Possession Prior to Final Judgment in California Condemnation Procedure

Clarence B. Taylor
Across the United States there is a groundswell of interest in the law of eminent domain. The principal concern is whether the philosophy, measures, and details of “just compensation” are being applied appropriately in the era of the freeway and the launching pad. Uniformly, however, it is being discovered that the question of just compensation cannot be considered apart from the total procedure provided for the exercise of the power of eminent domain.

* This article was prepared to provide the California Law Revision Commission with background information on this subject. However, the opinions, conclusions, and recommendations contained are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

** A.B., 1949, LL.B., 1952, University of California; Special Condemnation Counsel, California Law Revision Commission. Member of the California State Bar.


With respect to federal and federally assisted acquisitions, committees of the Congress have submitted thorough studies with far-reaching proposals. See Staff of Select Subcomm. on Real Property Acquisition, House Comm. on Public Works, 88th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisitions in Federal and Federally Assisted Programs (Comm. Print 1964); and Hearings on Real Property Acquisition, Practices, and Adequacy of Compensation in Federal and Federally Assisted Programs Before the Select Subcommittee on Real Property Acquisitions of the House Committee on Public Works, 88th Cong., 1st & 2d Sess. (1963-64). See also Advisory Comm’n on Intergovernmental Relations, Relocation: Unequal Treatment of People and Businesses Displaced by Governments (1965); Hearings on S. 1201 and S. 1681 Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 89th Cong., 1st Sess. (1965).

2 The conclusion generally reached is that there is a need for statutory revision sufficiently comprehensive “to codify, amend, revise and consolidate the law relating to eminent domain.” See, e.g., Pa. Stat. Ann. tit. 26, § 1-101 (Supp. 1965). Certain obstacles to that end are obvious. The entire subject is viewed as involving a precarious balance of powers and positions that cannot or should not be disturbed. Statutory and constitutional debris accumulated over decades is a formidable tech-
This article is concerned with one aspect of eminent domain procedure—the troublesome and pivotal problem of determining the stage at which the condemnor may or must take possession of the property.\textsuperscript{3}

I. THE RIGHT TO POSSESSION IN CALIFORNIA AND OTHER JURISDICTIONS

Section 14 of article I of the California Constitution forbids the "taking" or "damaging" of property "without just compensation having first been made to, or paid into court for, the owner." The general rule, therefore, is that the condemnor is not entitled to possession, and the property owner is not entitled to compensation, until "final judgment" in the eminent domain proceeding.\textsuperscript{4} There are two important exceptions to this rule. The first exception was created by amendments to section 14, adopted in 1918 and 1934, which authorize the state, cities, counties, and certain districts to obtain an order for possession upon commencement of the proceeding if the acquisition is for (1) "any right of way," or (2) "lands to be used for reservoir purposes."\textsuperscript{5} This privilege is commonly referred


\textsuperscript{5} The pertinent portion of Cal. Const. art. 1, § 14 is as follows: "[P]rovided, 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

\textsuperscript{3} The judgment entered in a condemnation proceeding is "interlocutory" in the sense that it confers no right to possession until the time for appeal or motion for new trial has expired, the amount of the award has been paid into court, and the "final order of condemnation" has been recorded. The "final judgment" is simply the judgment originally entered after the period for appeals or motions in the trial court has expired. See Department of Public Works v. Loop, 161 Cal. App. 2d 466, 326 P.2d 902 (1958).
to as the "right of immediate possession," although a more appropriate reference would be to "possession prior to judgment." The constitutional privilege is implemented by sections 1243.4 through 1243.7 of the Code of Civil Procedure. Briefly stated, the significant features of this legislation are

(1) The condemnor may obtain an order for "immediate possession" on ex parte application.

(2) The condemnor must deposit the amount the court determines to be the "probable just compensation" which will be made for the property and any damage incident thereto, and the court may increase or decrease the amount of the deposit upon a showing that it is inadequate or excessive.

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."

6 In condemnation law generally, "immediate possession" does not refer to possession obtainable by administrative action prior to or apart from judicial proceedings. Rather, the reference is to possession taken pursuant to court authorization at some point in the judicial proceedings prior to final determination and payment of compensation. In California, the temporal point of reference is the condemnor's "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." CAL. CONST. art. I, § 14. In only a very few states in which the so-called "administrative theory" of condemnation has been carried to its logical conclusion is possession taken through purely administrative procedure. See HIGHWAY RESEARCH BOARD, SPECIAL REP'T. 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1958) at 23.

The fact that immediate possession may be obtained only by court order in condemnation proceedings has an important effect upon the tempo of the taking. The difference in timing between a voluntary acquisition and the taking of immediate possession in a condemnation proceeding is illustrated by the following description of the operations of the California Division of Highways, an agency that has and frequently exercises the right to immediate possession: "The first fact graphically illustrated . . . [is] the fixed time requirement of the condemnation process. In California, a minimum period of five months (without expedited handling) is required to secure legal possession of a property which has not been acquired by contract. The process entails drawing condemnation descriptions, preparing resolutions for passage by the Highway Commission, securing such passage, preparing summonses and complaints, filing suit, serving papers, securing orders for possession, and allowing sufficient notice period for vacation of the property . . . ." WOMACK, How Can We Keep Right-of-Way From Slowing Down Our Program Progress? ORGANIZATION OF AMERICAN STATES, NINTH PAN AMERICAN HIGHWAY CONGRESS, Doc. No. 50, at 4 (1963). Although this delay would vary with the administrative procedures of particular agencies, it can be seen that in California "immediate possession" is something of a misnomer.
(3) The property owner may withdraw the entire deposit.

(4) Notice of the order for immediate possession must be given the record owner and occupants of the property at least 20 days prior to the time that possession is taken, but for good cause the court may reduce the notice period to not less than three days.

The other exception to the general rule of section 14 is found in section 1254 of the Code of Civil Procedure. Since 1878, this section has permitted the condemnor in any case to obtain possession “after trial and judgment entered or pending an appeal” by depositing for the defendant the amount of the award and an additional sum as security for any increase in the award. Possession under this provision is commonly called “possession pending appeal,” although a better term would be “possession after judgment” or “possession prior to final judgment.”

Almost all states provide, as does California, for immediate possession in right-of-way takings. But while California limits immediate possession to right of way and reservoir cases, the federal government and a majority of the states are far more liberal in allowing the exercise of this right for other purposes.

The Federal Declaration of Taking Act, which provides for an exchange of the right to possession and approximate compensation at the beginning of the proceedings, includes all takings by agencies of the federal government. Originally patterned after a statute that applied to the District of Columbia, the federal act requires the filing of a petition to condemn, a declaration that the taking is for a public use, a statement of the authority under which the condemnor is proceeding, a description of the property, the plans for the taking, and a statement of the amount estimated by the acquiring authority as just compensation for the property. Once the declaration of taking is filed and the estimated compensation is deposited, title to the property vests in the condemnor. At the same time, the right to just compensation vests in the condemnee. Compensation is determined at a future date in a proceeding for that purpose. In the interim, however, as the act provides, the court has “power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession.”

The purposes of the federal act as described by the Supreme Court, are (1) to allow the government to take immediate posses-
sion of the property; (2) to permit the land owner to receive an immediate cash payment; and (3) to reduce the interest on the final award.

Although all but three or four states make some provision for possession before judgment, comparison of these provisions reveals considerable variation in authorization and procedures. In several eastern states an administrative method is used for condemning property. This procedure usually has the effect of making the condemnor the plaintiff and vests title and the right to possession in the condemnor at an initial stage of the proceeding. Thus "immediate possession" is not an issue in these jurisdictions. The property owner is protected by deposit and withdrawal provisions, and is relieved of the onerous burdens of ownership, e.g., risk of loss, payment of taxes.

In a number of states the general condemnation procedure involves a preliminary determination of compensation by commissioners or referees, with a trial de novo in a court of general jurisdiction. In these states, "immediate" possession is usually permitted following the preliminary determination and pending the judicial proceedings.

In three states that adopted variations of section 14 of article I of the California Constitution, possession prior to judgment ap-

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12 At the time Rule 71A of the Federal Rules of Civil Procedure was adopted in 1951, throughout the United States there were 269 different methods of judicial procedure in various classes of condemnation cases and 56 distinct methods of non-judicial or administrative procedure. See the Notes of the Advisory Committee on Rules of Civil Procedure, p. 4356 following Rule 71A, 28 U.S.C. § 2070 (1952). Although California is fortunate in contributing only two of these methods (see text at note 149, infra, as to determination of compensation in certain cases by the Public Utilities Commission), direct comparison of California's immediate possession provisions with those of other states is complicated by the proliferation of condemnation procedures. Exact comparison is also difficult because of the unusual nature of the California Constitution in authorizing immediate possession in terms of two public uses, i.e., rights of way and lands for reservoir purposes. Nevertheless significant comparisons can be made.

A state-by-state analysis of possession-prior-to-judgment legislation is made in each of the studies cited in note 3 supra.


14 ALA. CODE tit. 19, § 18 (1958); ALASKA STAT. § 09.55.380 (1962); IND. ANN. STAT. § 3-1708 (Supp. 1965); IOWA CODE ANN. § 472.23 (Supp. 1964); KAN. GEN. STAT. ANN. § 26-508 (1964); KY. REV. STAT. § 177.086 (1962); MISS. CODE ANN. § 2766 (1942); MO. ANN. STAT. §§ 523.040-050 (1953); MONT. REV. CODE ANN. § 93-9920 (1963); NEB. REV. STAT. § 76-711 (Supp. 1965); OKLA. STAT. ANN. tit. 69, § 46(4) (Supp. 1964); TEX. REV. CIV. STAT. ANN. § 3268 (1952).

pears to be precluded in all instances. In two of these states, the courts have voided legislative efforts to give the condemnor the right to immediate possession in certain instances.

In other states general provision is made for immediate possession when the condemnation is on behalf of a state or other public agency, but not when the plaintiff is a public utility or other non-governmental condemnor. In several of these states this distinction appears to be required by an explicit constitutional provision.

In recent years, a growing number of states have incorporated into their condemnation procedure general and uniform provisions for possession at the outset of the proceeding. Quite frequently, this result is obtained in overall revisions of condemnation law. For example, a recent comprehensive study of eminent domain in New Jersey concluded that:

Except in the rather rare cases in which the right to condemn is questioned, it is essential that the condemning body be permitted to take possession of the property promptly following the filing of the complaint and service of process. . . . As has been stated, many agencies do not currently possess such power.

It is believed that the right to take possession should be granted on a uniform basis to all bodies possessing the power of eminent domain, except individuals or private corporations who are constitutionally prohibited from taking possession until compensation has been paid . . . .

The trend in all states is to expand the application of immediate possession, even though the authorization may be in terms of particular public acquisition programs.


16 See note 121 infra.


In summary, therefore, it can be said that the trend of the law on this subject is a movement from denial of any right to possession or compensation prior to final judgment to systems involving a preliminary exchange of property for approximate compensation.

II. POLICY CONSIDERATIONS RELEVANT TO EARLY POSSESSION

A. Historical Evolution of the Right to Possession Prior to Judgment

In the 19th century when condemnation procedures were established, takings involved few properties that were privately owned and even fewer properties that were highly developed. The economic tempo of that time did not make the taking of immediate possession an important question. Business and governmental activity did not proceed at the pace that has become accepted and expected in this era. The condemnors foremost in the mind of law-makers were not governmental entities and agencies, but rather privately owned utilities and common carriers. In California, for example, the eminent domain title of the Code of Civil Procedure was taken directly from the preceding railroad acts. To encourage establishment of the vast network of public services needed in an undeveloped country, and to facilitate development of natural resources, the power of eminent domain was authorized in the broadest possible terms. It was therefore imperative that the power be exercised exclusively through judicial proceedings, and that interference with private property prior to payment of the final judgment be precluded.

Although determination of just compensation was then, as now, the principal problem in the great majority of proceedings, the condemnation action determined other important issues. The constitutional limitation that property be taken only for "public use" was litigated in many cases. Further, the statutory requirements that a "public necessity" exist for a particular project or improvement, and that the taking of the property be necessary for the improvement, were issues to be litigated in every case. Beginnings of

21 See the Code Commissioner's Notes to subdivision 4 in CAL. CODE CIV. PROC. § 1238 (Deering 1959).
22 The vestiges of this approach to conferring the power of eminent domain can still be seen in the expansive statement of "public uses" in CAL. CODE CIV. PROC. § 1238 and in the authorization in CAL. CIV. CODE § 1001 for "any person . . . without further legislative action" to take property for such uses.
24 With respect to the issue of "public necessity" in California condemnation,
the existing broad statutory provisions for conclusive legislative or administrative determination of these issues did not appear in California law until 1913.25

In this framework, the pressures for possession prior to judgment soon developed. It became apparent that condemnation litigation would delay acquisition of sites and construction of facilities by governmental entities and agencies as well as by privately owned enterprises vested with the power of eminent domain. The agitation for changes in procedure from enactment of the Code of Civil Procedure in 1872 to adoption of the first immediate possession "proviso" to section 14 of article I of the California Constitution in 1918 was predominantly prompted by takings for railroad purposes. The development of the automobile and the need for highways added further pressures. California's constitutional provision for immediate possession in right of way cases is roughly equivalent to the special condemnation procedures adopted in a great many states that are limited in application to acquisitions for highway and freeway purposes.26 The last change made in California constitutional law in 1934 to authorize such possession in takings of "lands for reservoir purposes" evinced the early and continuing importance in this state of developing water resources.27

The circumstances, other than the pressing need for public facilities of various kinds, that have made provisions for immediate possession both necessary and feasible are several. First, the congestion of trial and appellate court calendars is a relatively recent phenomenon. Despite all efforts to expedite the disposition of condemnation proceedings, it has become clear that this approach cannot afford an adequate solution to the problems.28 More importantly,

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26 See the legislative history in CAL. CODE CIV. PROC. § 1241 (Deering 1959).

27 See the argument to the voters submitted with the 1934 amendment in Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal. 2d 845, 850, 215 P.2d 462, 465 (1950) (dissenting opinion).

28 Various measures introduced in the California Legislature in recent years would have required expeditious handling of condemnation cases. For example, Senate Bill 1200 introduced in 1965 would have required that, in all cases, the issue of compensation be tried within 180 days from the filing of the complaint. It appears, however, that in the populous counties the courts are hard pressed to bring condemnation cases to trial within one year and that a special effort is made to do so to preserve the basic date of valuation specified by CAL. CODE CIV. PROC. § 1249. See Swartzman v. Superior Court, 231 Cal. App. 2d 195, 41 Cal. Rptr. 721 (1964); County of San Mateo v. Bartole, 184 Cal. App. 2d 422, 7 Cal. Rptr. 569 (1960).
the condemnation proceeding itself has evolved from a general trial of multiple issues into a sophisticated inquiry into the issues of compensability and values. As the Supreme Court of the United States has had occasion to emphasize, in such proceedings "the vital issue—and generally the only issue—is that of just compensation." The still theoretically important doctrine of "public use" has dwindled in importance as a factor in the actual litigation of cases. In the very few cases in which there is a genuine issue of "public use," the issue may be determined by the appellate courts on writ procedure, as well as in the trial court and on appeal from the judgment in the condemnation proceeding. Although the issue of "public necessity" is still litigable in a considerable range of acquisitions, in the vast majority of takings the issue is conclusively resolved by administrative or legislative determination.

