest to accumulate. Since the rate of interest is now seven per cent, it is likely that in many cases the condemnee would want to leave the deposit in court since on the open market he could not always draw such a high rate of secured interest.

The federal rule on this point as well as the rule adopted in most other states would seem, at first glance, to be more appropriate. In those jurisdictions interest stops on the amount at the time of the deposit.⁸⁸ This permits the public body to be relieved from the burden of heavy interest charges to the extent of the deposit. Interest, of course, on the difference between the final award and the amount of deposit must be paid. However, a serious objection to the majority rule arises since often the property owner may have difficulty in withdrawing the deposit. If he cannot withdraw the deposit, he should be allowed interest thereon.

The principal obstacle to an easy and rapid withdrawal of the deposit is, of course, Code of Civil Procedure Section 1246.1 and its application to immediate possession. As long as the owners of the various interests in the property are left to determine among themselves their fair proportions of the deposit, they are limited and burdened in their right to withdraw the deposit. Even with a statute providing for a hearing on the withdrawal question, the period between the deposit (and possession) and withdrawal, especially when there are numerous property interests involved, will often be a prolonged one. There is little justification, therefore, for tolling interest at the time of deposit when the condemnee no longer has possession and yet is unable to withdraw the deposit.

Nor would a principal aim of the deposit provision—to enable the condemnor to prevent the accrual of interest—be upset to any great extent by having interest cease on withdrawal rather than deposit. For now, with the establishment of the Condemnation Deposits Fund as provided in Sections 1254 and 1254.5 of the Code of Civil Procedure, the moneys placed in deposit may be invested in various securities that earn appreciable interest which, in turn, inures to the condemnor. While such investments may not earn at the rate of seven per cent (the amount the condemnor must pay), they lessen considerably the burden of the condemnor's liability for interest.

Accordingly, it is recommended that the statutory policy regarding interest that is now reflected in Section 1254.7 be continued.

Tax Problems

Tax and assessment problems in eminent domain present a vexing difficulty from an administrative point of view. A number of efforts have been made in recent years, including legislative ones, to solve

⁸⁸ See, e.g., 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1953); ILL. ANN. STAT. ch. 47 § 2.6 (Cum. Supp. 1960); TENN. CODE ANN. § 23-1526 (Cum. Supp. 1960).

these problems. The crux of the difficulty is the inability to ascertain the exact date that the final order will become effective; consequently, there is doubt and confusion on the part of both courts and administrators as to what amount must be deducted from the award in the way of such tax and assessment liability. Another acute problem concerns the apportionment of taxes if the condemnee has already paid his tax bill for the period of time when he will not be in possession. The tax problems in immediate possession cases are only a small part of the over-all tax problem and, accordingly, it would be more appropriate to handle these problems together. This will be done at a later stage of this study.

POSSESSION PENDING APPEAL

As was shown at the beginning of this study, the tangled history of Section 1254 finally produced a provision that grants to the condemnor the right to take possession of the property following judgment despite any subsequent appeal. That provision is presently utilized to a great extent, particularly by those condemning agencies that do not have the right to take immediate possession. The importance of this provision lies in the fact that quite frequently one of the parties appeals and the final adjudication is delayed for many months or even years. Section 1254 protects the condemnor in these instances by allowing it to enter the property following judgment; and it protects the condemnee by permitting him to withdraw the amount of the judgment that the condemnor must place into court. (The condemnor may be required to deposit additional sums to insure against abandonment, and these additional sums cannot be withdrawn.)

A fair reading of the statute would seem to indicate that either party may appeal and the condemnor, upon paying the judgment into court, can take possession. But California courts have not given it that interpretation. In *Mt. Shasta Power Corp. v. Dennis*,⁸⁹ the court held that if the condemnor takes possession pending appeal after depositing the award into court, it cannot appeal. In other words, only if the condemnee appeals may the provisions of Section 1254 become effective. Clearly the statute is stripped of a great deal of its efficacy and, perhaps, purpose.

The rationale of the *Dennis* decision, in the words of the court, was as follows:

Plaintiff had the option of paying the damages awarded and taking possession or appealing from the judgment and remaining out of possession until the final determination of the compensation to be paid. . . . In taking the fruits of the judgment under the authority of the statute, the plaintiff could not impose conditions upon defendants' acceptance of the money paid which are not provided by the statute.⁹⁰

In 1958 the *Dennis* opinion was cited and approved in *People v. Loop*.⁹¹ California is not the only state in which a court has adopted the questionable rationale that a condemnor "cannot have its cake and

⁸⁹ 66 Cal. App. 186, 225 Pac. 877 (1924).

⁹⁰ *Id.* at 190-91, 225 Pac. at 879.

⁹¹ 161 Cal. App.2d 466, 477, 326 P.2d 902, 909 (1958).

eat it too." A recent decision in the State of Washington, *State v. Laws*,⁹² has adopted the same reasoning.

But is the condemnor truly taking advantage of the judgment to the undue prejudice of the defendant? This does not appear to be the case. The condemnee receives the amount of the judgment *before* the condemnor can take possession. This amount constitutes just compensation, limited only by the possibility that subsequent litigation may decrease or increase such amount. And in cases where the condemnor appeals, usually the verdict is a high one, and the condemnee may, if he chooses, use all or any part of the money deposited. Furthermore, the condemnor may be required to deposit an extra amount as contingent security in case additional damages are caused by any abandonment. Moreover, the *Dennis* construction often places the condemnor on the horns of a dilemma: If the trial court award is excessively high and the property is needed immediately, the condemnor must either pay the excessive award or delay construction of the needed improvement. The condemnor comes out on the short end, regardless. And by the same token, the property owner can often be injured as the result of the condemnor's predicament. A deposit of the judgment into court is not necessary if the condemnor decides to forego taking possession pending appeal rather than yield to a high verdict. Hence, the condemnee will not be able to withdraw the amount of the judgment and will be forced to await the final outcome before receiving any money. This can cause an acute hardship to the condemnee who is continuously defraying the court costs and expenses involved in a new trial.