Notwithstanding the erratic and unsystematic development of the law on this subject, an essentially simple idea of general application has emerged: The law has evolved to a point where it is necessary and feasible to devise procedures for taking possession of property and devoting it to public use prior to judgment and, at the same time, for furnishing the property owner approximate compensation at the time possession is taken. Admittedly there are problems in devising acceptable procedures, but as experience in other states demonstrates, these problems can be overcome to the advantage of both the tax-paying and property-owning public.

B. The Condemnor's Need for Early Possession

The most direct consequence of delay between commencement of condemnation proceedings and the taking of possession is the forestalling of construction of much needed public facilities. If a suitable alternative can be devised, it seems especially poor policy to permit such delay in a state of burgeoning population and unprecedented growth. The only administrative method of overcoming the delay is to increase the "lead time" allowed for acquisition of the necessary property following final planning of the project. Usually this means that property within the project area must be acquired months or even years before it is actually needed, thus depriving the property owner of the use of the property for that period to the ultimate disadvantage of both condemnor and condemnee. Attempts to overcome this obstacle can also lead to precipitant filing of proceedings and premature and ill-considered acquisition of property.

31 See text accompanying notes 140-2 infra.
In acquiring property for public use, it is virtually essential that there be a definite future date as of which all property needed for the public improvement will be available. In short, the need is for certainty rather than haste. Public works are accomplished through the letting of contracts and advertising for bids, all of which require definite dates upon which acquiring agencies can rely for having use of the property. Contracts for public work usually assure the contractor of use and occupancy of the site or right of way on a definite date. An unanticipated delay in obtaining such possession can even subject the public agency to suits for breach of contract. Other considerations, such as the need for a definite date for utility relocations, for the removal of existing improvements and obstructions, and for integrating the construction with related work also underscore the need for certainty in the date of possession.

The general need for promptness in accomplishing public improvements and the practicalities of performing public work are not the only considerations that argue for early and assured dates of possession. Under prevailing economic conditions, with ever-rising costs of labor and material, delays in commencing a project reflect themselves in increased costs of the public improvement. As a minimum consequence, this increase in cost is reflected in increased taxes and utility rates. As the extreme, this economic phenomenon can preclude construction of the improvement altogether. This problem is so prevalent in California and elsewhere at the present time as to be recurring front page news. Moreover, as many public improvements are financed by the issuance of bonds, an inability for any reason to accomplish the project in timely fashion often results in the funds being inadequate to complete the project. Even if the bond proceeds prove to be sufficient, delay in construction increases interest costs borne by the tax-paying and rate-paying public. Incurrence of these costs before construction has begun seems especially unfortunate if the delay results from correctable awkwardness in the condemnation process.

Still another oblique but important aspect of the need for promptness in site and right of way acquisition is the need to obtain, and indeed to compete for, federal financial participation in many projects. Notwithstanding the flood of federal funds to state and local governments, it is generally the responsibility of the local government or agency to acquire the necessary property. Until and unless such property is acquired or its acquisition is assured, there usually is no basis for application for federal participation. As an exception, early possession and control of rights of way in highway work is assured by federal legislation. For a number of years, the federal highway acts have provided that if a state is unable to obtain rights of way "with sufficient promptness," the Secretary of Com-
comer may acquire such rights under federal law, including the Federal Declaration of Taking Act,\textsuperscript{32} and thereafter convey them to the state.\textsuperscript{33}

While these requirements of property acquisition programs have been recognized for decades, construction of public improvements has often been delayed for excessive periods of time, partially because of the inability of entities and agencies to expedite the taking of possession. In California this result has stemmed largely from the assumption that the constitutional problem is insurmountable. Probably the largest class of acquisitions not accompanied by the right to possession prior to judgment are those for school purposes. Development of school sites usually does not present the problems of land assembly typically encountered in acquisitions for rights of way or reservoir purposes, but school districts are forced to compete in volatile suburban land markets and are expected to provide facilities promptly\textsuperscript{34} and indeed to overcome the notorious lag in school facilities.

The problems of acquiring land for public use in California exist in many areas outside the existing constitutional authorization for immediate possession. In fact, any program of public improvement will give rise to pressures for early possession of necessary property. For example, control of water pollution is being stressed currently by federal, state, and local governments. One of the repercussions in the property acquisition field is succinctly stated in the following extract from a motion adopted by the San Francisco Regional Water Quality Control Board:

[T]his Regional Water Quality Control Board has experienced extensive delays in obtaining correction of water pollution problems


\textsuperscript{34} Letter From Harold W. Culver, San Diego City Schools, to the California Law Revision Commission, June 30, 1966, stating: "The times involved extended from May 1958, when preliminary arrangements were made . . . , to the board action authorizing eminent domain on 3/10/59, to the negotiated purchase on 4/10/61, and the plant completion on 2/14/62. This school was made more than twelve months late by the actions of the defendant.

... The district has found that some landowners and their attorneys use the delays made possible by the lack of the right of immediate possession as a negotiating tool. The right of immediate possession would eliminate the ability of these uncooperative persons to delay the school district in its acquisition of land or to threaten to delay the school district and hinder its acquisition of land needed for school sites.

The backlog of cases awaiting trial in the superior courts, coupled with the time necessary to properly prepare a condemnation case, can seriously delay the date on which a school district is able to provide the school facilities required for any particular area. The right of immediate possession would eliminate these delays and would not, to our knowledge have any offsetting, undesirable effects."
because the offending public agency could not obtain immediate possession of property on which to construct the necessary waste treatment facilities and appurtenances. The Board understands that appropriate constitutional changes would be necessary to make such immediate possession possible, and requests that such changes be drawn up by the California Law Revision Commission and made a part of its recommendations.\textsuperscript{35}

Since it seems inevitable that the area of these problems will continue to expand, the search should be for an overall and enduring solution. As a minimum, any remediable or unnecessary delays or barriers in the condemnation process should be eliminated.

C. Advantages of Immediate Possession to Property Owners

To appreciate fully the ways in which a system for possession and approximate payment prior to judgment can benefit property owners, as well as condemning agencies, it is necessary to consider the dual role of the condemnee. Although he is a civil litigant, he is also a seller of property—involuntary though the sale may be. The resulting position usually is not an enviable one. A leading author on eminent domain, in comparing the administrative and judicial methods of condemnation, has aptly described the property owner’s problems as follows:

Under the system of condemnation by administrative order, the title to the condemned property vests in the condemner at the very outset of the proceeding. Here the principal hardship is the delay in the determination of compensation and in the postponement of payment. Although the owner is entitled to interest for the delay, this is often insufficient to repay him for his loss, for the uncertainty of the date of payment and of the amount of compensation makes it difficult, and in some cases, impossible for him to secure the financing necessary to re-instate him in his business or in a new home. Under the system of condemnation by judicial decree, title to the property sought to be acquired does not vest in the condemner until the payment of compensation. Although here the owner remains technically in control of his property, the effects of the expropriation are often more severe under this method than under the alternative procedure. For it usually happens that the very institution of the condemnation proceeding puts the property under a blight. If the land is vacant, the owner is foreclosed from erecting structures on it or otherwise improving it. On the other hand, if the property is improved, it would be foolhardy for the owner to make alterations or additional improvements, and even substantial expenditures for maintenance are unwarranted in view of the impending condemnation. Yet, if the owner allows the property to run down, its condition at the time of trial may greatly reduce the award that he might otherwise have re-

\textsuperscript{35} Motion adopted June 16, 1966, as presented in Letter From the San Francisco Regional Water Quality Control Board to the California Law Revision Commission, July 19, 1966.
ceived. Moreover, the income that the owner derives from the property may be materially reduced by the imminence of the condemnation.\(^\text{36}\)

Although this description ignores the usual requirement of a deposit for the property owner in administrative condemnation and assumes the absence of immediate possession provisions in connection with the judicial method, it is accurate as to California cases in which immediate possession is not taken. Upon the filing of the condemnation proceeding, the California condemnee loses many of the valuable incidents of ownership. He is not compensated for any improvements to the property made after that time.\(^\text{37}\) He is precluded, as a practical matter, from selling or renting the property as any transaction will be subject to the inevitable outcome of the condemnation suit.\(^\text{38}\) He is deprived of any increase in the value of the property occurring thereafter, for the condemnation award ordinarily is based on the value of the property at the commencement of the proceeding.\(^\text{39}\)

Because their property is being taken, many condemnees must find and purchase replacement property and prepare to move. At the same time they incur the costs of litigating the condemnation action. While these expenses are incurred whether immediate possession is taken or not, the landowner receives no compensation until the conclusion of the litigation unless such possession is taken. It is at least possible that a property owner without substantial assets other than the property being taken will be forced to settle his claim for an inadequate amount simply to relieve the immediate economic hardship. In contrast, the relinquishment of possession and the receipt of approximate compensation prior to judgment permits the condemnee to meet these problems and expenses while proceeding with the trial on the issue of compensation. When immediate possession is taken, existing California statutory provisions assure the property owner that he will have available an amount fixed by the court as the probable compensation to be awarded in the proceeding.\(^\text{40}\) These provisions permit the condemnee to go to trial on the issues of compensation and damages, and still receive sufficient funds to obtain other property while awaiting trial, or to leave the amount on

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\(^{36}\) 2 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 247, at 263 (2d ed. 1953).

\(^{37}\) CAL. CODE CIV. PROC. § 1249.

\(^{38}\) A "lis pendens" must be recorded at the outset of every eminent domain proceeding. CAL. CODE CIV. PROC. § 1243.

\(^{39}\) CAL. CODE CIV. PROC. § 1249.

\(^{40}\) See CAL. CODE CIV. PROC. §§ 1243.5(a) (condemnor seeking immediate possession must deposit "probable just compensation" for the property), 1243.5(d) (condemnee may obtain order increasing the amount of an inadequate deposit), and 1243.7(a) (condemnee may withdraw the amount deposited).
deposit and receive interest at the legal rate of seven percent throughout the proceeding.\textsuperscript{41}

The reality of these advantages is indicated by the fact that property owners have sought unsuccessfully to compel the condemnor to take possession and to make the required deposit. Another indication is the repeated suggestion by counsel for property owners to allow immediate possession procedures to be initiated by the condemnee.\textsuperscript{42}

It is apparent that several of these advantages accrue only if the deposit is made available to the condemnee at the time possession is taken. Further, the series of advantages is not logically complete unless the owner is treated, in all respects in which it is to his advantage, as though he had actually sold the property on the date possession is taken.

The absence of detailed provisions for immediate possession in section 14 of article I of the Constitution has given rise to the widespread but unanalyzed impression that it is always in the best interest of the property owner to postpone relinquishment of possession. From 1918 to 1957, there were no statutory provisions for withdrawal of the required deposit, and therefore the property owner was always deprived of his property for a substantial period before actual receipt of any amount. Furthermore, if the deposit was made to obtain possession following entry of judgment, the amount could be withdrawn immediately, but if the deposit was made to obtain possession before judgment, withdrawal was not permitted even upon entry of judgment.\textsuperscript{43}

Even more irritating to condemnees was the absence of legislation providing for any of the consequences of early possession. For example, it was necessary for the California Supreme Court to devise a means of compensating the property owner for use and possession of the property during the period of immediate possession.\textsuperscript{44} Intervention of that court also was necessary to prevent the property owners being required to pay taxes and special assessments accruing during the period of immediate possession.\textsuperscript{45} The existence of these shortcomings for several decades after immediate possession was authorized has left impressions that are difficult to overcome. But, as the California Supreme Court recently has had occasion to declare, provisions for an exchange of possession for approximate

\textsuperscript{41} \textit{Cal. Code Civ. Proc.} § 1255(b).
\textsuperscript{42} See text accompanying note 194 \textit{infra}.
\textsuperscript{43} See Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934).
\textsuperscript{44} See People v. Peninsula Title Guar. Co., 47 Cal. 2d 29, 301 P.2d 1 (1956).
\textsuperscript{45} See Metropolitan Water Dist. v. Adams, 16 Cal. 2d 676, 107 P.2d 618 (1940).
compensation during the progress of condemnation litigation are for the mutual benefit of both condemnors and condemnees, and are to be construed accordingly. 46

D. Effect of Immediate Possession Upon Negotiations and Settlements

In all cases in which "just compensation" is ultimately determined by court or jury, it is clear that the right to immediate possession has no effect in determining compensation. The single problem that arises in this connection is that in certain cases, especially when structures have been razed, it may be more 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. Although this problem is regarded as serious by some practitioners, it can be largely overcome by the preparation of appraisals, together with photographs, in the interim between service of the order for immediate possession and the date possession is actually taken. This general disadvantage of immediate possession is also substantially offset by a corresponding advantage. Since severance damages and the offsetting of benefits are major factors in ascertaining compensation, expediting construction of the public facility may assist in arriving at a more accurate estimate of these amounts.

A more subtle question is whether the availability of immediate possession to the condemnor has any significant effect upon negotiations and settlements in cases in which the issue of compensation is resolved by the parties. An oft-stated purpose of immediate possession provisions is to prevent property owners from using the possibility of protracted litigation as a negotiating factor. For example, the argument submitted to the voters in connection with the constitutional amendment of 1918 (rights of way) emphasized this point as follows:

Experience has shown that cities, in acquiring long stretches of rights of way for public purposes, are often held up by unreasonable and arbitrary owners who attempt to take advantage of a rule which requires that the city can not go into possession prior to a jury actually fixing the compensation to be paid. 47

It is probably true that in exceptional circumstances, such as a need for possession to meet a construction deadline, a California condemnor that cannot take immediate possession may be forced to pay an excessive price. In general, however, public entities and

47 See SECRETARY OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 34 (1918).
agencies have limitations on the extent to which they can negotiate and upon their particular method or procedure of negotiation. Governmental agencies are precluded from paying more than their appraisals without cogent reasons supporting a determination of higher just compensation.48 Delay in construction of the public facility or an increase in allotted "lead time," would therefore appear to be more probable consequences than payment of excessive prices.

Conversely, many attorneys fear that broad provisions for possession prior to judgment would permit condemnors to force unfair settlements. Similar apprehension is reflected in the following formulation of policy for federal legislation:

In no event should the head of a federal agency either advance the time of condemnation, or defer the condemnation and the deposit of funds in court for the use of the owner, in order to compel an agreement on the price to be paid for the property. If an agency head cannot reach an agreement with the owner, after negotiations have continued for a reasonable time, he should promptly institute condemnation proceedings and, at the same time or as soon thereafter as practicable, file a declaration of taking and deposit funds with the court in accordance with the [Federal Declaration of Taking Act].49

Although it does not appear that agencies having the right of immediate possession systematically make lesser offers than agencies without such right,50 it is probably true that in the absence of notice of the order for possession and a period of delay in its effective date, or of any provision for withdrawal of the required deposit of probable just compensation, the right of immediate possession is subject to the possibility of administrative abuse. In the view of private practitioners, it is not the taking of immediate possession itself that affects negotiation of the issue of compensation. Rather, the difficulty lies in the possibility that immediate possession might be taken and the property owner be left without either property or compensation for a prolonged period.51 It would appear that the adoption in 1961

48 California Continuing Education of the Bar, California Condemnation Practice § 6.6 (1960).
50 Ibid. See also California Continuing Education of the Bar, California Condemnation Practice §§ 11.1-19 (1960).
51 Letter From Leslie R. Tarr to the California Law Revision Commission, Aug. 4, 1960, stating: "There have been times when agents for public bodies actually threatened property owners with the taking of immediate possession, wherein the owner would be deprived of his property and have no funds either to move or to purchase other property. And it has been dynamite to [the] business of industrial firms, forcing settlements to avoid business losses and financial failure."
of general provisions for withdrawal of the total deposit have overcome this unfairness.

Providing property owners with even partial compensation at the outset of the proceedings does supply funds with which to conduct the litigation. It does not seem realistic, however, to conclude that this substantially increases the number of contested cases and thereby hampers acquisition of property for public use. Furthermore, rudimentary fairness to the property owner dictates that he not be deprived of his "day in court" through sheer economic necessity.

In a majority of the states, the condemnor is required to make a "jurisdictional offer" to purchase the property and to establish inability to agree with the property owner before beginning the condemnation proceeding.\(^52\) Since enactment of the Code of Civil Procedure in 1872, California law has not included any such requirement, and negotiating practices have varied from agency to agency and from entity to entity.\(^53\) Legislation calculated to force the condemnor to make a definite offer before beginning the condemnation proceeding has been repeatedly introduced in the California legislature, but has failed of enactment.\(^54\) Whatever the merits of the "jurisdictional offer," the purpose of the requirement is largely served by comprehensive deposit and withdrawal provisions related to the taking of possession prior to judgment. From the property owner's point of view, the latter provisions afford the additional advantages of a judicial review of the amount of the deposit and permit him to press his claim for greater compensation if he chooses. From the condemnor's standpoint, deposit and withdrawal provisions are less advantageous in that acceptance of the "jurisdictional offer" would avoid or terminate the condemnation proceeding. However, if the condemnor has made a bona fide offer, it would not appear to be subjected to additional hardship by being required to deposit the amount of the offer for withdrawal by the property owner.


\(^{53}\) Supra note 48.

\(^{54}\) For example, Senate Bill No. 69 introduced in the 1959 Legislature would have added the following provision: "Where the State, or any of its agencies, seeks to acquire property pursuant to any law and commences negotiations with the owner of the property in contemplation of the subsequent condemnation thereof if necessary, the state agency or officer involved in the negotiations shall offer a fair and equitable price for such property. In connection with such offer, the negotiator shall make available to the owner of the property, upon his written request therefor, the appraisal or reports relating to the value of such property upon which the offer is based."
E. Effectuating the Policy of Concurrent Payment

Adoption of the immediate possession provisions of section 14 of article I of the state constitution reversed a long-standing policy that property may not be taken unless compensation has first been made. The 1961 statutory provisions for withdrawal of the total deposit, however, permit the property owner to receive approximate compensation months or even years earlier than he would if possession were postponed. The extent of this discrepancy can be seen by reference to the provisions governing payment of the award in ordinary condemnation proceedings.

Code of Civil Procedure section 1251 requires that the compensation assessed must be paid within 30 days after "final judgment." For this purpose, "final judgment" is defined as "a judgment when all possibility of direct attack thereon by way of appeal, motion for new trial, or motion to vacate the judgment has been exhausted." 55 56

The 30-day period within which the condemnor must pay the award is therefore extended an additional 60 days within which an appeal may be filed after entry of judgment or disposition of a motion for new trial. 60 The period is also extended by the 10 days from notice of the entry of judgment within which either party may move for a new trial, or move to vacate or set aside the judgment. 67 During this delay, there is no means by which the condemnor can be compelled to take or pay for the property. 58

If the plaintiff is the State of California or a "public corporation," and bonds must be sold to pay the sum assessed, payment need not be made until one year after the date of the judgment and, in computing the one-year period, any period of litigation affecting the validity of the bonds is discounted. 59 Considering that these

55 CAL. CODE CIV. PROC. § 1264.7.
56 CAL. CT. R. 2. City of Los Angeles v. Aitken, 32 Cal. App. 2d 524, 90 P.2d 377 (1939). The 30-day period is computed from the filing of the remittitur, and if payment is not made or deposited within that 30-day period the proceeding may be dismissed. County of Los Angeles v. Bartlett, 223 Cal. App. 2d 353, 36 Cal. Rptr. 193 (1963).
57 CAL. CODE CIV. PROC. § 659 (motion for new trial), § 663a (motion to vacate or set aside the judgment); Pool v. Butler, 141 Cal. 46, 74 Pac. 444 (1903).
59 CAL. CODE CIV. PROC. § 1251. This provision now reads as follows: "In case the plaintiff is the State of California, or is a public corporation, and it appears by affidavit that bonds of said State or of any agency thereof, or of said public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; provided further, that if the sale of any such bonds cannot be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which payment must be made" (emphasis in original).
periods of delay are additional to the time needed to proceed to trial and judgment, it is apparent that the constitutional assurance of prepayment has not been effective in assuring prompt payment. Although it is arguable that the constitutional policy of prepayment is intended only to protect property owners from financial irresponsibility or administrative abuse on the part of condemns, it appears that a secondary purpose of the policy is to assure a businesslike and substantially simultaneous exchange of property and compensation. Long before “immediate possession” became a serious problem in the law of eminent domain, this objective of the law was recognized. As quaintly stated in an early decision:

The true rule would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder Court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary by the forms of law, to conduct the inquiry . . . .

In the economic pace of the last few decades, something more than an abstract constitutional guarantee of prepayment is required. The most promising approach to a general solution has been found in schemes for a preliminary exchange of the property for approximate compensation. In federal condemnation practice, for example, the deposit required to be made with the filing of a declaration of taking is “paid forthwith for or on account of the just compensation to be awarded in said proceeding.” More significantly, even in cases in which a declaration of taking is not filed, the plaintiff in condemnation may make a deposit and “in such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation.”

For a decision questioning the constitutionality of the provision and giving it a highly restrictive interpretation, see People v. Thompson, 5 Cal. App. 2d 655, 43 P.2d 600 (1935). The principle application of the provision is to permit issuance of revenue or general obligation bonds by local governments to acquire ownership of utility systems from private ownership. See, e.g., City of Sacramento v. Citizens Util. Co., 239 Cal. App. 2d 103, 48 Cal. Rptr. 547 (1965). Use of the extension is greatly restricted by the rule that the related period for abandonment of the proceeding is not similarly extended. After 30 days from final judgment, the proceedings may not be abandoned by the condemnor even though the extension for issuance of bonds is applicable and even though the bond proceeds have not been forthcoming within that period. Southern Pub. Util. Dist. v. Silva, 47 Cal. 2d 163, 301 P.2d 841 (1956).


FED. R. CIV. P. 71A(j).
Existing California law provides for the deposit of probable just compensation only in connection with an application for an order of immediate possession in the limited range of cases in which such possession is authorized. An appropriate broadening of the range of immediate possession is a practical method of effectuating the constitutional policy of concurrent payment.

III. The Constitutional Question

A. Constitutional Requirements Generally

The Constitution of the United States imposes no direct limitation upon state statutory or constitutional provisions for possession prior to judgment. Neither the fifth amendment's "just compensation" clause nor the fourteenth amendment's due process clause require that compensation be determined in advance of possession, or that any amount be paid into court for the property owner before his possession is disturbed. "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution." However, a source of compensation must be assured before any change of possession or other activity which is deemed to be a "taking" in the constitutional sense. For example, it is sufficient for a governmental entity to pledge the public faith and credit for eventual payment if an adequate means of enforcing the claim to compensation is provided. Essentially the same rule applies to non-governmental condemnors, except that greater security for ultimate payment must be provided to the property owner.

This general requirement applies to the California condemnation process irrespective of any more specific limitation or authorization in section 14 of article I of the California Constitution. In applying the first clause of section 14 and, impliedly, the federal requirement, California decisions have invalidated statutory schemes for the making of public improvements that involved the taking or damaging of private property without preexisting provision for the ascertainment and payment of compensation. These decisions,

68 Most of these decisions are cited and discussed in Beals v. City of Los Angeles,
however, concerned situations in which the property was not being acquired through formal condemnation. They invalidated statutory authorization of governmental activities that would have constituted so-called "inverse condemnation." Consequently, the decisions shed little light upon the limitations applicable in connection with the usual judicial condemnation proceedings. It is clear that federal "due process" does not preclude provisions for possession prior to judgment in such proceedings. The limited provisions for immediate possession in the California Constitution have been sustained when challenged on federal grounds.69

In addition to the fundamental requirement of eventual compensation, the constitutions of approximately half the states contain special provisions regarding the method or time of payment in eminent domain proceedings. In terms of the language used, these constitutional provisions can be divided roughly into three groups: (1) provisions that seemingly require that compensation be actually paid in advance of the taking;70 (2) provisions that require, as does section 14 of article I, that compensation be paid, paid into court, or deposited in some other fashion for the owner;71 and (3) provisions that require only that compensation be paid or secured.72

The courts have generally found no conflict between these constitutional provisions and the "immediate possession" statutes.73 Provisions of the second category are not often construed to require that the determination of the amount to be paid into court be final.

23 Cal. 2d 381, 144 P.2d 839 (1943). A typical statement is found in Bigelow v. Ballerino, 111 Cal. 559, 564, 44 Pac. 307, 309 (1896): "The constitutional rights of an owner of private property which is sought to be taken or damaged for public use are two: 1. The right to compensation; and 2. The right to have that compensation made or paid into court before his property is taken or injuriously affected. . . . [T]he property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them."


rather than preliminary, or be made by jury. The more usual construction imposes the single condition that the property owner have the right to withdraw the amount deposited prior to termination of the condemnation proceeding.  

It is possible, however, to compound the requirement of payment into court with the requirement of jury trial and to conclude that the payment into court can be made only after the issue of compensation is tried and determined. Although the matter is far from clear, this conclusion is commonly assumed to be the California position. Hence, proposals for change in California procedure have uniformly taken the form of proposed amendments to section 14 of article I. Since the section's last amendment in 1934, approximately thirty proposed constitutional amendments have been introduced in the Legislature. To determine whether this general assumption is well founded and whether statutory revision without a constitutional amendment is precluded, a consideration of the background of section 14 and of the judicial decisions construing that section is required.

B. Derivation of Section 14, Article I, California Constitution

The various amendments to section 14 have made it virtually unreadable. For example, it is impossible to know that the phrase "right of way or lands to be used for reservoir purposes" refers to two distinct types of acquisitions without also knowing that the words "or lands to be used for reservoir purposes" were added by separate amendment. However, in historical perspective, the section can be at least grammatically untangled.

As adopted in 1879, the section read:

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,

and no right of way shall be appropriated to the use of any corpora-

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75 Most of these amendments would have extended immediate possession to other entities or agencies as to takings for additional public purposes. Among other changes, they would have provided possession prior to judgment in acquisitions for expositions or fairs (Assembly Constitutional Amendment No. 77, 1935); public beaches, public buildings or civic centers (Assembly Constitutional Amendment No. 9, 1947); airports, schools or "borrow sites" for flood control or highway projects (Assembly Constitutional Amendment No. 25, 1949); facilities for sanitary and sanitation districts (Assembly Constitutional Amendment No. 52, 1949); redevelopment agencies (Senate Constitutional Amendment No. 6, 1957); rights of way for electric, water, gas, telephone and telegraph corporations subject to the jurisdiction of the Public Utilities Commission (Assembly Constitutional Amendment No. 57, 1957).
tion other than municipal until full compensation therefor be first made in money or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation,

which compensation shall be ascertained by a jury, unless a jury be waived, as in other cases in a Court of record, as shall be prescribed by law.

The unitalicized words of the first clause comprised the entire wording of the provision on eminent domain in the constitution of 1849. Major ambiguities in the additional language are apparent. To determine whether compensation paid into court must, in general, have been previously determined by jury, it must be decided whether the words "which compensation" in the third clause refer to "just compensation" in the first, or to "full compensation" in the second. The source of the language indicates that the words refer to "full compensation" and have nothing to do with the initial general language of the section. Even if the words refer to the second clause, however, it can be argued in instances of takings for right of way purposes by "any corporation other than municipal" that a previous jury determination is necessary. It then must be determined whether the second clause is addressed only to the offsetting of "benefits" or also imposes a requirement that a jury determine the compensation to be paid into court for the owner. Again, the source of the language indicates that the provision concerns only the problem of offsetting benefits.

Subsequent amendments to section 14 have obscured but not changed these basic problems of construction. An amendment of 1918 changed the second clause to enlarge the words "corporation other than municipal" to "corporation, except a municipal corporation or a county." This amendment also added the first version of the elaborate proviso dealing with immediate possession that now follows the third clause. The proponents of the 1918 amendment assumed, or at least argued, that the second clause prevented offsetting benefits, and that the addition of the proviso was necessary to permit any condemnor to take possession prior to jury determination of the amount of compensation. This proposed amendment was submitted to the voters with the following argument:

The principal purpose of this amendment is to permit the State, a county, municipal corporation, or a drainage, irrigation, levee or reclamation district, when acquiring rights of way only, in eminent domain proceedings, to take possession upon commencing a condemnation

76 CAL. CONST. art. I, § 8 (1849). As to this derivation of section 14, see Historical Notes in CAL. CONST. art. I, § 14 (West 1954); CAL. CONST. ANN., art. I, § 14 (Mason ed. 1953).
suit and depositing in court such amount of cash money as is fixed by
court to secure the owners . . . .

. . . .

Another change effected by the amendment is to extend to coun-
ties the same privileges that a municipal corporation now has to set
off benefits that might result to an owner's property in determining
the compensation that must be paid.

. . . .

As the law now stands, . . . possession of the property can not be
obtained until after a jury has determined the amount of compensa-
tion to be paid for taking of such property.

. . . .

Under existing law, no matter how urgent may be the necessity,
or how great may be the damages suffered by delay, possession can
not be obtained until after what may become protracted litigation.
[Emphasis in original.][77]

An amendment of 1928 added the words "or the State" to the
exception of the second clause, presumably to assure offsetting
benefits in takings by the State of California.