An additional line of argument indicating that the *Dennis* court's interpretation is illogical has been advanced. In discussing the similar Washington case,⁹³ the Highway Research Study notes:

The court's reasoning is subject to criticism. The fact that the State does not acquiesce in the jury determination of compensation should not detract from the fact that "just compensation" has been paid into court for the property owner. The purpose of the constitutional requirement is to insure that the property owner is paid for his land. Logically the property owner's refusal to accept the award and his act of taking an appeal would seem to negate the payment of just compensation and therefore prevent the State's entry into possession. However, this is not the law. Indeed, the fact that the property owner appeals would seem to make a stronger case for a denial of possession than the State's appeal.⁹⁴

Moreover, the court in the *Dennis* case recognized the great weight of authority which holds as Lewis indicates:

If the petitioner pays the damages awarded, this will, in the absence of any statute, waive an appeal, but the deposit of damages for the purpose of obtaining possession will not deprive the petitioner of the right of appeal.⁹⁵

⁹² *State v. Laws*, 51 Wash.2d 346, 318 P.2d 321 (1957).

⁹³ *Ibid.*

⁹⁴ HIGHWAY RESEARCH BD. at 45.

⁹⁵ 2 LEWIS, EMINENT DOMAIN § 808, at 1430 (3d ed. 1909).

But the court then went on to distinguish the statutes of a number of states to show that they are different from Section 1254. A critical reading of those statutes, however, casts a shadow over the court's distinction. Only by the most strict construction can the statutes of other jurisdictions, where a different interpretation is given, result in the conclusion that Section 1254 should be interpreted as the *Dennis* court indicated.

In conclusion, therefore, it is felt that Section 1254 should be revised to overrule the *Dennis* interpretation. It might also be added that the excess verbiage concerning the method of investing the deposited funds, while undoubtedly important, does not rightfully belong within the eminent domain statute and should be codified within some other code.

DATE OF TAKING IN RELATION TO THE INDICES OF OWNERSHIP

Related to the problem involved in immediate possession and possession pending appeal situations is the problem of determining the "date of taking." While Code of Civil Procedure Section 1249 is quite clear in defining the date of valuation in condemnation, in no statute is there a clear definition of the date of taking. To be sure, the date that title passes is clearly ascertainable, for by the terms of Code of Civil Procedure Section 1253, title passes upon the recordation of the final order, under Code of Civil Procedure Section 1254.7, title passes when the condemnee withdraws the deposit. But the date of taking, while significant principally for its effect upon "title" questions, also involves questions of risk of loss, subsequent improvements, valuation, interest and termination of leases. Before proceeding to each of these questions separately, we shall first try to incorporate the general question of the date of taking into the over-all study outlined thus far.

Under the Federal Declaration of Taking Act and in most states utilizing the administrative method of condemnation, the right of possession and title to the condemned property vest in the condemnor at the initial stage of the proceeding. It logically follows, therefore, that the separate question of immediate possession is not too important in those jurisdictions. The condemnor is granted all the power it needs and the property owner is protected in large measure by the deposit and withdrawal provisions. It would also follow, however, that if the incidence of ownership (*e.g.*, risk of loss, taxes and interest) accrued to the party gaining or retaining possession, the question of transfer of title and "date of taking" would likewise be of far less critical importance.

The problem of the date of taking, therefore, will be discussed while adopting the argumentative position that the present scope of immediate possession in California will not be expanded. While this position is not the one advocated, it will better enable us to focus on the problems that are involved. Furthermore, the same reasons that may possibly be valid for denying the right to immediate *possession* to all condemnors would be equally applicable to a federal-type statute granting immediate *title* to the condemnor.

Risk of Loss

Under an administrative or federal type of taking procedure, the question of risk of loss is easily resolved. Since the condemnor has title to the property, it follows that if the condemned property is destroyed or damaged through no fault of the property owner after the proceedings are begun but before final adjudication, the condemnor will bear the loss. In California, however, while there appears to be no authority one way or the other, the result presently would probably be otherwise. In cases other than those involving immediate possession or possession pending appeal, the property owner retains both possession and title until the final order. Presumably, therefore, the risk of loss would be borne by the condemnee under these circumstances.

Although there is only scant authority in this country on this risk of loss question, what little exists leans toward placing that risk upon the condemnee. Early New York and New Hampshire cases took this position, adhering to the rationale that there is no "taking" until title passes, which event does not occur until the final adjudication or at some other time subsequent to the commencement of the action.⁹⁶ A more recent Alabama case, however, reversing its previous conclusion on rehearing, finally used the date of filing of the complaint to indicate the date of taking and to shift the risk of loss.⁹⁷ In that case a fire destroyed the condemned premises after commencement of the proceedings but prior to final adjudication. The court held the condemnee should be awarded the value of the premises prior to the fire, asserting:

True, the landowner still has possession of the land, and no easement thereon has been established, but possession is not the only element of value in land. The right to sell, the right to rent, the right to improve, the right to sow and to reap, are all valuable rights which are affected by the mere filing of the application for order of condemnation.⁹⁸

The Alabama court is, of course, quite correct that the condemnee is often handicapped in his use of the property once the proceedings have begun. But almost all property owners in the area of a proposed taking are affected by such notice, often quite detrimentally, whether their property is ultimately condemned or not; and, obviously, they have no recourse against the taking authority. Furthermore, frequently a condemnee, particularly one owning residential property, is not adversely affected in his use of the property until such time as he must give up possession.