The last amendment in 1934 added "lands to be used for reser-
voir purposes" to both the exception of the second clause and to
the immediate possession proviso. In addition, the amendment in-
cluded "metropolitan water districts, municipal utility districts,
municipal water districts, water conservation districts, and similar
public corporations" in the proviso dealing with immediate posses-
sion. Furthermore, the amendment added to the second clause all
the districts, including drainage, irrigation, levee, and reclamation
districts which previously had appeared only in the immediate pos-
session proviso, plus the phrase "similar public corporations." The
argument submitted to the voters in connection with the amend-
ment of 1934 was similar to the one advanced in 1918.[78]

Decisions since 1934 have held that a taking for airport pur-
poses is not the taking of a "right of way"[79] and that a condemna-
tion to acquire water wells is not a taking of "lands for reservoir
purposes."[80] These decisions recognize that the existing authoriza-
tion for possession prior to judgment is constitutional, rather than

[77] See Secretary of State, Amendments to Constitution and Proposed Stat-
tutes with Arguments Respecting the Same 35 (1918).
[78] The argument is set forth in full in Central Contra Costa Sanitary Dist. v.
Superior Court, 34 Cal. 2d 845, 215 P.2d 462 (1950).
the Legislature submitted, but the voters rejected, a proposal that would have ex-
tended the immediate possession provisions of section 14 to include takings for air-
port purposes and takings by school districts.
(1951).
statutory. Similarly, condemnors other than the entities named in
the proviso to section 14 may not take possession prior to entry of
judgment in any case because there is no authorization for their
doing so. 81

C. The Constitutional Convention of 1878-79

The proposals and debates of the constitutional convention af-
ford a rather clear insight into the intended meanings of section 14.
They also afford classic considerations of some of the funda-
mentals of eminent domain. Two versions of the proposed section
were introduced in the convention. One provided:

Private property shall not be taken for public use without just
compensation be [sic] first made, or secured by deposit of money to
the owner, and such compensation shall be ascertained by jury of
twelve men, without deduction for benefit to any property of the
owner, in a court of record, as shall be prescribed by law. 82

The other proposal read:

[N]or shall private property be taken or damaged for public use
without just compensation. Such compensation shall be ascertained
by jury, in such manner as may be prescribed by law; and until the
same shall be paid to the owner, or into court for the owner, the
property shall not be disturbed or the proprietary rights of the owner
therein divested. 83

From these proposals, the Committee on Preamble and Bill
of Rights prepared this version:

Sec. 14. Private property shall not be taken or damaged for
public use without just compensation having been made to or paid
into court for the owner, except in cases of war, riot, fire, or great
public peril, in which cases compensation shall afterwards be made;
such compensation or damages to be assessed by a jury, unless
waived by the parties . . . 84

That version, however, was referred to the Committee on Ju-
diciary and Judicial Department which proposed the following:

Sec. 14. Private property shall not be taken for public use
without just compensation having been first made to or paid into court
for the owner. 85

81 City of Sierra Madre v. Superior Court, 191 Cal. App. 2d 587, 12 Cal. Rptr.
836 (1961).
82 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE
OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28,
1878, at 104 (1880) [hereinafter cited as DEBATES AND PROCEEDINGS].
83 Id. at 97.
84 Id. at 232.
85 Id. at 262, 344.
This version was reported to the convention for adoption. The ensuing debate led to the proposal of the following additional language:

[And no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury in a court of record, as shall be prescribed by law.]

Thus, the language relating to jury trial was introduced as an integral part of the additional language, with no apparent reference to the initial proposal. Further, the statement supporting the addition indicated that it was proposed only to reverse "a rule of the past that when damages were assessed for a right of way, to allow the prospective advantages to offset the damages." The Judiciary Committee indicated that although such a rule might have existed under the railroad acts, it had been changed by enactment in 1872 of section 1248 of the Code of Civil Procedure to provide a uniform rule on offsetting benefits.

The proponent's statements concerning the additional language indicate that it may have been intended to distinguish between so-called "general" benefits and "special" benefits. As one proponent stated:

It must be borne in mind that, as land becomes more valuable, as it is more generally taken up and cultivated, and as the railroads increase, they can not be run across the country without doing very material damage; without severing farms into irregular shape; without separating buildings and destroying orchards, and there is no justice in permitting the general advantages accruing to the community to offset that class of damages. [Emphasis added.]

This possible interpretation of the additional language was subsequently adopted in Beveridge v. Lewis. That decision holds that the second clause of section 14 refers only to general benefits; that the provision forbids their being set off by "corporations other than municipal"; that to make sense of the clause, and to avoid

86 Id. at 344.
87 Ibid. The reference was to San Francisco, A.&S. R.R. v. Caldwell, 31 Cal. 367 (1866).
88 See Debates and Proceedings (remarks of Barnes and Edgerton) 345, 346. Incidentally, the question whether "special benefits" might be offset against the value of the property taken, as well as against severance damages, was not finally settled in California until the amendment of Cal. Code Civ. Proc. § 1248(3) in 1965 to provide that "benefits shall in no event be deducted from the value of the portion taken." Cal. Stat. 1965, ch. 51, § 1, p. 932.
89 Id. at 346.
90 137 Cal. 619, 70 Pac. 1083 (1902).
conflict with the United States Constitution's equal protection clause it must be read so as not to discriminate between condemnors in this respect; and that, therefore, the provision merely prevents setting off of general benefits by all condemnors. Although inconsistent language exists in decisions rendered both before and after the 1902 Beveridge decision, presumably that decision still accurately states the constitutional law on "benefits."91

Numerous statements indicate that the sole concern of the proponents was with the offsetting of benefits:

I did not expect, when I offered that amendment, that it was going to create so much discussion. It is admitted finally by the gentlemen on my left that the rule is to offset absolute damages by supposed benefits. Now, my amendment covers that one single idea alone and no other; that is, that absolute damages shall not be set off by supposed benefits. There is no question of bonds. Neither does it enable any individual to lie in the way of any corporation in any manner that does not now exist . . . .92

The allusion to bonds refers to the series of California Supreme Court decisions which culminated in an 1879 holding that railroads might not take immediate possession upon furnishing bonds because such bonds simply did not constitute "just compensation" within the meaning of the Constitution of 1849.93

To complete the origin of the language in the convention, after


Seemingly inconsistent decisions intervened between adoption of the Constitution of 1879 and the Beveridge decision in 1902. Decisions in Muller v. Southern Pac. Branch Ry., 83 Cal. 240, 23 Pac. 265 (1890), and Pacific Coast Ry. v. Porter, 74 Cal. 261, 15 Pac. 774 (1887), referred to the discrimination between "corporations other than municipal" and all other condemnors, but in establishing and applying the so-called "before and after rule" as to the value of the remainder they permitted, in effect, the offsetting of special benefits.

Decisions in Moran v. Ross, 79 Cal. 549, 21 Pac. 958 (1889), and Pacific Coast Ry. v. Porter, 74 Cal. 261, 15 Pac. 774 (1887), recognized and seemingly applied what the latter decision refers to as the "absurd and unjust" discrimination between classes of condemnors, but it is not clear whether those decisions were dealing with general or special benefits. In San Bernardino & E. Ry. v. Haven, 94 Cal. 489, 29 Pac. 875 (1892), the court also referred to that discrimination, but it is clear that the decision dealt with general rather than special benefits.

92 DeBATES AND PROCEEDINGS at 350.

93 See Vilhac v. Stockton & Ione R.R., 53 Cal. 208 (1878); Sanborn v. Belden, 51 Cal. 266 (1876); compare Fox v. Western Pac. R.R., 31 Cal. 538 (1867). The Vilhac decision also held that, because section 1254 of the Code of Civil Procedure as it existed before an amendment of 1878 was unconstitutional in permitting bonds to be posted, all of the bonds given as security on taking possession prior to judgment were void. Undoubtedly this decision led to the amendment of the code in 1878 and influenced the choice of language in the constitutional convention of 1878-79.
the proposal of this additional language, it was amended on the floor of the convention by its proponent to include the words "other than municipal" after the word "corporation." Again, that change had reference to benefits rather than to any question of payment or ascertainment of just compensation prior to possession.94

Later in the convention, the first clause of section 14 was amended to include the words "or damaged" after the word "taken." The remarks of both the proponents and opponents of that change indicate that its purpose was to assure that damaging, as well as taking, of property would fall within the constitutional requirement of just compensation. In short, the intention was to expand the range of compensability; "damage" was not used to refer to possession prior to payment of compensation or jury verdict.66

The third clause of section 14 was also amended to include the words "unless a jury be waived, as in other civil cases" after the word "jury." In connection with this change, it was pointed out that section 7 of article I of the constitution as proposed at the convention also guaranteed jury trial in eminent domain proceedings. The change was adopted, but it is clear that there was no intention to relate the requirement of jury trial to the language of the first clause.68 The section, as set forth above, was adopted with these changes.

Any analysis of the origin of the language of section 14 demonstrates the futility of a grammarian's or logician's approach to interpretation of the section. The word "first" in the initial clause has a fundamental import, but it is not directed to the provisions made for possession, or to jury trial, in regularly instituted eminent domain proceedings. An amendment to the language that would have had that precise effect was proposed and rejected in the convention.97

California Supreme Court decisions both immediately before and after the constitutional revision of 1879 held (1) that takings by eminent domain must be via judicial proceedings first instituted,98 and (2) that compensation must be first made or paid into court.99

94 DEBATES AND PROCEEDINGS at 347.
95 Id. at 1190.
96 Ibid.
97 See DEBATES AND PROCEEDINGS at 351-53 (motion of Waters).
98 McCauley v. Weller, 12 Cal. 500 (1859); Weber v. County of Santa Clara, 59 Cal. 265, 266 (1881).
99 San Mateo Waterworks v. Sharpstein, 50 Cal. 284, 285 (1875) "The taking in this case amounts to a taking of private property for public use in the sense in which that phrase is used in the Constitution, and can only be effected upon the conditions prescribed in the Constitution—that is, upon just compensation being simultaneously made."; Bensley v. Mountain Lake Water Co., 13 Cal. 306, 318 (1859) "there is nothing in the legislation of this State which gives any right of
The subsequent decision in *Steinhart v. Superior Court*[^100] is confusing in other respects, but it is demonstrably correct in holding that the first clause of section 14 precludes taking of possession by filing a bond or furnishing security other than deposit in court, and that the deposit must be available to the owner. In this regard, the revision of section 14 in 1879 merely continued pre-existing constitutional policies.

D. The Judicial Decisions


From the first three decisions, it is possible to derive an argument that statutory provisions for possession pending appeal are constitutional, but that provisions for possession at any time prior to the interlocutory judgment in condemnation proceedings would be unconstitutional. The last decision gives an expansive interpretation to the existing limited constitutional provision.

To understand the argument, it is necessary to trace the evolution of Code of Civil Procedure section 1254, which now deals only with possession pending appeal. As enacted in the eminent domain title of the Code of Civil Procedure in 1872, section 1254 provided that at any time after service of summons, the plaintiff might have possession by giving "security" approved by the court.[^105] The Code Commissioners' Notes indicate that the Code Commission "in a first report, proposed to provide for a preliminary assessment of damages, and that the amount thereof shall be deposited in Court before the entry can be made." The note proceeds to explain the Commissioners' reasons for providing the alternative of permitting the posting of "security," especially a bond. That section was declared

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[^100]: 137 Cal. 575, 70 Pac. 629 (1902).
[^101]: 137 Cal. 575, 70 Pac. 629 (1902).
[^102]: 137 Cal. 575, 70 Pac. 629 (1902).
[^103]: 137 Cal. 575, 70 Pac. 629 (1902).
[^104]: 137 Cal. 575, 70 Pac. 629 (1902).
[^105]: See Legislative History in *CAL. CODE CIV. PROC. § 1254* (Deering 1959).
unconstitutional by a number of Supreme Court decisions in the 1870's.108

In 1877 the section was changed to provide for possession "at any time after trial by jury and judgment entered . . . wherever the plaintiff shall have paid into Court, for the defendant, the full amount of the judgment . . . ." As this was the provision in effect at the time of the Constitutional Convention of 1879, it can be argued that the first clause of section 14 of article I merely adopts this statutory provision. The difference in language, however, could also indicate a calculated difference in the constitutional requirement and the then existing statutory provision.

In Spring Valley Water Works v. Drinkhouse,107 the California Supreme Court held the 1877 version of section 1254 constitutional, rejecting various arguments based upon the wording of section 14 of article I of the constitution as adopted in 1879.

In 1897 the Legislature changed the section entirely and provided that possession might be had "at any time after the filing of the complaint, and the issuance and service of the summons thereon." Most remarkably, in view of the history of this subject, that version permitted the plaintiff to "pay a sufficient sum of money into court, or give security for the payment thereof, to be approved by the judge of such court." Obviously, in case of the posting of a bond, no funds could be withdrawn by the property owner. The section was hopelessly ambiguous whether funds paid into court, if that course were followed, could have been withdrawn on deposit or only upon final judgment.

An order for "immediate possession" under those provisions came before the California Supreme Court in Steinhart v. Superior Court.108 The opinion does not indicate whether, in that particular instance, a bond was filed or cash was deposited. The court granted prohibition to prevent execution of the order. All that one can learn for certain from the decision is that a railroad might not acquire immediate possession in 1902 under such provisions.

The decision is usually analyzed as requiring that the funds deposited must be subject to withdrawal by the property owner before possession may be taken.109 The author of the opinion did observe:

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108 See cases cited note 93 supra.
107 95 Cal. 220, 30 Pac. 218 (1892).
108 137 Cal. 575, 70 Pac. 629 (1902).
I do not agree to the proposition that compensation is made to the owner by paying into court a sum of money before the damage has been judicially determined and when the property-owner cannot take the money. Surely he is not compensated until he may take the money. It is not paid into court for him until he can take it. In the Spring Valley case he might have taken; here he could not, and therefore compensation in such a case is not first made.\textsuperscript{110}

The decision is not based upon any distinction between "corporations other than municipal" and other condemnors. In other words, the court applied the first, rather than the second, clause of section 14.\textsuperscript{111} In fact, the opinion seems to suggest that any such distinction might violate the equal protection clause of the fourteenth amendment to the Constitution of the United States.

In all charity, the opinion in \textit{Steinhart} is unfathomable. In this respect, it parallels the opinion in the companion case of \textit{Beveridge v. Lewis}\textsuperscript{112} which dealt with the offsetting of benefits. Each decision has had the effect of obscuring the law on the respective subjects for over half a century.

In 1903 the Legislature again amended Code of Civil Procedure section 1254 to provide for possession "at any time after trial and judgment entered or pending an appeal" upon the payment into court "for the defendant, the full amount of the judgment." The section was also changed to provide, as it now does, for immediate withdrawal of the total amount deposited by the defendant. An order for possession under these provisions came before the court in \textit{Heilbron v. Superior Court} (another railroad case).\textsuperscript{113} The court sustained the provisions without criticizing or commenting on the \textit{Steinhart} decision, other than to say that the 1897 provisions did not provide for payment of compensation into court "for the owner" as required by the first clause of section 14, article I, of the California Constitution. The court observed that the provisions of 1903 met constitutional requirements:

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 the judgment may be reversed and that the defendant may ultimately obtain a verdict for a much larger amount of money.\textsuperscript{114}

\textsuperscript{110} 137 Cal. 575, 579, 70 Pac. 629, 630 (1902) (emphasis in original).
\textsuperscript{111} Ibid. Decisions in states with provisions identical to the first and second clauses of section 14 differ as to whether the language of the second clause distinguishes between condemnors in the matter of possession prior to judgment. \textit{Compare} Hughes Tool Co. v. Superior Court, 91 Ariz. 154, 370 P.2d 646 (1962), \textit{with} Lewis v. City of Seattle, 5 Wash. 741, 32 Pac. 794 (1893).
\textsuperscript{112} 137 Cal. 619, 70 Pac. 1083 (1902). See text accompanying note 90 supra.
\textsuperscript{113} 151 Cal. 271, 90 Pac. 706 (1907).
\textsuperscript{114} Id. at 278, 90 Pac. at 708.
Following this decision in 1907, the various amendments to section 14 began, including in particular the amendment of 1918 to authorize immediate possession in acquisitions of rights of way and the amendment of 1934 to include takings for reservoir purposes. Language added by the amendment of 1934 was presented to the court for construction in *Central Contra Costa Sanitary Dist. v. Superior Court.* The question of construction was whether sanitary districts were included in the amendment as "similar public corporations." The court held such districts to be included. A contrary view was expressed by Justice Carter, dissenting, as follows:

I think it is clear that the people of this state have not thus far expressed their willingness to confer such power upon a sanitary district and the holding of the majority to the contrary is a palpable distortion of the plain language used to express the intention of those who drafted the 1934 amendment and the voters who adopted it. . . . The people of the state should have the opportunity to decide what public agency should be given the power to take immediate possession.