The problem, therefore, as the many opinions written in the Alabama case depict, is a difficult one to resolve. The equities certainly fall on both sides. The concept of "title," despite its often empty meaning, still may be the final determinant to a resolution of this problem. Under present California procedure, as title does not pass until the completion of the action, the risk of loss is kept on the property owner; the federal type of procedure shifts that risk to the condemnor.

⁹⁶ *Farmer v. Hookset*, 28 N.H. 244 (1854); *In re Mechanicville Bridge Co.*, 81 Misc. 324, 142 N.Y. Supp. 949, *award confirmed*, 83 Misc. 331, 145 N.Y. Supp. 1058 (Sup. Ct. 1913).

⁹⁷ *Jefferson County v. Adwell*, 267 Ala. 544, 103 So.2d 143 (1953).

⁹⁸ *Id.* at 555, 103 So.2d at 152.

Subsequent Improvements

The problem of compensation for subsequent improvement involves two questions: (1) whether the condemnee is to be paid for improvements made subsequent to notice of a pending taking but prior to service of the complaint, and (2) whether the condemnation award must compensate the condemnee for improvements made subsequent to the commencement of the action but prior to the final adjudication of the proceeding.

The first question—improvements made after notice but prior to service of the complaint—is one that is reasonably well settled by case law in jurisdictions other than California; but the problem does not seem to have been clearly raised in this State. The great weight of authority holds that *notice* of pending condemnation of particular property is not sufficient to constitute, in itself, a taking.⁹⁹ Consequently, any improvements made in good faith by the condemnee prior to the commencement of the action must be paid for in the award. Those states following the administrative type of procedure, *e.g.*, Massachusetts, arrive at this result upon the rationale that there is no taking until title vests which, in those states, is at the commencement of the action.¹⁰⁰ States adhering to the judicial method of taking reach the same result by holding that because the condemnor can still abandon the contemplated proceeding, the owner retains the right to improve his property.¹⁰¹ This latter logic, however, runs into some difficulty in situations where the improvement is made after service of the complaint, as will be discussed below. Regardless of the rationale, the result in almost all states is that compensation for a good faith improvement made with notice but before the commencement of the action must be included within the award. Although case law outside of California is reasonably clear, the question should be settled in California by a statutory provision to preclude any doubt on this point. Such a provision should be coupled with some of the existing language in Code of Civil Procedure Section 1249 (discussed below) and be made a separate section.

The second question—improvements made after service of the complaint but before the final adjudication of the proceeding—is more troublesome, even though on the surface it would appear to be resolved by statute in this State. Initially, it should be emphasized that if the right of immediate possession were expanded and exercised to a greater extent, this problem would obviously be less acute, for the condemnor would be in possession of the property, and no further improvements could be made by the condemnee.¹⁰²

⁹⁹ See *Benedict v. City of New York*, 98 Fed. 789 (2d Cir. 1899); *State v. Stabb*, 226 Ind. 319, 79 N.E.2d 392 (1948); *Missouri v. Fenix*, 311 S.W.2d 61 (Mo. Ct. App. 1958); *Keane v. City of Portland*, 115 Ore. 1, 235 Pac. 677 (1925); 4 NICHOLS, *EMINENT DOMAIN* § 13.14 (3d ed. 1951); 18 AM. JUR. *Eminent Domain* § 256 (1938); 10 R.C.L. *Eminent Domain* § 124 (1915).

¹⁰⁰ *Maher v. Commonwealth*, 291 Mass. 343, 197 N.E. 78 (1935).

¹⁰¹ *Missouri v. Fenix*, 311 S.W.2d 61 (Mo. Ct. App. 1958); 10 R.C.L. *Eminent Domain* § 124 (1915).

¹⁰² In most of those states utilizing the administrative method of condemnation, title vests in the condemnor at the commencement of the proceeding. Thus, as an example, under the Federal Declaration of Taking Act, any subsequent improvement made by the condemnee would not be compensable since it would have been made on property owned at the time by the condemnor. Because the condemnor cannot subsequently abandon without the approval of the condemnee, the latter is not placed between Scylla and Charybdis—he knows that the improvement inures to the condemnor's benefit, and at the same time, he is not misled to his detriment by *not* making a necessary or propitious improvement or making different plans and then finding out to his dismay and loss that the condemnor has abandoned the taking.

Section 1249 of the Code of Civil Procedure clearly states that improvements made subsequent to service of summons may not be included in the assessment of compensation. It is interesting to note what was implied above. Although states (like California) that employ the judicial method of condemnation allow compensation for improvements made subsequent to notice but prior to trial, for the reason that the condemnor is still able to abandon the taking, Section 1249 denies compensation for improvements made subsequent to service even though the condemnor still retains the right to abandon the proceeding.

But a more important point involving the improvement of property subsequent to service, particularly in light of Section 1249, is the hardship caused to the condemnee. He cannot safely make necessary and profitable improvements because Section 1249 prohibits compensation for them. Hence, the condemnee may be forced to let his property become "run down" or to turn down an excellent opportunity to properly develop and expand his enterprise. In addition he may sell his business on unsatisfactory terms; he may revamp his whole operations; he may make preparations to move and actually purchase other property; or he may lose an opportunity to sell the property on advantageous terms. And unlike cases where immediate possession is taken, he is afforded little statutory protection if the condemnor subsequently abandons the proceeding. He is not confronted with this predicament under the Federal Declaration of Taking Act or where title vests at the initial stage of the action. It is true that the estoppel theory enunciated by the Supreme Court in *Times-Mirror Co. v. Superior Court*,¹⁰³ may afford him some protection. However, this ground for preventing abandonment has been limited by a subsequent Supreme Court case and, at best, affords the condemnee relief only when all, or at least most, of the equities are in his favor.¹⁰⁴

Nonetheless, while it is difficult to reconcile the reasoning that the courts utilize to uphold the denial of compensation for subsequent improvements, it is recommended that the policy embodied in Section 1249 be retained. The basic reason for this position is that a public agency should not have to pay for improvements that are totally useless to it and that were made after the condemnee was legally and actually aware that his property would be taken. Furthermore, the latent danger that the condemnor may subsequently abandon the taking can, to a very large extent, be mitigated. The owner can move that the proceedings be advanced on the calendar, and the action can usually be heard and decided within a few months. Thus, the owner need not be left dangling in a state of indecision.

Date of Taking in Relation to Date of Valuation

Probably the most important, and certainly the most complex, aspect of the date of taking problem is the manner in which that concept affects the valuation of the property. Because the problem is complicated and involves many factors outside the scope of this study, it will be dealt with in a subsequent study. For now, however, it may be helpful to mention some of the key questions that arise in date of valuation problems that are germane to date of taking considerations.

¹⁰³ 3 Cal.2d 309, 44 P.2d 547 (1935).

¹⁰⁴ *Gibson Properties Co. v. Oakland*, 12 Cal.2d 291, 83 P.2d 942 (1938).

It is clear from the present statute that the date of valuation is the date of the issuance of summons (or the time of trial if over a year from the commencement of the action and the delay is not caused by the defendant).¹⁰⁵ But two major, often related factors involving the date of valuation continually plague the entire field of condemnation.

First, the announced intention to condemn a general area for a particular project frequently has a drastic effect upon values in that and the adjacent areas. Values may radically increase or decrease depending upon the nature of the project being planned. Often a blight upon the whole area will result because the announced intention to condemn may halt or impair the economic development of the designated area. In a theoretical, if not in a legal sense, a property owner may be the victim of a "taking." At least one state, Massachusetts, has made an effort recently to compensate property owners for such economic loss suffered as a result of publicly known plans to condemn in the future.¹⁰⁶ But the problem is so complex that no equitable system has been found to alleviate such "injuries." A related problem, and one that often confronts both courts and appraisers, is the effect that a prior public improvement may have upon the value of other pieces of property subsequently taken. This question was raised and discussed in both *United States v. Miller*¹⁰⁷ and, in California, in *County of Los Angeles v. Hoe*.¹⁰⁸ Unfortunately, because of the very nature of the problem, the results in these and other similar cases create more questions than they answer.

Although these problems usually turn on the question of when the "taking" occurred, they go a great deal deeper than that. In essence, these are policy more than technical questions and as such must be resolved on a policy level, after weighing the many complex problems involved. Merely changing the date of taking will not resolve these problems. Perhaps to a large extent the problems cannot be resolved; but a mechanical attempt would certainly fail to accomplish an improvement.

Interest

The matter of a condemnee's right to interest has been previously discussed in this study with reference to immediate possession problems. Other aspects of the interest problem are here considered, and some of the previous conclusions are restated for the sake of completeness.

The inquiry is, under what circumstances should an owner be entitled to interest or other compensation for delay in payment of his award. Recent statutory and case law has done much to clarify many uncertainties in this field.

Interest or Compensation for Loss of Use

While it now seems clear that interest is the proper measure of compensation for delay in payment, and no change in this respect is recommended, until recently legal interest was not necessarily the only measure of compensation. A leading case held that the measure of

¹⁰⁵ CAL. CODE CIV. PROC. § 1249.

¹⁰⁶ See REPORT OF MASSACHUSETTS SPECIAL COMMISSION RELATIVE TO CERTAIN MATTERS PERTAINING TO THE TAKING OF LAND BY EMINENT DOMAIN, House No. 2738, pp. 12-13 (1956).

¹⁰⁷ 317 U.S. 369 (1943).

¹⁰⁸ 133 Cal. App.2d 74, 219 P.2d 98 (1955).

damage, in immediate possession cases, was the value of use of the property which had been lost by the owner, although this value may be measured by interest on the award.¹⁰⁹ Under this theory the owner is deemed to have lost merely the use of his land. He is compensated for that loss by a payment in the nature of rent. On the other hand, where interest as such is viewed as the proper compensation, the owner is regarded as having lost substantially all of his interest in the property on a given date and, therefore, he is entitled to be paid for the property on that date. If he is not so paid, he is given the usual damages for the withholding of money—legal interest. It is apparent that the two theories can, under different circumstances, result in greatly differing amounts of compensation. For example, if property is being held for appreciation of value alone and is not being put to use, it might be argued that the owner is not entitled to any compensation for loss of use. Under the interest theory, however, he would always be entitled to compensation for the loss of possession.

As a result of the enactment of Code of Civil Procedure Section 1255b in 1959, interest is now made the measure of compensation in immediate possession cases. The interest standard is simple, fixed and easy of ascertainment. It avoids the necessity of expert testimony on the value of the use of the property. Damages measured by loss of use are usually far more difficult to ascertain. It is therefore recommended that the policy expressed in Section 1255b—the use of interest as the standard—be continued.

When Interest Should Commence To Accrue

If it is assumed that interest is the correct measure of damage for delay in payment, the next problem is to determine under what circumstances interest should be allowed. Differing situations in condemnation actions may have differing effects upon the right to interest. Four typical situations are as follows:

(a) Immediate possession is taken by the condemnor under an order for immediate possession.

(b) Immediate possession is not taken. The case proceeds to a normal conclusion without appeal—that is, interlocutory judgment, payment and final order of condemnation.

(c) Immediate possession is not taken. The judgment is appealed but no possession is taken pending appeal.

(d) Immediate possession is not taken. However, the judgment is appealed and possession is taken “after trial and judgment entered or pending an appeal” under Section 1254 of the Code of Civil Procedure.

In the immediate possession cases, category (a) above, it is clear from the earlier discussion on pages B-48, B-49 that, since the adoption of Section 1255b, interest accrues from the “effective date” of the order of possession. For the reasons previously stated, no change in this policy is recommended.