Although that argument goes only to construction of the existing constitutional authorization for "immediate possession," it does emphasize the long standing assumption that changes in the procedures for possession prior to judgment are to be made by amending section 14 of article I of the California Constitution. The court's emphatic rejection of that approach in construing section 14 may indicate that the assumption is not necessarily correct. Other appellate decisions, dealing with the date of valuation in immediate possession cases, use reasoning compatible with the Legislature's freedom to legislate in this area.

Some support for the view that the Legislature may provide for possession prior to judgment, within the reasonable limitations of the first clause of section 14, can be derived from decisions arising under section 14 1/2. That section authorizes condemnation of property in addition to that actually needed for certain projects

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116 Id. at 854, 215 P.2d at 467.
117 "[T]he constitutionally guaranteed right to receive just compensation of property taken or damaged for public purposes neither includes nor implies the right to have such compensation ascertained by any particular procedure or as of any certain date." City of Los Angeles v. Oliver, 102 Cal. App. 299, 315, 283 Pac. 298, 305 (1929). "[I]t cannot be successfully contended that the mere entry into possession by the condemnor amounts to such a complete and irrevocable taking as to require application of the rule that the owner is entitled to the value of his land at the time it is taken. The Constitution guarantees that he be compensated only for whatever is taken from him—the value of the use for the time he is deprived of it, and the value of the fee or easement, and damages as of the time when title either actually or constructively passes." City of Los Angeles v. Tower, 90 Cal. App. 2d 869, 875-76, 204 P.2d 395, 400 (1949).
under very limited circumstances. The decisions have held that the section is not exclusive and does not preclude legislative authorization of similar acquisitions in other situations.¹¹⁸

E. Conclusion as to Need for a Constitutional Amendment to Extend Right of Immediate Possession

In view of the tangled history of the subject, it is obviously impossible to predict with certainty the position the California Supreme Court would take as to legislation, rather than a constitutional amendment, respecting possession prior to judgment.

The peculiar history of section 14 has resulted in constitutional language under which the existing authorization for "immediate possession" is seemingly cast as an exception to requirements that (1) compensation be paid or paid into court and (2) that the amount of such compensation be determined by jury before possession is taken. As has been demonstrated, however, that construction of the existing language does not stand up under careful analysis.

The two amendments to section 14 to provide the existing authorization were necessary because the added proviso does not purport to comply with the general requirement that compensation have "first been made to, or paid into court for, the owner." Although the constitutional "proviso" for immediate possession requires "security" for eventual payment of the award, the lack of any provisions whatever for withdrawal by the property owner of the amount deposited make the proviso a true exception to the requirement of payment into court for the owner. It is probably correct to state that the amendments were adopted to "overcome" the Steinhart decision. In view of their particular form, they not only overcome the result of that decision; they ride roughshod over the decision's construction of the first clause of section 14. The amendments and the resulting surface appearance of section 14 should therefore not be considered to preclude legislation authorizing possession prior to judgment on payment into court, for withdrawal by the property owner, of the amount of probable compensation determined by the court.

With respect to any assumed requirement of a previous determination by jury of the amount of compensation, it is notable that the decisions construing section 14, including Steinhart, are not based on any such requirement. The Heilbron decision, in fact,

points out instances under existing legislation in which compensation is not "ascertained by jury" before possession is taken.

The Steinhart decision, however, is demonstrably correct in its view that section 14 is not so much concerned with security for eventual payment as it is with the assurance of prompt payment. 119 Unfettered provisions for withdrawal of the amount deposited would therefore have to be (and should be) included in any legislation. 120 The lack of such assurance is a marked shortcoming of the existing "immediate possession proviso" in section 14.

Also, under the decisions from other states that have copied section 14, such legislation must provide for determination of the amount to be deposited by the court, rather than the condemning agency. 121 As to this requirement, existing procedures conforming to the proviso in section 14 are adequate.

The ruling of the court would also depend upon its view of the fairness and practicality of the particular provisions enacted. The Supreme Court of Illinois recently overruled its contrary decision

119 See cases cited note 99 supra.
121 The Supreme Court of Washington invalidated that state's procedures because they required deposit of the amount of the condemning's last offer to the property owner. State v. Yelle, 46 Wash. 2d 166, 279 P.2d 645 (1955). The Arizona Supreme Court has sustained a statute providing for determination of the amount of the deposit by the court. Bugbee v. Superior Court, 34 Ariz. 38, 267 Pac. 420 (1928). See also Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 370 P.2d 652 (1962). A concurring opinion in the Washington case explains the differences and the essential problem as follows: "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.]

"If legislation of the latter-mentioned type, comparable to that involved in [Arizona] 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.

"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." State v. Yelle, supra at 176, 279 P.2d at 651. Idaho invalidated a statute under which the deposit was determined by the condemning's affidavit as to value. Yellowstone Pipe Line Co. v. Drummond, 77 Idaho 36, 287 P.2d 288 (1955). Louisiana also held its statute to violate a constitutional provision prohibiting taking "until after just and adequate compensation" because the statute provided for a deposit by the condemnor of its own estimate of compensation. State v. Phares, 245 La. 534, 159 So. 2d 144 (1963).
of only seven years standing, to sustain provisions for possession prior to judgment in a well-designed statutory plan.\textsuperscript{122}

The result might also depend upon the aid offered the court in reconstructing the constitutional background of this subject. The Supreme Court of Arizona very recently sustained that state's immediate possession statute under constitutional provisions copied without change from the first and second clauses of section 14 of article I of the California Constitution.\textsuperscript{123} The formal basis for the court's decision was its inquiry into the intentions and purposes manifested in that state's constitutional convention. These decisions represent the overwhelming weight and trend of authority in the other states.\textsuperscript{124}

Nevertheless, in its recommendation of 1961 on this subject, the Law Revision Commission resolved these considerations in favor of proposing a constitutional amendment and recommending enactment of statutory provisions made contingent upon adoption of that amendment.\textsuperscript{125} That course would again seem appropriate whether the legislation be separate provisions for payment and possession or part of a comprehensive revision of the eminent domain title of the Code of Civil Procedure.

IV. FORMULATING A LEGISLATIVE SOLUTION

A. Constitutional Revision

The preceding analysis indicates that legislation broadening the right of immediate possession probably would be held constitu-


\textsuperscript{123} Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 370 P.2d 652 (1962).


For reviews of decisions on "immediate possession," see ABA SECTION ON LOCAL GOVERNMENT LAW, COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURE, REPORTS, 1963 at 143, 1964 at 112, 1965 at 137, 1966 at 138.

\textsuperscript{125} See 3 CAL. LAW REVISION COMM., REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1, B-10 (1961).
tional in California without any amendment of the California Constitution if such legislation included adequate procedural protections to the property owner. Nevertheless, an appropriate amendment of section 14, article I, is desirable in order to avoid any doubt concerning the constitutionality of such legislation.

The basic objective in any revision of section 14, article I, of the California Constitution should be to revise the section to make it clear that (1) the Legislature may determine the entities and agencies to benefit from provisions for possession prior to judgment and may specify the public purposes for which the privilege may be exercised, and (2) the property owner is guaranteed that he will actually receive compensation at the time possession of his property is taken.

Such a revision would make it unnecessary to amend the constitution every time it is found that existing procedures or authorizations need change. Not the least of the benefits to be derived from the amendment would be the restoration of clarity and precision to the principal section of the California Constitution dealing with eminent domain. Moreover, such an amendment would coincide with the efforts of the Constitution Revision Commission established by the California Legislature. The work of that commission, partially completed, looks to total revision of the California Constitution.

An appropriate amendment might take one of several forms. The entire content of section 14, except the basic guarantees of the first clause, could be eliminated. The states that have most recently adopted constitutions have followed that course.

However, those public agencies that now have the privilege of possession prior to judgment in right of way and reservoir cases uniformly and strongly oppose deletion of the direct authorization from the constitution. There is at least political merit in that view and the authorization does not hamper revision of the constitutional and statutory law.

126 In a study of the law of New York, two authorities have concluded that: "Article I, section 7 of the New York Constitution dealing with eminent domain should be amended to provide a simple but firm guaranty that any individual be fairly compensated in condemnation proceedings. In all other respects, we recommend that the constitutional provisions concerning details and methods of payment should be deleted since they form no proper part of a constitution. These simply clutter the constitution, which can be amended only with great difficulty; the details can be left to legislative decision. Municipal and state authorities should adopt the federal practice providing for payment of an estimated amount of compensation as a condition to vesting title, the exact amount to await the actual trial. . . ." Searles and Raphael, *Current Trends in the Law of Condemnation*, 27 Fordham L. Rev. 529, 553 (1959).

Specifically, section 14 of Article I should be amended as follows:

1. An explicit provision should be added guaranteeing the owner the right, in all cases, to be compensated promptly whenever possession or use of his property is taken.

2. The existing authorization for possession prior to judgment in right of way and reservoir cases should be retained, but should be subjected to a clear requirement of prompt compensation. The authorization in such cases also should be extended to all governmental entities and agencies having the right to take for right of way or reservoir purposes.

3. The Legislature should be authorized to specify the other purposes for which, and entities by which, possession may be taken prior to judgment. The authorization should include the power to classify entities and classes of takings for this purpose. Subject to the basic constitutional guarantees, the Legislature also should be authorized to establish and change procedure for such cases.

4. The uncertain and partially obsolete language of section 14 should be clarified, and partially deleted, as follows:

   (a) The phrase, "which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law" should be clarified to make the latter two phrases refer to the total process for ascertainment of compensation, rather than merely to waiver of jury.

   (b) The elongated proviso to the first sentence, dealing with "immediate possession," should be eliminated and superseded by clear provisions (1) authorizing possession prior to judgment in right of way and reservoir cases, (2) authorizing possession in such other cases as are prescribed by statute, and (3) requiring prompt compensation to the property owner in all cases.

   (c) The second portion of the first sentence, prohibiting "appropriation" of property "until full compensation therefor be first made in money or ascertained and paid into court for the owner" should be eliminated as surplusage.

   (d) The language of the first sentence requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed by such corporation" should be eliminated. The complex question of the offsetting of benefits in cases of partial takings should be left to treatment by the Legislature in keeping with more fundamental guarantees of the state and federal constitutions.

   (e) The last sentence of the section, which provides, in effect,
that property may be taken for certain logging and lumbering railroads, and that such taking constitutes the taker a common carrier, should be deleted.\textsuperscript{128}

After such an amendment, section 14 would read:

(a) (1) 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.

(2) Subject to the provisions of Section 23a of Article XII, just compensation shall be assessed in a court of record as in other civil cases and, unless a jury is waived, shall be determined by a jury.\textsuperscript{129}

(b) Subject to subdivision (d) of this section, in a proceeding in eminent domain brought by the state or a county, city, district, or other public entity to acquire any property, whether a fee or other interest be sought, the plaintiff may take possession of the property or property interest following commencement of the proceeding and prior to the final judgment if the property or property interest being acquired is (1) any right of way, or (2) lands to be used for reservoir purposes.

(c) Subject to subdivision (d) of this section, with respect to any cases not covered by subdivision (b) of this section, the Legislature may specify and classify the entities or persons by which, the public purposes for which, and the manner in and the time at which, possession of any property or property interest may be taken following commencement of the eminent domain proceeding and prior to final judgment.

(d) Before possession of any property or property interest is taken in an eminent domain proceeding, just compensation shall be made to the owner or the plaintiff shall deposit such amount of money as the court determines to be the probable just compensation to be made for the property or property interest and any damage incident to the taking. The money so deposited shall be available immediately to the person or persons the court determines to be entitled thereto and may be withdrawn in accordance with such procedure and upon such security as the Legislature may prescribe.

B. Immediate Possession Practice

Adoption by the voters of the recommended constitutional amendment would not, of itself, substantially change existing Cali-

\textsuperscript{128} This provision, added in 1911, has never been construed or applied by the California appellate courts. The portion of the sentence making the taker a common carrier is merely an instance of a broader proposition inherent in the nature of power of eminent domain. Western Canal Co. v. Railroad Comm'n, 216 Cal. 639, 15 P.2d 853 (1932); Traber v. Railroad Comm'n, 183 Cal. 304, 191 Pac. 366 (1920). Deletion of the sentence clarifies, rather than changes, existing law.

\textsuperscript{129} The purpose of making this paragraph “subject to the provisions of section 23a of article XII” is to prevent any implication that section 23a is superseded by the readoption of this section. Section 23a empowers the Legislature to authorize the Public Utilities Commission to determine the compensation to be made in takings of public utility property. See the text accompanying note 149 infra.
fornia practice respecting possession in eminent domain proceedings. The precise effect of the amendment would be to permit all governmental entities and agencies, rather than only those entities now named, to obtain "immediate possession," under existing procedures and with existing consequences, in takings of "rights of way" and "lands for reservoir purposes." The constitutional provision for such possession has been held to be self-executing in the sense that no legislation is required to authorize a condemning agency to avail itself of the provision. However, the essential purpose of the amendment is to permit the Legislature to deal with the matter of possession in a comprehensive revision of the law applicable to all eminent domain proceedings. There would remain for legislative consideration the questions of how inclusive provisions for possession prior to judgment should be; whether existing procedures in immediate possession cases are appropriate; and whether the incidents and effects of possession being taken prior to judgment should be changed.

Before considering immediate possession practice in detail it will be useful to outline briefly the existing procedure. A California condemnor may obtain an order for immediate possession upon a showing to the court that all of the following requirements are satisfied:

(1) The plaintiff must be one of those public bodies authorized to obtain immediate possession;

(2) The purpose of the condemnation must be for a right of way or a reservoir;

(3) Proper notice of the order for possession must be given to the property owner and occupants of the property;

(4) The condemnor must deposit "probable just compensation" for the property as determined by the court on ex parte application.

If these requirements are met, the court will issue an order, also on ex parte application, authorizing the condemnor to take immediate possession and use of the property. If a defendant believes that the amount deposited is inadequate, he may move the court for an order increasing the amount. A property owner is entitled to withdraw all or any portion of the amount deposited. If he withdraws any portion of the deposit, however, he waives all defenses to the taking except his claim for greater compensation.

1 Young v. Superior Court, 216 Cal. 512, 15 P.2d 163 (1932); Fletcher v. District Court of Appeal, 191 Cal. 711, 714, 218 Pac. 391, 392 (1923): "The right to the possession of the property was transferred by the constitution itself . . . upon the compliance with the terms fixed by the constitution."

1 CAL. CODE CIV. PROC. §§ 1243.4, 1243.5, 1243.7. See also CALIFORNIA CON-
1. Classification of Condemnors and Authorized Purposes

Both the California Constitution and statutory law limit the public agencies that can obtain an order of immediate possession to "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 only decision construing the term "similar public corporation" has held a sanitary district to be included. This existing list of entities has resulted from piecemeal amendments to the constitution, and there appears to be no logical basis for a distinction between the entities included and those omitted.

The purposes for which immediate possession may be taken are limited to "rights of way" and "lands to be used for reservoir purposes." The court order authorizing the taking of possession must state that the condemnation is for one of these purposes. The term "right of way" is given its common or lay meaning, rather than a legal interpretation. For example, the authorization includes the easement necessary for sanitary sewers, but does not include the property interest necessary for airports or approaches to airports. The phrase "lands to be used for reservoir purposes" is given an expansive meaning. The term has been held to include lands containing dredger tailings taken for fill, even though the land was located six miles from the project. The court rejected the contention that the term included only the dam or reservoir site itself.