With respect to cases falling within category (b) above—no immediate possession, no possession after judgment and no appeal—the case of *Bellflower City School Dist. v. Skaggs*¹¹⁰ has done much to clarify

¹⁰⁹ Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 107 P.2d 618 (1940).

¹¹⁰ 52 Cal.2d 278, 339 P.2d 848 (1959).

the law. The *Skaggs* case held that interest accrues on the award from the date of entry of the interlocutory judgment until the date of payment, upon the rationale that a judgment in condemnation is like any other judgment and the rights of the condemnation defendant are substantially identical with those of a plaintiff recovering a money judgment in a civil action. The court noted the constitutional provision that the rate of interest on any judgment rendered in any court of the State shall be seven per cent per annum.

Where no appeal is taken from the main judgment, the rule established in the *Skaggs* case does not have serious substantive consequences. Large amounts of interest are not usually involved in such instances because awards are generally paid within a few weeks of judgment. The rule does give rise to some administrative difficulties, however.¹¹¹ Since interest must be paid from the time of the interlocutory judgment to the date of payment of the award into court, the date of payment into court must be estimated by the condemnor's attorneys at the time they request funds from its disbursing office. Since it is not always possible to estimate this date accurately, too much money or too little may be requested. If too little money to satisfy the judgment is requested, the court clerk will not accept the deposit. If too much is deposited there has been a needless waste of public funds. However, in view of the *Skaggs* court's reliance upon the constitutional provision in reaching its decision, no ready solution to the administrative problem is apparent.

It is in its possible application to the third category of cases mentioned above—no immediate possession, appeal from the judgment, but no possession taken pending appeal—that the *Skaggs* rule is likely to cause the most controversy.

Critics of the *Skaggs* decision take the position that an award in condemnation is not like an ordinary civil judgment. They say it is, in contemplation of law, merely an offer by the condemnee to sell at the price fixed by the judgment—an offer which the condemnor may accept by payment of the judgment or decline by abandonment of the action. Thus, they contend that no liability to pay arises until acceptance of the "offer" by payment itself and therefore interest liability for delay in payment can never arise. Moreover, they contend that when the *Skaggs* rule is applied to the situation where an owner continues in possession of his property, receiving the rents, issues and profits pending an appeal, it is unjust to award him interest also.

In view of the *Skaggs* court's reliance upon the constitutional provision granting seven per cent interest on judgments, it is doubtful whether the *Skaggs* holding could be changed without a constitutional amendment even if it were desirable to do so. Perhaps one method of making a change by statute alone would be to declare that judgments in eminent domain are not true judgments, but are merely offers on the part of the owner to sell, to be accepted or rejected by the condemnor.

The authors of this study do not recommend departure from the *Skaggs* rule. For each instance in which an owner may benefit from the *Skaggs* rule, another would suffer detriment if it were changed. An

¹¹¹ Discussion with Mr. Harold Ostley, Clerk of the Superior Court, Los Angeles County.

owner who has property under a judgment of condemnation which is being appealed is in most cases so limited in dealing with his property that he has in effect suffered a taking by the judgment, which should entitle him to compensation from that date.

Moreover, under Code of Civil Procedure Section 1254 the condemnor has the power to take possession of property pending appeal. If the condemnor believes that it is being unduly prejudiced by the accrual of interest pending the appeal, such as in situations where an owner is also collecting rents, the condemnor can take possession and presumably collect the rents itself to offset its interest liability.

With respect to the remaining category of cases—where an appeal is taken and the condemnor takes possession pending appeal pursuant to Section 1254—it appears that the rule of the *Skaggs* case applies and that interest must be paid from the date of entry of the interlocutory judgment until the date of payment of the deposit into court. It should be noted that Code of Civil Procedure Section 1249 appears to establish a different rule. The second paragraph of Section 1249 provides that the award draws interest from the date of an order “letting the plaintiff into possession” under Section 1254. However, the Supreme Court in *Vallejo etc. R.R. v. Reed Orchard Co.*,¹¹² pointed out that this language was placed in Section 1249 in 1872 when Section 1254 provided for an order letting the plaintiff into possession *prior* to judgment in all condemnation cases. This was the “order letting the plaintiff into possession” contained in Section 1254 that is referred to in Section 1249, and it was deleted from Section 1254 by amendment in 1877. The court held, therefore, that Section 1249 does *not* refer to Section 1254 as it now reads and that there is no statutory provision for interest if possession is taken after judgment under Section 1254. Thus it would appear that the rule of the *Skaggs* case would also apply to possession pending appeal cases.

If possession is taken after a judgment that is reversed on appeal and the defendant ultimately recovers a larger award, it would seem under the rationale of *Metropolitan Water Dist. v. Adams*¹¹³ that the defendant would be entitled to interest on the amount of the ultimate judgment that is in excess of the deposit from the date that possession was taken. However, apparently no California case involving this issue has reached an appellate court.

When Interest Should Cease To Accrue

The foregoing discussion has dealt with the time when interest should commence to run. Consideration is next given to the time when interest should cease to accrue. As a general proposition it seems just that interest should cease to accrue on any sums which are paid to the condemnee or are available for him. As discussed before, in immediate possession situations, interest should cease to accrue on the amount deposited on the date of its withdrawal, as is presently the policy under Section 1254.7 (limited now to state highway takings). In the event the right to withdraw the deposit is extended to all immediate possession

¹¹² 177 Cal. 249, 170 Pac. 426 (1918). But compare dicta in *City of San Rafael v. Wood*, 144 Cal. App.2d 604, 607, 301 P.2d 421, 425 (1956).

¹¹³ 16 Cal.2d 676, 107 P.2d 618 (1940).

cases, it is recommended that a similar rule relating to the cessation of interest apply to all amounts withdrawn.

Code of Civil Procedure Section 1254 has no specific provision for the abatement of interest upon amounts withdrawn where possession is taken after trial or pending appeal. However, the *Reed Orchard Co.* case held that a deposit of the amount of the judgment in order to obtain possession under Section 1254 is, in effect, a tender of payment and stops the accrual of interest on the judgment under Civil Code Section 1504 if the judgment is affirmed. The court relied on the rule, applicable to all civil judgments, that interest does not accrue if the amount of the judgment is deposited in court pending an unsuccessful appeal.¹¹⁴ Thus, interest ceases to accrue at the time of the deposit of the judgment in court for the condemnee, rather than upon the date of the withdrawal if the judgment is ultimately affirmed. This conclusion seems proper, for in this situation the rights of the parties in the property and their share of the award have already been determined. A party is not faced, as he is in immediate possession cases, with the prospect of litigating issues of ownership and value, with the resultant delay in getting his money out of court. Moreover, under Section 1254 the condemnee may withdraw the amount of the judgment without waiving his right of appeal on the amount of the award.

Although the problem was not involved in the *Reed Orchard Co.* case, if possession is taken after judgment under Section 1254 and the judgment is reversed, it would seem that interest should cease to accrue on the amount of the original judgment at the time of the deposit, for the defendant is entitled to withdraw this amount without waiving his right of appeal.

If possession is not taken by the condemnor, a deposit of the amount of the award in court under Sections 1251 and 1252 of the Code of Civil Procedure probably would be deemed a tender which stops the running of interest if no appeal is taken or if the judgment is affirmed on appeal, although some writers take the contrary view.¹¹⁵ Hence, a

¹¹⁴ *Ferrea v. Tubbs*, 125 Cal. 687, 58 Pac. 308 (1899).

¹¹⁵ No case precisely in point has been found. In CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE, King & Zifferen, *Interest and Cost*, 341 (1960), it is stated:

"Where the owner remains in possession of his property pending an appeal by either party, interest does not accrue after sufficient unconditional tender is made. See *Rose v. Hecht* (1949) 94 C.A.2d 662, 211 P.2d 347. In California, however, the mere deposit into court of the award, including accrued interest, probably does not stop the running of interest during an appeal. Because ordinarily a defendant cannot accept the fruits of the judgment (i.e., the compensation awarded) and at the same time appeal claiming a larger sum, a deposit of itself has been said to be insufficient tender; the funds are available to the owner only if he waives his right of appeal. *State v. Loop* (1958) 161 C.A.2d 466, 326 P.2d 902. To cut off the accrual of interest during a defendant's appeal, the condemnor should either (a) make a valid offer of payment by remitting directly to the defendant or into court for his benefit, according to C.C.P. §1252, with an express stipulation that the defendant's right of appeal is not waived or jeopardized, or (b) deposit additional security with the court pursuant to C.C.P. §1254. If the plaintiff rather than the defendant prosecutes the appeal, only the first of the above alternatives is available, because by resorting to C.C.P. §1254, plaintiff waives the right of appeal. See §15.8. Where the deposit into court is made after the time for defendant's appeal has expired, the deposit is deemed full and sufficient tender." [Emphasis added.] *Id.* at 347.

However, the italicized statement seems contrary to the holdings of *Ferrea v. Tubbs*, *supra* note 114, and *Vallejo etc. R.R. v. Reed Orchard Co.*, 177 Cal. 249, 170 Pac. 426 (1918). *Ferrea v. Tubbs* held that a tender to an appealing judgment creditor in the full amount of the judgment stopped the running of interest even though the judgment creditor could not accept any of the tender without waiving his appeal. *Vallejo etc. R.R. v. Reed Orchard Co.* held that the rules set forth in *Ferrea v. Tubbs* are applicable to deposits after judgment in condemnation cases. *People v. Loop*, 161 Cal. App.2d 466, 326 P.2d 902 (1958), is not con-

condemnor may wish to make such a deposit without taking possession under Section 1254. In these cases, if the condemnee withdraws the deposit, it has been held that the condemnee waives his right of appeal.¹¹⁶ However, it is not unjust to deprive the condemnee of the use of the money deposited if he wishes to appeal, for the condemnee retains the use of his property. He should not be able to have the use of the money and the use of the property at the same time. Nor is it unjust to deprive the condemnee of interest on the judgment after such a deposit. The condemnee would be compensated for a loss not suffered if he were permitted to have interest on the deposit at the same time that he has the use of the property for which the deposit was made.

Taxes

In the past many problems have arisen in the wake of condemnation actions concerning the collection of local taxes and assessments on the property being condemned. Typical of these are: the question of the condemnee's liability for taxes, the method of fixing the amount due, the mechanics for payment of taxes and the right of the condemning body to have unpaid taxes cancelled. A number of attempts have been made in recent years¹¹⁷ by the Legislature, the courts and by administrators to simplify the problems, but they still present numerous headaches from an administrative viewpoint.¹¹⁸ Moreover, at least one major policy question, thus far ignored, presents itself.

For many years condemnors took the position that the condemnee was liable for taxes until title to the property had passed to the condemnor even in cases where immediate possession had been taken. *City of Los Angeles v. Los Angeles Pacific Co.*¹¹⁹ was often cited in support of the condemnor's position, although it is not a clear-cut authority. However, the courts clarified the law in *People v. Peninsula Title Guar. Co.*¹²⁰ and in *Long Beach v. Aistrup.*¹²¹ These decisions held that where possession is taken by a condemnor, sufficient attributes of ownership are taken from the owner to constitute a "taking" of his property, and he is not liable for taxes which became a lien after that date even though he retains record title to the property. Although one burden upon the owner—that of having to pay taxes attaching after his possession was lost—was thus eliminated by these cases, another burdensome rule—that denying proration—remained and was, in fact, reinforced by the *Aistrup* decision.