It is apparent that these two authorizations apply in a wide range of cases. "Rights of way" includes most acquisitions for street and highway purposes, and a great number of municipal improvements. At the level of state government, the authorization is roughly equivalent to acquisitions by the Division of Highways. As expansively interpreted, the authorization for "lands for reservoir purposes" has facilitated the acquisition of property for the development and conservation of water resources. Again at the level of state government, it covers most activities of the Department of

132 CAL. CONST. art. I, § 14; CAL. CODE CIV. PROC. § 1243.4.
133 CAL. CODE CIV. PROC. § 1243.4(d)(2).
Water Resources. It has become apparent, however, that these two classes are neither entirely logical nor sufficiently inclusive. For example, local governments may take possession of the rights of way for a sewerage system, but may not obtain possession of the site for a sewage treatment plant. The development of highways, and especially freeways, sometimes necessitates the taking of property outside the rights of way. Even though the acquisition is by the Division of Highways, no authorization exists for early possession of property outside the boundaries of the right of way.

Rather than stating and limiting the authorization for possession prior to judgment in terms of certain named public entities and two public uses, legislation should classify condemners and acquisitions in accordance with the nature of the issues that may be raised in the condemnation proceeding, and specify procedures applicable to each class that will fully protect the rights of persons whose property is being taken. In terms of condemnation procedure, the most meaningful distinction can be made in connection with the procedural aspects of the question of "public necessity." In every acquisition by eminent domain, taking of the property must be "necessary." Thus, it must be determined that there is a public necessity for the particular improvement or project, that the taking of the particular property is necessary to accomplish the public project or improvement, and that the project or improvement is planned or located in a manner most compatible with the greatest public good and the least private injury.

As a general proposition, these issues are to be determined by the court after consideration of evidence in the condemnation proceeding. The most significant development in California condemnation law since adoption of the Code of Civil Procedure, however, has been the enactment of statutes which relegate the issue of "public necessity" to the legislative or administrative branches of government, rather than to the courts. This development began in 1913 by amendment of the second subdivision of Code of Civil Procedure section 1241 to provide that a resolution or ordinance adopted by a city or county and authorizing a condemnation proceeding has the effect in such proceeding of being "conclusive evidence" of any issue of necessity. The resolution or ordinance has that effect, however, only if adopted by vote of two-thirds of the members of the governing body, and if the taking is of property within the terri-

140 Cal. Stat. 1913, ch. 293, § 1, p. 549.
torial limits of the city or county. Since 1913, the section has been amended many times to add a great range of local governments, including the principal types of public districts.

From this beginning, conclusive legislative or administrative determination of the issue of "public necessity" has spread to most authorizations for taking by public agencies and entities.\textsuperscript{141} For example, of the ten state agencies authorized to condemn property, the resolutions of eight are made conclusive of the existence of public necessity; the resolutions of the other two are made "prima facie evidence" on that issue.\textsuperscript{142}

The pervasive effect of these conclusive resolutions, ordinances, or declarations in condemnation proceedings can be seen in the reasoning of the leading California Supreme Court decision:

\begin{quote}
[T]he questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvements cannot be made justiciable issues . . . . To hold otherwise would not only thwart the legislative purpose in making such determinations conclusive, but would open the door to endless litigation and perhaps conflicting determinations of the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement.\textsuperscript{143}
\end{quote}

In short, such a resolution substantially eliminates any possibility of the proceeding failing and reduces the condemnation action to an evaluation proceeding in virtually all cases. This inevitability of the taking warrants appropriate provisions for possession prior to judgment, whatever the public use or purpose for which the property is being acquired.

The lack of any correspondence between the provisions for immediate possession and those for conclusive determination of necessity has always been an anomaly. If an entity or agency is sufficiently responsible to determine conclusively the need for acquiring the property, it should also be considered sufficiently responsible to invoke procedures for early possession.

A wide range of cases still fall outside the provisions for conclusive non-judicial determination of "public necessity." Takings

\textsuperscript{141} An exhaustive list of these agencies, entities, and statutes is contained in the Appendix.
\textsuperscript{142} The resolutions of the State Park Commission (\textsc{Cal. Pub. Resources Code} § 5006.1) and the declaration of the State Adjutant General (\textsc{Cal. Mil. & Vet. Code} § 438) are prima facie evidence of necessity.
\textsuperscript{143} People v. Chevalier, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959). See also \textsc{Rindge Co. v. County of Los Angeles}, 262 U.S. 700 (1923).
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by cities, counties, and most local governments that are not authorized by two-thirds vote of the governing body, or that pertain to property outside the territorial limits of the entity, are excluded.\textsuperscript{144} Acquisitions by entities or agencies whose resolution is only prima facie evidence of necessity, or whose resolution is given no assigned effect in the condemnation proceeding, are also omitted.\textsuperscript{145} As conclusive resolutions issue only from governmental bodies, all acquisitions by public utilities, common carriers, and other public service corporations are not affected. In these takings, the certificate of public convenience and necessity obtained from the Public Utilities Commission plays a vital role in the court's determination of necessity.\textsuperscript{146} Lastly, the very limited cases in which private persons may invoke the power of eminent domain under Civil Code section 1001 are not covered.\textsuperscript{147}

Although it would be reasonable to extend the right to early possession to all condemnors empowered to make a conclusive determination of necessity, the provisions for such possession should not be restricted to those bodies. In some situations an identical public service may be provided by a governmental entity whose resolution of necessity is conclusive, an entity whose resolution is not conclusive, or a public utility. Even though the issue of public necessity is handled differently as to each condemnor, the need for early possession is the same in each case. In acquisitions not affected by a conclusive resolution of necessity, the necessary safeguard should be incorporated into the immediate possession procedure. As to this class of takings, it would be appropriate to prescribe a noticed motion procedure in which the court may determine preliminarily any issue of public necessity, the right to acquire the property generally,

\textsuperscript{144} For an example of the litigation of the issue of necessity in such cases, see City of Hawthorne v. Peebles, 166 Cal. App. 2d 758, 333 P.2d 442 (1959).

\textsuperscript{145} For examples of the determination of necessity in such cases, compare People v. Van Gorden, 226 Cal. App. 2d 634, 38 Cal. Rptr. 265 (1964), and People v. O'Connell Bros., 204 Cal. App. 2d 34, 21 Cal. Rptr. 890 (1962). For other decisions in which the taking by a public entity or agency was not governed by a conclusive resolution, see Rialto Irrigating Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484 (1894); Los Altos School Dist. v. Watson, 133 Cal. App. 2d 447, 284 P.2d 513 (1955); Housing Authority v. Forbes, 51 Cal. App. 2d 1, 124 P.2d 194 (1942); Montebello Unified School Dist. v. Keay, 55 Cal. App. 2d 839, 131 P.2d 384 (1942).


the right to invoke the early possession procedure, and the amount of probable compensation to be deposited.\textsuperscript{148} This right to obtain possession upon noticed motion should be limited, however, to public entities, public utilities, and common carriers. The right should not be extended to the exceptional cases of so-called "private" condemnation.

2. Immediate Possession of Public Utility Property

The recommended scheme for possession prior to judgment takes account of all California condemnation with a single exception. Section 23a of article XII of the California Constitution permits the Legislature to authorize the Public Utilities Commission to "fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings." Legislation implementing this authorization constitutes the only exception to the uniform application of the eminent domain title of the Code of Civil Procedure (sections 1237-1266.2) to all condemnation.\textsuperscript{149}

Pursuant to this constitutional authority, the Legislature has enacted Public Utilities Code sections 1401-1421. These sections permit any "political subdivision" to take "the land, property, and rights of any character whatsoever of any public utility" and to have the compensation for such taking determined by the Public Utilities Commission. To obtain the determination of the Commission, the political subdivision may proceed in either of two ways. It may file a "petition of the first class" stating its intention to acquire the public utility by eminent domain proceedings, or it may file a "petition of the second class" stating its intention to submit to its voters a proposition to acquire the public utility.\textsuperscript{150} In either case, if the public utility declines to accept the compensation determined by the Commission, eminent domain proceedings are begun by the political subdivision and, in those proceedings, the court includes the Commission's determination of value in its judgment.\textsuperscript{151}

A consequence of extending the provisions for possession prior to judgment to all condemners whose resolution of necessity is conclusive would be to encompass these proceedings under the Public

\textsuperscript{148} As to motion and ex parte procedure, see the text at note 158 infra.
\textsuperscript{149} Two local improvement acts seemingly set forth systems for taking property entirely apart from the provisions of the Code of Civil Procedure. On analysis, however, these acts merely restate the provisions of the Code of Civil Procedure except that, at the option of the property owner, compensation is determined by three referees appointed by the court, rather than by the court or jury. See the Street Opening Act of 1903 (CAL. STS. & HY. CODE §§ 4000-4443) and the Park and Playground Act of 1909 (CAL. GOVT. CODE §§ 38000-38213).
\textsuperscript{150} CAL. PUB. UTIL. CODE § 1403.
\textsuperscript{151} CAL. PUB. UTIL. CODE § 1416.
Utilities Code. Under existing law, there is no correspondence between the constitutional authorization for immediate possession and these provisions for acquisition of public utility systems by political subdivisions. Although it would be possible simply to exclude application of the recommended provisions for possession prior to judgment to these proceedings, there is no impelling reason to do so. As the eminent domain proceedings are filed after the determination of value by the Public Utilities Commission, the court would determine probable just compensation to be, and require deposit of, the amount determined by the Public Utilities Commission. Early possession in these proceedings would obviate several problems of compensation and property valuation that are peculiar to takings of public utility property and that arise from any protracted period between the filing of the eminent domain proceeding and final judgment.

The procedures of the Public Utilities Code are expressly made alternative to proceedings under the Code of Civil Procedure. The political subdivision may therefore proceed directly with a judicial condemnation action. In these cases the court or jury determines compensation, but valuation methods similar to those employed by the Public Utilities Commission are applied. Under the recommended scheme, possession prior to judgment would be available in these cases.

3. Procedure in Immediate Possession Cases

Section 14 of article I of the California Constitution does not undertake to specify the procedure for effectuating the "immediate possession" which it authorizes. Before 1961, there were no statutes on the subject, but it was assumed that the order was obtained by ex parte application and that practice developed. As added in 1961, Code of Civil Procedure section 1243.5 continues and delineates the practice.

Although section 1243.5 was enacted on recommendation of the Law Revision Commission, an important feature of the Commiss-

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152 The single exception pertains to takings necessary to eliminate grade crossings. CAL. PUB. UTIL. CODE § 1202.1 expressly provides for the taking of possession prior to the determination of compensation in railroad crossing proceedings, whether the proceeding is begun initially in the superior court or before the Public Utilities Commission.


154 CAL. PUB. UTIL. CODE § 1421.

sion's recommendation was not adopted. The recommendation would have effected a compromise between ex parte procedure and noticed motion procedure by permitting the condemnee to contest the taking of the property or the taking of immediate possession before possession can be taken under the order for possession. Under that recommendation the following language would have been included.

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.

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. 156

Forceful objections were made to that proposal on two grounds. First, it was contended that any provision for stay of the order for possession would permit the courts, rather than administrative agencies, to determine the essentially administrative question of the need for early possession. Second, it was pointed out that, although legislation makes no reference to modification of an order for possession, the court making the order is authorized under Code of Civil Procedure section 937 to modify or vacate the original order upon ex parte application, without notice or hearing. 157

Other states divide about equally in providing for immediate possession by ex parte application or by noticed motion procedure. For example, the model statute prepared by the Highway Research Board exemplifies provisions enacted in many states, and has been used as the basis for legislation, especially in those states in which distinctive treatment is given condemnation for highway purposes. 158

The model statute proposed by the Highway Research Board provides alternatives: (1) an immediate possession order obtained upon

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158 HIGHWAY RESEARCH BOARD, SPECIAL REP'T 33, at 13 (1958).
ex parte application of the condemnor, or (2) an immediate possession order obtained upon noticed motion.

The obvious purpose of noticed motion procedure is to permit the property owner, if he chooses, to be heard on the questions of the right of the plaintiff to take the property and of its right and need to take early possession. The objections are that such procedure entails greater burdens to the plaintiff and the courts and may tend to dissipate the advantages of "immediate" possession to the condemnor.Disposition of the motion, however, does not entail consideration of any evidence or matters not considered, at least in theory, on ex parte application. As any evidence offered by the property owner would be presented by affidavit or declaration, disposition of the motion in the great majority of cases should prove to be as expeditious as consideration of an ex parte application.

California law has never recognized any criteria or standards for granting or withholding an order for immediate possession, or for delaying the effect of an order once issued. The appellate courts speak of a discretion at the trial level to grant or withhold an "order of immediate possession." In each instance, however, they are referring to the order for possession after judgment under section 1254 of the Code of Civil Procedure. Under that section, the court has discretion whether to grant an order for possession pending appeal. In contrast, the constitutionally authorized order for immediate possession is available to the plaintiff as a matter of right.

In many other states, the trial courts are given both discretion and guidance as to granting, denying, or delaying the effect of an order for possession prior to judgment. For example, the comprehensive statute recently enacted in Illinois requires notice of motion for an order of immediate possession to include the following:

[T]he formally adopted schedule or plan of operation for the execution of the petitioner's project; the situation of the property to which the motion relates, with respect to such schedule or plan; and the necessity for taking such property in the manner requested . . . .

Acting on this information and any evidence offered by the property owner, the court finds whether "reasonable necessity" requires taking of possession in the manner requested. The statute

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159 E.g., County of Los Angeles v. Anthony, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308 (1964).
160 Housing Authority v. Superior Court, 18 Cal. 2d 336, 115 P.2d 468 (1941).
163 ILL. REV. STAT. ch. 47, § 2.2 (Supp. 1965).
was promptly attacked on constitutional grounds, principally because of its asserted lack of sufficient standards, and was sustained in this and other respects by that state's supreme court.\textsuperscript{164}

In an extension of existing California procedure beyond right of way and reservoir cases, the court should be expressly authorized to weigh the relative needs of the parties. In addition to putting the right to early possession on a rational basis, any possibility of administrative abuse of the privilege would be precluded.

Under existing practice, an appeal may not be taken from an order authorizing or denying possession prior to entry of judgment. Mandamus, prohibition, or certiorari are the appropriate remedies.\textsuperscript{166} However, the order for possession following entry of judgment is an appealable order.\textsuperscript{166}

The legislation proposed by the Law Revision Commission in 1961 would not have permitted a defendant to appeal from an order for immediate possession. To have done so would have substantially nullified the right to such possession. However, the following provision was recommended:

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.\textsuperscript{167}

The concern of the Commission was not the right to early possession, but rather the ultimate right of the plaintiff to take the property.\textsuperscript{168} A final determination of any genuine issue as to "public use" or "public necessity" should precede the condemnor's tak-

\textsuperscript{166} San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App. 2d 668, 267 P.2d 349 (1954); Housing Authority v. Forbes, 47 Cal. App. 2d 358, 117 P.2d 722 (1941). Following the second decision, the section was amended to prevent appeal of an order for possession after judgment in condemnations by school districts. Cal. Stat. 1955, ch. 929, § 1, p. 1557. That special provision was eliminated in the general revision of the section in 1961.
\textsuperscript{167} 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-14 (1961).
\textsuperscript{168} Id. at B-7.
ing of possession. These defenses may be rendered meaningless if, at the time the questions are finally determined, the condemnor has demolished structures or completed the public improvement. On application for immediate possession under existing law, the court is required to determine whether "the plaintiff is entitled to take the property by eminent domain," but that determination is preliminary rather than final.170

Conceding the need of property owners for protection in this respect, it is not clear that a provision for appeal, rather than existing writ practice, would be an improvement. Recent appellate decisions permit any issue as to the plaintiff's right to take the property to be determined in an extraordinary writ proceeding dealing with an order or proposed order for possession.171 In the ensuing eminent domain proceeding that determination is final.172 Writ practice has the additional advantages of expedition and of eliminating the need to have the trial court record prepared.