The court in the *Aistrup* case held that if the property was taken after the lien date, the first Monday in March, all the taxes becoming a lien on that date were payable out of the award. Proration or appor-

trary to these cases, for *People v. Loop* involved a case where immediate possession was taken, where the amount deposited after the original judgment was insufficient in amount under that judgment, where the original judgment was reversed on appeal and where the defendant recovered a larger award on the new trial. In the *Loop* case, there was never a tender of the full amount found to be due the defendant, and there was no occasion to apply the rule that such a tender stops the accrual of interest.

¹¹⁶ *People v. Lindskog*, 184 Adv. Cal. App. 410, 7 Cal. Rptr. 508 (1960).

¹¹⁷ See, e.g., Code of Civil Procedure Section 1252.1 (1953), which was repealed by Cal. Stat. 1955, ch. 1229, § 1, p. 2242; CAL. REV. & TAX. CODE § 4986. Interview between Reginald B. Pegram and authors, January 14, 1960; statement by Harold Ostley, August 12, 1959.

¹¹⁸ *Ibid.*

¹¹⁹ 31 Cal. App. 100, 115-16, 159 Pac. 992, 998-99 (1916).

¹²⁰ 47 Cal.2d 29, 301 P.2d 1 (1956).

¹²¹ 164 Cal. App.2d 41, 330 P.2d 282 (1958).

tionment of taxes over the tax year was not allowed. Thus an owner might lose possession on the day after the lien date and yet have to pay taxes for a fiscal year which had not even then commenced.

In 1953 the Legislature attempted to meet some of the tax problems by enacting Code of Civil Procedure Section 1252.1.¹²² This section provided a rather detailed method of fixing the amount of and the liability for taxes. Taxes were to be apportioned for the fiscal year according to the date on which the condemnee lost possession. Although admirable in purpose, the statute was repealed in 1955¹²³ because of difficulties in its administration. Some tax officials, it was reported, were finding the cost of collecting taxes under the statute greater than the amount of taxes collected.

In 1959 the Legislature again attempted to achieve the beneficial purposes of Section 1252.1 by amending Section 4986 of the Revenue and Taxation Code.¹²⁴ This statute likewise contains the apportionment principle, but like former Section 1252.1 it has given rise to some administrative problems. For example, the date for proration in court acquisitions is the date on which "title was transferred to, or possession was taken by, the public agency, whichever time the court determines to have first occurred." Proration as of the date title was transferred poses the same difficulty that arises in the fixing of the precise amount of interest due on an award. Since title passes on the recording of the final order of condemnation, and since the date of recording cannot always be predicted with certainty at the time of trial, a problem is encountered in computing the exact amounts to be due from the owner. A possible solution lies in amending the language of the statute to prorate the taxes as of the date of trial, or date of stipulation for judgment if there is no trial, unless possession is taken earlier.

The legal department of the Division of Highways has prepared a memorandum in which several questions concerning the operation of Section 4986 are raised.¹²⁵ Among the points discussed in the memo are the following:

(a) The statute provides for the collection of all delinquent taxes, penalties and costs and the proration of current taxes and penalties and costs. It is assumed that an owner who loses possession before his taxes are due and payable does not pay them. If the trial occurs after the delinquency date, are the taxes then delinquent and subject to being paid in full? If so, the owner is denied the benefits of the apportionment statute.

(b) The statute provides that where property is acquired by negotiated purchase, taxes are prorated as of the date of acquisition. If this date is interpreted as being the date the deed is accepted, the statute would seem to preclude the use of a right of way contract and deed and require use of a stipulated judgment where the owner had previously lost possession of his property under an order of possession and desired proration of his taxes as of the possession date.

¹²² Cal. Stat. 1953, ch. 1792, p. 3573.

¹²³ Cal. Stat. 1955, ch. 1229, p. 2242.

¹²⁴ Cal. Stat. 1959, ch. 1023, p. 3044.

¹²⁵ A copy of this memo was obtained by the authors of this study through the courtesy of Mr. Reginald B. Pegram of the Division of Highways.

(c) Does the chapter apply to chartered cities which collect taxes under provisions and authority of their charters? The memorandum states that some chartered cities are contending it does not.

(d) Do the words "public agency" include the State?

(e) In the portion of the statute dealing with acquisitions by a negotiated purchase, it is provided that the public agency shall not be liable for certain specified taxes. The statute does not say they shall be cancelled. Does this leave the uncanceled taxes on the tax roll as a cloud upon the condemnor's title?

At the time of this writing, experience with the new statute has been relatively limited. It is suggested that before recommending any revision of Section 4986, further study be given to its operation. The Division of Highways and others interested should be invited to suggest recommendations for amendment in the light of the more extensive experience at that time.

A continuation of the policy adopted by the Legislature and expressed in Section 4986 (with such amendments as may be required to clarify the intent or aid in administration) is recommended. That policy is in harmony with the practices of private buyers and sellers of real estate, and a condemnation action is essentially a sale and purchase of real estate.

However, in at least one area, present case and statutory law has failed to provide needed relief. The problem arises where an owner, who would have been entitled to have unpaid taxes prorated under Section 4986, has paid taxes for a tax period extending beyond the proration date. A typical example is the owner who pays his full year's taxes on December 10. If a condemnation case is filed and possession is taken from him at any time before June 30 of the following year, he would, under Section 4986, be entitled to a proration of the unpaid taxes as of the date he lost possession. However, where he has already paid the taxes, present law makes no provision for a refund to him.¹²⁶

The problem arises not only in cases where voluntary prepayment has been made. A dilemma faces every owner threatened with loss of possession by condemnation as a tax delinquency date approaches. He may pay his taxes and risk the loss of the proration to which he is rightfully entitled if possession is taken from him before the end of the tax period covered by the payment; or he may refuse to pay the taxes and let them become delinquent, in which case, upon proration, he will be assessed with a part of the penalties and interest, and if the acquisition should be delayed until the next tax period, he will have to pay the penalties and interest in full.

The same problem faces the owner in a partial taking, but to an enhanced degree. Like the owner in an entire taking, he must weigh the potential penalties and interest against what he will lose if he pays taxes for which he may not be liable. His problem is complicated by the fact that taxes eventually will be cancelled only on the part taken, not on his remaining property. Thus, if his remaining holdings are large, the penalties and interest may be substantial. In order to avoid incurring them, he may have to forego a substantial cancellation of taxes on the part taken.

¹²⁶ See generally Note, *Eminent Domain—Liability for Assessments Accruing During Proceedings*, 8 HASTINGS L.J. 327 (1957).

Two possible alternatives suggest themselves. First, it might be provided that, if all or part of a property is a subject of a condemnation action, no penalties or interest for nonpayment of taxes will be incurred after the filing of the suit. In the event of a partial taking, liability would be restored when the condemnor's interest has been carved out of the whole parcel and the owner sent a tax bill on the remaining property.

A second alternative would be to provide that an owner is entitled to receive, as part of his just compensation, that sum which represents taxes already paid for any period following the date on which the condemnor took possession or title.

The latter approach has the advantage of protecting the owner who pays his taxes, possibly for the entire year, without knowing that a condemnation action has been or is about to be filed. In the typical open market sale one who prepays his taxes suffers no loss. He is given credit for that portion of the taxes which will inure to the benefit of his buyer. It seems reasonable to require that prepaid taxes be treated as an element of just compensation in an eminent domain case.

The two methods suggested for alleviating the problem have different results as far as the public agencies are concerned. Under the first proposal the taxing authorities would lose certain sums now collected as interest and penalties. Under the second, the condemning agencies would become liable for increased payments to condemnees.

It is recommended that relief be granted to the condemnee. Whether the cost should fall upon public agencies as condemnors or upon public agencies as taxing authorities is not the subject of a recommendation.

Rights and Obligations of Parties to a Leasehold Taken by Condemnation

Thus far we have examined the problems that arise in the date of taking and passage of title context as they affect the owners of property *vis-a-vis* the condemnor. Although there has been little discussion of the way these same problems would concern a lessee of the real property to be taken, it should follow that the rights and obligations of owners of property generally in this context should be the rights and obligations of a lessee also. For example, in cases of immediate possession the property interest of the lessee, like the interest of the fee owner, would be deemed to have been taken from the effective date of the order for possession. And, as in the case of a taking of the owner's interest, the incidents of the lessee's ownership would likewise inure to the condemnor at that time.

While the courts would probably arrive at the same result, in order to make clear that there should be no distinction made between the lessor and lessee when date of taking and passage of title problems arise concerning the questions discussed thus far, it is recommended that an explicit statutory provision be adopted.

There are, of course, major problems, related to the passage of title and date of taking problems, that concern the rights and obligations of the lessor and lessee between themselves as distinguished from their relationship to the condemnor. These questions will be separately examined in a subsequent study on the apportionment and allocation of awards.

Conclusions Regarding Date of Taking Problems

In light of the prior discussion, the question is clearly presented as to when title to condemned property should pass to the condemnor, and, more particularly, whether title should vest in the condemnor at the beginning of the proceedings upon the filing of a declaration of taking as under federal law, at the time possession is taken, at the time of withdrawal of deposit, or, as is most frequently the case under present law, upon recordation of the final order of condemnation.

It must be understood that any proposal to adopt a procedure similar to the Federal Declaration of Taking Act encounters the same constitutional arguments and objections that an expansion of the right of immediate possession would meet: vesting title in the condemnor is essentially a taking and the *Steinhart* logic, regardless of its merit, remains an obstacle. Moreover, such a change may not be effective if applied to those agencies already having the right of immediate possession, since that power emanates from the special provisions of Article I, Section 14, of the California Constitution. Accordingly, any change in the date title is deemed to pass may meet constitutional objections if done solely by statute. Hence, resort may have to be made to a constitutional amendment if such a change is proposed.

Assuming that a federal type of taking procedure can be adopted either by statute or constitutional amendment, the question then presented is whether it would be desirable to do so. As previously recommended, in immediate possession cases the condemnor should be liable both for interest and taxes commencing with the effective date of the order permitting it to take possession. Likewise, since the condemnor has possession, it should also incur the "risk of loss" for any injury done to the property subsequent to its right to possess. Since these factors are related to possession rather than title in immediate possession cases, the date on which title passes is not of prime importance in these cases. The question, therefore, is whether title ought to pass in the ordinary case, where possession is not taken until the conclusion of the action, at the recording of the final order or at some earlier date.

Should the condemnor be vested with title at the commencement of the proceedings, it undoubtedly would be necessary for it to deposit the estimated just compensation, and withdrawal provisions would probably be mandatory also. Furthermore, if the federal type of statute should be adopted, the ability of the condemnor to abandon would be far more restricted. Moreover, it would seem that if the condemnor had the option to proceed under a declaration of taking procedure or to proceed without taking title (as it does under the federal procedure), the entire area would be clouded with perplexing questions. It would not appear to simplify matters to adopt a federal-type procedure.

However, the basic reason justifying the retention of the present procedure—where title passes upon the recording of the final order—is that, except where possession is taken, the condemnee in most cases continues to have the beneficial use of his property, though subject to certain limitations. Thus, it is appropriate that he should not be immediately relieved of tax liability, nor should he be granted interest on the amount of the award, and the risk of any loss to the property should fall on him.

Although in immediate possession cases the rights and liabilities of ownership are held by the condemnor to simplify matters and to avoid any additional constitutional objection which might arise to the proposed expansion of the right of immediate possession, it would seem best that title in immediate possession cases also should not pass until the final order of condemnation. In this way, title in all cases would not pass until recordation of the final order, but the incidents of ownership would be held by the party that retains or gains the right of possession.

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