In connection with the enforcement of orders for possession, it should be noted that neither an order for immediate possession, an order for possession pending appeal, nor the final order in condemnation, is the equivalent of a "writ of possession" or "writ of assistance." Although such orders entitle the condemnor to possession in accordance with their terms, they must be enforced by other process. The writ of assistance is the remedy available to a condemnor entitled to possession under any order of the condemnation court.173 Section 1254 of the Code of Civil Procedure formerly made provision for writs of assistance in condemnation proceedings, but those provisions were deleted, apparently through inadvertence, in one of the many revisions of section 1254 for other purposes.174 The writ is, however, obtainable as a matter of right, and mandamus will issue to require its issuance and execution.175 A court may also issue orders preventing the plaintiff from taking possession of the

169 CAL. CODE CIV. PROC. § 1243.5(b).
170 CAL. CONST. art. I, § 14 contemplates situations in which the preliminary determination may ultimately be overturned. It provides in this respect that the security deposited must cover this eventuality. The section accords with CAL. CODE CIV. PROC. § 1255a, dealing with abandonment, which provides for restoration of the property to the defendant if a proceeding is abandoned after possession has been taken or the plaintiff is determined not to have the right to take the property.
171 See cases cited note 165 supra. Accord, United States v. Cobb, 328 F.2d 115 (9th Cir. 1964) (Federal practice).
173 See Marblehead Land Co. v. Los Angeles County, 276 Fed. 305 (S.D. Cal. 1921).
property or restoring the defendant to possession. In the interest of codification, these existing powers and practices should be stated in section 1247 of the Code of Civil Procedure.

In summary, therefore, the ex parte procedure now provided for cases in which immediate possession of property is being taken for right of way or reservoir purposes should be continued. In the expanded range of cases in which any condemnor whose resolution of necessity is conclusive may obtain possession prior to judgment, ex parte procedure should be provided, but the court should be required to find that the plaintiff has, in fact, adopted such a resolution. In these cases, after being served with an order for possession, any owner or occupant of the property should be permitted to move for a stay or vacation of the order.

In all other cases in which immediate possession is authorized, the application should be made by noticed motion. On hearing of the motion, the court should consider relevant evidence, including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to that schedule or plan. It should make an order authorizing the plaintiff to take possession of the property only if it determines that the need of the plaintiff for possession of the property outweighs any hardship the owner or occupant of the property will suffer if possession is taken.

4. Notice to the Condemnee

By its terms section 14 of article I of the California Constitution does not require any notice or delay in the effective date of the order of immediate possession for which it provides. In 1957, section 1243.5 was added to the Code of Civil Procedure to require three days' notice in immediate possession cases. On recommendation of the Law Revision Commission, Code of Civil Procedure section 1243.5 was amended in 1961 to require that the condemnee be given 20 days' notice prior to the time possession is taken. The section contains an exception to the normal 20 days' notice which permits the court, upon "good cause shown by affidavit," to reduce the notice period to not less than three days.

Section 1243.5 also requires that notice be served on both the record owners of the property and upon any occupants. The section requires personal service of the order upon the condemnee unless

176 See Neale v. Superior Court, 77 Cal. 28, 18 Pac. 790 (1888); In re Bryan, 65 Cal. 375, 4 Pac. 304 (1884).

177 CAL. CODE CIV. PROC. § 1243.5(c). See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-6 (1961).
he has been served with a copy of the summons and complaint or has appeared in the proceedings. In the latter cases, service of the order may be made by mail on either the condemnee or his attorney. If a condemnee resides outside of the state, is absent from the state, or cannot with due diligence be found within the state, the condemnor may serve such condemnee by mail at his last known address. The court may, for good cause shown, authorize the condemnor to occupy the property without serving the order for possession upon a record owner who is not occupying the property.

Gauged by the current concern over the dislocation of persons by governmental activities, existing procedure may be defective in failing to assure the homeowner or businessman a reasonable time in which to vacate the property. Only 20 days' notice can cause the occupant serious inconvenience and affords at least the possibility of coercive use of the right of immediate possession in settlement negotiations.

Massachusetts enacted legislation in 1964 which provides that no person shall be required to vacate property acquired by eminent domain until four months after he has been given notice of the taking. A study prepared by the staff of the Select Subcommittee on Real Property Acquisition of the Committee on Public Works of the United States House of Representatives contains a recommendation that “clearing or construction should be so scheduled that an occupant is not compelled to move from a home, business, or farm without at least 180 days written notice of the date by which the move is required.” Senate Bill 1201 was introduced in the 89th Congress to effectuate the recommendations of the staff of the Select Subcommittee. Hearings were held on the bill, but no action was taken because various agencies requested time to study the comprehensive proposals of the Select Subcommittee.

178 See, e.g., ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, RELocation: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS (1965).

179 Section 8B of chapter 79 of the General Laws of Massachusetts. MASS. GEN. LAWS ANN. ch. 79, § 8B (Supp. 1965) provides: “Section 8B. No person in possession of property which has been taken under the provisions of this chapter shall be required to vacate any portion of such property which is being used by him as a dwelling place or place of business at the time the order of taking is made until four months after notice of such taking has been given to him in accordance with the provisions of section seven C.”

180 STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION, HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 122-124 (Comm. Print 1964).

Generally speaking, persons testifying took the view that the recommendation would impose a feasible requirement. For example, a representative of the Bureau of Public Roads stated the following view:

The amount of time required for planning is not the controlling factor since in many instances the notice could not be given until the planning is complete and final right-of-way lines have been established. The 180-day requirement would provide additional leadtime for the orderly right-of-way acquisition. After an initial slowdown to provide this leadtime, the program should proceed without further delays because of the requirement.182

House Resolution 7984, the Housing and Urban Development Act of 1965, as passed by the House, contained the following provision:

(6) The construction or development of any public improvements shall be so scheduled that no person lawfully occupying the real property shall be required to surrender possession on account of such construction or development without at least 90 days' written notice from the applicant of the date on which such construction or development is scheduled to begin.

The Senate did not include this portion of the bill because Senate Bill 1201 and other bills were pending in a Senate Subcommittee.188

Most California condemnees receive notice of impending condemnation long before the filing of any action. For example, the Department of Public Works provides advance notice of the date when possession is required by letters to occupants, personal visits, public hearings on proposed projects, public meetings held to discuss right of way procedures, and pamphlets mailed or delivered prior to inspection of the property for purposes of appraisal.

In addition to being of convenience to property owners, this effort facilitates the long range land acquisition programs of public agencies. As an official of the Department of Public Works has written:

It has long been established policy in California that a condemnation suit should not be filed, nor should possession be taken under court order, until a property owner has had a reasonable time in which to consider the state's offer to buy his property. The policy recognizes the necessity of the property owner as well as the value of good public relations. From time to time, however, the basic value of the policy has been brought forcibly home when other considerations have forced its abrogation.

182 Id. at 236.
188 Id. at 188.
Unrealistic project deadlines which do not allow a property owner sufficient time for consideration and orderly relocation generate public rejection of efforts which might otherwise be met enthusiastically. . . .

A deficiency of informal notification given outside, and possibly before, the condemnation proceeding is that the property owner cannot rely explicitly upon such notice. He has no remedy in the event of a change in the condemning agency’s plans. Therefore, rather than following the federal proposals, it would be more appropriate to lengthen the period of notice given in connection with the court’s order for “immediate” possession. If enacted, however, the federal legislation would apply to all federally assisted acquisitions. In that event, it would be almost imperative to adopt a conforming requirement in California law.

It would therefore be appropriate to extend the period of notice from the existing 20 days to 60 or 90 days. In addition to further reducing the possibility of serious inconvenience to the property owner, the change will make possible the actual disbursement to the property owner of approximate compensation before he is required to relinquish possession of the property. If pending federal legislation is enacted, a conforming additional notice provision should be adopted.

5. Deposit and Withdrawal of “Probable Just Compensation”

Section 14 of article I of the California Constitution requires the condemnor, before immediate possession is taken, to deposit an amount determined by the court to be “reasonably adequate to secure to the owner of the property sought to be taken payment of just compensation for such taking and any damage incident there-to. . . .”

The section also provides that:

The court may, upon motion of any party to the 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.

Code of Civil Procedure section 1243.5, added in 1961, restates

185 See, e.g., Hilltop Properties, Inc. v. State, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965). In that case the state communicated its intention to acquire two strips of plaintiff’s property in order to widen a highway. The plaintiff allegedly left the strips unused at the specific request of the state. The court held that, in the absence of actual public work or interference with the property, the plaintiff was without remedy.
these procedures, clarifying the constitutional requirement to specify that the amount deposited must be "the probable just compensation" to be made for the property and any damages. Although the established ex parte procedure was continued in the 1961 legislation, a duty was imposed upon the court to assure that the amount deposited be "probable just compensation."

Neither the amount deposited nor any amount withdrawn may be given in evidence or referred to in the trial of the issue of compensation. Section 1243.6 of the Code of Civil Procedure, also added in 1961, requires that any amount to be deposited be deposited in the "Condemnation Deposits Fund" of the state treasury unless the condemnor requests that the money be deposited with the county treasurer. Interest or other earnings of the state fund are returned to the condemning agency.

The existing statutory provisions for determining the amount of probable just compensation and providing for its deposit result from the recommendation of the Law Revision Commission to the 1961 Legislature. At that time, the Commission appraised the existing practice and studied the great variety of procedures in other jurisdictions. It was recognized that the amount deposited is determined more administratively than judicially, and typically is based upon the condemnor's staff or independent appraisals. It was also recognized that final awards generally exceed deposits. However, the property owner usually is not prepared to present evidence on the question of value at the time application is made to the court and considerations of time and expense preclude extensive inquiry into the issue of compensation. For these and other reasons considered in the earlier study, ex parte procedures for determining the amount of the deposit should be retained.

186 CAL. CODE CIV. PROC. § 1243.5(a),(d).
187 CAL. CODE CIV. PROC. § 1243.5(e).
188 CAL. CODE CIV. PROC. § 1254.
189 See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-38 (1961). A number of states follow the Federal Declaration of Taking Act, 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958), by permitting the preliminary determination of compensation to be made solely by the condemnor. Other jurisdictions require a hearing and consideration of evidence produced by the property owner. See HIGHWAY RESEARCH BOARD, SPECIAL REP'T 33, at 8 (1958). The federal act requires deposit "of the sum of money estimated by said acquiring authority to be just compensation for the land taken." 40 U.S.C. § 258a. By its terms, the act makes no provision for judicial review of the amount of the deposit. The federal courts are in disagreement whether the court may order a change in the amount of the deposit for "abuse of discretion" or "bad faith" on the part of the condemnor. Very restrictive decisions include United States v. Cobb, 328 F.2d 115 (9th Cir. 1964) and Washington v. United States, 214 F.2d 33 (9th Cir. 1954). Decisions permitting such review include United States v. 44 Acres of Land, 234 F.2d 410 (2d Cir. 1956) and United States v. 45.33 Acres of Land, 266 F.2d 741 (4th Cir. 1959).
The most significant accomplishment of the 1961 legislation was to permit all condemnees to withdraw the full amount deposited for their property interests. Section 1243.7 was added to the Code of Civil Procedure to provide a detailed procedure whereby the deposit may be withdrawn even though there may be conflicting claims to the award, and notwithstanding the fact that the amount deposited may have been increased on motion of the defendants.

The condemnee must apply to the court for an order permitting withdrawal. Such an order may not be made until 20 days after service on the condemnor of the application for withdrawal. Within the 20-day period, the condemnor may object to the withdrawal on the ground that other persons are known or believed to have interests in the property. If the condemnor objects, it must attempt to serve personally such other persons with a notice that they must appear within 10 days of service of such notice if they wish to contest the withdrawal. If the condemnor is unable to make such personal service, the person attempting to withdraw the deposit must make the service. Failure of a person so served to appear and object within 10 days after service waives "any right to such amount withdrawn or further rights against the [condemnor] to the extent of the sum withdrawn."

If a person served appears and objects to the withdrawal, or if the condemnor so requests, the court is required to hold a hearing, after notice to all parties, and to determine the amounts to be withdrawn. If the court determines that a party is entitled to withdraw any portion of a deposit claimed by another, it must require such party to file an undertaking to assure repayment of any excess withdrawal. When the final judgment determines the amount to which each party is entitled, any excessive withdrawal must be repaid to the person entitled, together with interest from the date of withdrawal.

If the total amount sought to be withdrawn prior to judgment exceeds the amount originally deposited, the person or persons attempting to withdraw any amount in excess of the original deposit must file an undertaking to assure repayment of the excess. The statute provides that bond premiums for such purposes are costs recoverable by the defendants in the proceeding. Any amount withdrawn is credited upon the final award. The statute also provides procedures for enforcing repayment of any excess withdrawals.

Withdrawal of the deposit is made a waiver by the person mak-
ing such withdrawal of all defenses to the condemnation proceeding except a claim for greater compensation.

At the time these provisions were adopted, the procedures were reviewed and revised in response to the Commission's recommendations and appear to have been working satisfactorily in most cases. Therefore, no basic changes in the system are indicated. The system should, however, be streamlined to further eliminate, insofar as possible, obstacles to withdrawal. For example, under existing law, the property owner is not necessarily notified of the making of a deposit unless and until he is served with an order of immediate possession. Notice of the deposit should be required to be given in all cases to facilitate withdrawal of the funds by the defendants. Under existing practice withdrawal of a deposit is not permitted unless personal service of the application to withdraw is made upon all parties. This requirement should be simplified by permitting service by mail upon the other parties and their attorneys, if any, in all cases in which the party has appeared in the proceedings or has been served with the complaint and summons. The existing absolute prohibition of withdrawal for lack of personal service also should be eliminated. Quite often "defendants" named in eminent domain proceedings can easily be shown to have no compensable interest in the property. In such cases, withdrawal should be permitted even in the absence of personal service. In all cases, the requirement of an undertaking for withdrawal should be left to the sound discretion of the court, rather than being required as a matter of course upon the appearance of any possible conflict, however technical, in claims to the eventual award.

6. Possession and Deposit on Demand of the Defendant

The several definite advantages accruing to the condemnee when immediate possession is taken have been outlined earlier in this article. In addition to permitting prompt receipt of "probable just compensation," the procedure alleviates various hardships faced by certain property owners in the substantial period of delay between filing of the condemnation proceeding and final judgment.

These considerations, and the fact that the advantages accrue only if early possession is taken, have led to recommendations in other states that the condemnee be given an option to require a preliminary transfer of possession and approximate compensation. For example, the recent study of New Jersey's law produced the following recommendation:

101 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1, B-7 (1961).
From time to time, agencies may institute proceedings, but not take possession of the property until after an award has been made. In the meantime, the owner is without funds to acquire substitute property and is unable to efficiently manage his property because of loss of tenants and inability to re-rent pendente lite. This is a great hardship to property owners, particularly to owners of small properties. It is recommended that if the condemning body does not take possession within three months after institution of the proceedings, any party in interest, upon application to the court, may require the condemning body to take such possession and make the deposit herein required unless for good cause, the court shall direct otherwise.\(^{192}\)

At least one state has enacted legislation based on a similar recommendation. The recently enacted Pennsylvania Eminent Domain Code provides:

> If within sixty days from the filing of the declaration of taking, the condemnor has not paid just compensation as provided in subsection (a) of this section, the condemnee may tender possession or right of entry in writing and the condemnor shall thereupon make payment of the just compensation due such condemnee as estimated by the condemnor. If the condemnor fails to make such payment the court, upon petition of the condemnee, may compel the condemnor to file a declaration of estimated just compensation or, if the condemnor fails or refuses to file such declaration, may at the cost of the condemnor appoint an impartial expert appraiser to estimate such just compensation. The court may, after hearing, enter judgment for the amount of the estimated just compensation.\(^{193}\)

An official comment to the section makes clear its purpose and effect:

> Even though the condemnor does not desire immediate possession after the condemnation, the condemnee, who may want to move immediately, has the right under this section, if the condemnor has not asked for possession within sixty days after the filing of the declaration of taking, to deliver possession to the condemnor and take the condemnor's estimate of just compensation without prejudice to his right to prosecute his claim for damages.

Although specific legislation to this effect appears never to have been proposed for California, the objective of such measures is often suggested by counsel for property owners.\(^{194}\)

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\(^{192}\) N.J. EMINENT DOMAIN REV. COM'N, REPORT 19 (1965).


\(^{194}\) E.g., Letter From Julius H. Selinger to California Law Revision Commission, Jan. 4, 1966, stating: “A case discloses a void in the condemnation law which created . . . an injustice to the condemnees. That void consists in the inability of the condemnee to compel the condemnor to take immediate possession, deposit security for the part taken, and allow the condemnee to proceed with the remainder of the construction without waiting the outcome of the ultimate trial and thus delay the construction on the remainder with the consequent losses to the condemnee . . . . The state did not request an order for immediate possession and consequently there was no security deposit for the take . . . . I petitioned the court for an order directing the state to
law, the option to resort to the immediate possession and deposit procedures lies entirely with the condemning agency. Neither the court nor the condemnee has any powers in this respect, whether the objective of the property owner is merely to obtain compensation promptly or to alleviate such a problem as that presented by a half-completed building.

Notwithstanding the novelty of such a procedure in California, it would not appear that most condemors would be seriously inconvenienced. Filing of the condemnation proceeding is preceded by a legislative or administrative decision to acquire the property, and negotiations with the property owner have proved fruitless. As the time of filing the proceeding lies entirely within the discretion of the condemning agency, a requirement that it take possession and deposit probable just compensation promptly should not present inordinate administrative or fiscal difficulties. The major consequence of the procedure would be to virtually eliminate the condemnor's privilege to abandon the proceeding. Also, there are certain cases in which the public funds for acquisition of property are not available at the outset of eminent domain proceedings. Improvement, revenue, or general obligation bonds may have to be sold. In certain limited situations, it is also necessary or convenient for the value of the property to be determined before the amount of the bond issue is established. It would be possible, however, to exclude such situations by permitting the condemning agency to file its affidavit that funds are not available in keeping with existing practice under Code of Civil Procedure section 1251.

Still another alternative would be to permit the condemnor to decline to make the deposit, but to provide that if it does so, interest on the eventual award accrues from the outset of the proceeding. Most importantly for condemors, if possession is taken

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196 See, e.g., Consumers Holding Co. v. County of Los Angeles, 204 Cal. App. 2d 234, 22 Cal. Rptr. 106 (1962).
197 See CAL. CODE CIV. PROC. § 1251.
and a deposit is made on demand of the condemnee, interest should not be paid on the amount deposited after the date of such deposit. The resulting savings in interest costs would make such a requirement much more acceptable to the public agencies. Another substantial advantage would accrue to condemnors from a corollary provision that compliance with a demand for depositing probable compensation results in a waiver of all defenses to the proceeding except claims to greater compensation.

It is therefore recommended that a provision entirely new to California law be enacted which permits the condemnee to move the court for an order determining probable compensation at the beginning of the proceedings or soon thereafter. On depositing the amount determined for withdrawal by the condemnee, the condemnor should be permitted to obtain an order for possession of the property. No interest on the eventual award should be payable to the extent of the amount deposited on demand of the condemnee. The condemnor should be permitted to decline to make the deposit, but in that event, interest at the legal rate of seven percent should accrue on the final award from the outset of the proceedings.

C. Possession After Entry of Judgment

As noted at the beginning of this article, California law distinguishes sharply between the taking of possession before entry of the "interlocutory judgment" of condemnation, and the taking of possession after that event. Since section 1254 of the Code of Civil Procedure was revised to meet constitutional objections in 1903, it has permitted the condemnor in any case to obtain possession following entry of judgment by depositing the amount of the award for withdrawal by the defendants. The court may also require de-

198 A view typical of that expressed by public agencies is the following: "We submit that the condemning agency should retain discretion with respect to whether or not it should take immediate possession. The cost to the public at 7 percent interest, which runs under current law from the date of possession, is a substantial cost factor which should not be imposed upon the public if the condemning agency cannot use that possession in the best interest of the public."

"In the event that the Commission might deem it desirable to allow a property owner to require the condemnor to take possession, then as a corollary of such change in present law, the condemnor should be empowered to require the condemnee to withdraw the money deposited to secure the order of immediate possession. Perhaps the law could be drafted to provide that in the event that the condemnee obtains an order requiring the condemnor to take possession that in such event no interest would be payable on the deposit to secure the order. We feel that such provisions would balance the equities between the legitimate public interest in holding the line on the cost of public improvements and the legitimate interest of some defendants in obtaining a sum of money approximately equivalent to the value of their property prior to the final determination of the valuation of the property." Letter From Terry C. Smith, Los Angeles Deputy County Counsel, to California Law Revision Commission, Dec. 15, 1965.
posit of an additional sum to secure payment of any additional amount that may be recovered in the proceeding. The procedure is available even though the award is attacked by either party by motions in the trial court or by appeal. The only right waived by either party under the procedure is that by withdrawal of the deposit the condemnee waives his right to contend by motion or appeal that the property may not be taken in the proceeding. Unlike provisions for possession prior to judgment, this authorization for possession after judgment does not raise constitutional problems.

Provisions for possession after entry of judgment are properly distinguished from similar provisions for possession prior to judgment. Unless the judgment is reversed or set aside, it determines the condemnor's right to take the property, the amount of compensation, and the allocation of the award among defendants. Since motions in the trial court, appeals, and possible new trials may consume a period of years, possession pending appeal is beneficial to both parties. From the condemnee's standpoint, the period during which he is effectively precluded from renting, selling, or improving the property is reduced, and he may withdraw the deposit and carry out his plans for the future. From the condemnor's standpoint, the procedure is essential to prevent the public improvement from being delayed for a protracted period or even abandoned entirely. The procedure should be retained and improved even though the provisions for possession prior to judgment are greatly extended.

Before 1961, the scope of the procedure for possession pending appeal was greatly restricted by an appellate decision that the condemnor might not deposit the award, take possession, and thereafter appeal. This resulted in the procedure being entirely one-sided. It was available, in effect, only in those cases in which the defendant appealed or moved for a new trial. On recommendation of the Law Revision Commission, this limitation was removed in 1961. The section now provides that:

199 Housing Authority v. Superior Court, 18 Cal. 2d 336, 115 P.2d 468 (1941); Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. 706 (1907).
200 The comparable provisions in other states are cited and discussed in HIGHWAY RESEARCH BOARD, SPECIAL REP'T 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1958) at 45. As to federal practice, the Declaration of Taking Act permits the declaration to be filed "with the petition or at any time before judgment." 40 U.S.C. § 258a. Similarly, Rule 71A of the Federal Rules of Civil Procedure has no application to deposits made by the government after judgment. United States v. Hirsch, 206 F.2d 289 (2d Cir. 1953). Notwithstanding these rules, the district courts are authorized by appellate decisions to permit any condemnor to take possession after judgment upon deposit of the amount of the award. Atlantic Seaboard Corp. v. Van Sterkenburg, 318 F.2d 455 (4th Cir. 1963).
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.

Since 1961, related problems have arisen. Section 1252 of the Code of Civil Procedure enables the condemnor to deposit the amount of the award whether or not an appeal is to be taken, or post-judgment motions are to be made, by either party. Many condemns deposit the award at the same time judgment is entered to avoid the computation and payment of interest. For years, statements have appeared in cases indicating that a defendant's withdrawal of a deposit made under section 1252 waives his right of appeal, while withdrawal of a deposit made under section 1254 would not.

A recent decision has cast doubt on the validity of these statements by holding that a defendant may withdraw a deposit made under section 1252 without waiving his claim to a new trial on the issue of compensation. In brief, the decision held that a deposit made after judgment—not intended as a deposit to obtain possession—may be withdrawn by the defendant just as though it were a deposit made to obtain possession after judgment. Procedurally, the defendant can file a receipt and waiver of all defenses except his claim to greater compensation (the procedure specified in section 1254) and preserve his right to a new trial or appeal on the issue of compensation. The court held, however, that because of its effect as a waiver of all claims except to greater compensation, the withdrawal resulted in a surrender of the right of possession to the condemnor.

Another recent decision, however, has held that a post-judgment deposit may not be treated by the defendant as a payment made to "satisfy the judgment and end the litigation" within the meaning of Code of Civil Procedure section 1049. In short, by withdrawing the deposit the defendant may not preclude a motion for a new trial or appeal by the plaintiff.

This confusion between deposits made to obtain possession under section 1254 and deposits made in satisfaction of the judgment under section 1252 should be eliminated by providing a single

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203 See People v. Richman, 242 A.C.A. 427, 51 Cal. Rptr. 454 (1966); California Continuing Education of the Bar, California Condemnation Practice §§ 11.9–10 (1960).


post-judgment deposit procedure. In this respect, provisions for deposit and possession after entry of judgment should be made to parallel those for deposit and possession before entry of judgment. Neither party should be prejudiced in the matter of appealing or moving for the new trial by making or withdrawing a deposit in either case. The single exception should be, as under existing law, that in either case withdrawal of the deposit by the defendant waives defenses other than the claim to greater compensation.

There are various other procedural and clarifying changes that should be made in a revision of section 1254. These are especially necessary to conform and adapt post-judgment procedures with the provisions and procedures for deposits and possession prior to judgment. As a matter of codification, all provisions for deposit and withdrawal of compensation and possession prior to final judgment in the proceeding should be organized in a new title of the Code of Civil Procedure consisting of three chapters dealing, respectively, with (a) the deposit and withdrawal of probable just compensation, (b) possession before entry of judgment, and (c) deposit and withdrawal of the award and possession after entry of judgment. The provisions for possession should be clarified by providing that an application for possession prior to judgment may be made after entry of judgment if the judgment entered has been reversed, vacated, or set aside. More importantly, existing law should be clarified to permit deposits made prior to judgment to be withdrawn after entry of judgment under the relatively simple provisions for withdrawal of deposits made after judgment.

D. Related Problems

1. Abandonment of the Proceeding After Possession is Taken

Abandonment of eminent domain proceedings is covered by section 1255a of the Code of Civil Procedure. Whether or not possession has been taken, the section permits the condemnor to abandon the proceeding at any time after the filing of the complaint and before expiration of 30 days after final judgment. In other words, the proceeding may be abandoned at any time before payment of the final award is required. However, upon motion of the condemnee, the court may set aside an 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."207

207 CAL. CODE CIV. PROC. § 1255a(b).
This express restriction upon abandonment was added to section 1255a in 1961 upon recommendation of the Law Revision Commission.\textsuperscript{208}

From the condemnor's point of view, abandonment after possession is taken may also be precluded, as a practical matter, after the required deposit has been withdrawn by the property owner. Although both Code of Civil Procedure sections 1243.7 and 1254 provide for recovery of an excessive withdrawal if the excess results from over-valuation of the property or payment to an improper person, no provision is made for recoupment in the case of abandonment.

In federal practice and in a growing majority of states, the proceeding may not be abandoned without consent of the condemnee after possession is taken.\textsuperscript{209} Some California practitioners consider elimination of the privilege of abandonment important even though the equitable principle enacted in 1961 would appear to prevent abandonment in virtually all cases in which possession has been taken.\textsuperscript{210} If a homeowner has moved, a business has been relocated, a deposit has been withdrawn and expended, or property cannot be restored to its original condition, the statutory restriction should apply.

Absolute prohibition of abandonment after an order for possession is obtained usually would force the condemning agency to devote the property to another use, dispose of it on the market, or compromise with the condemnee. While these consequences can be justified theoretically, they would not appear necessary to adequate protection of property owners.

California experience has indicated that there have been and will be very few abandonments following possession. As an official of the Department of Public Works has written:

There are not many examples of total abandonments after entry into possession by any of the condemnors who presently have the right to immediate possession, due to the fact that such possession is taken for the purpose of immediate construction of expensive public improvements, which projects would be highly uneconomical to abandon. . . .

Most "abandonments" are not total abandonments but are slight


\textsuperscript{210} See Riemer, Abandonment of an Eminent Domain Action: The Buyer Disappears, 9 ORANGE COUNTY BAR BULL. 85 (1966).
changes in right of way alignments such as where by mistake the taking line has gone through a small portion of an existing building where the alignment can be drawn back to protect the improvements and minimize damages. In this situation a statute ... [precluding abandonment] would permit the condemnee to force the state into compensating him to obtain his consent to an abandonment. Another example of the same type of situation is an amendment to take a lesser interest, such as a reservation of mineral and oil interests to the property owner. . . .

There are also reported instances in which proceedings have had to be abandoned because of the taking or proposed taking of the property by another condemnor having a superior power of eminent domain. To allow for these highly technical cases of abandonment, the privilege should not be eliminated altogether even in connection with the enactment of broad provisions for possession prior to final judgment.

In one important respect, however, section 1255a of the Code of Civil Procedure is unsatisfactory. Subdivision (c) permits recovery by the defendant of his costs and necessary expenses upon abandonment. The general purpose of this provision is to compensate the defendant for all expenses necessarily incurred whenever the plaintiff fails to carry the proceeding through to its conclusion. It has been held that the defendant may recover reasonable attorney's fees actually incurred in connection with a proceeding, even though a portion of the legal services were rendered before the complaint was filed. All other expenses, however, including appraisal fees, may not be recovered if the proceeding is discontinued 40 or more days before the date set for pretrial.

In most cases, a defendant's attorney cannot properly advise his client without first obtaining appraisal data and consulting appraisers. Thus the landowner must usually incur appraisal fees at

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approximately the same time that he obtains an attorney.\textsuperscript{216} It would seem, therefore, that failure to allow the defendant to recover appraisal fees and other expenses is neither logical, practical nor fair. The 40-day limitation should be eliminated and a uniform rule applied to all expenses.

2. Interest Problems in Early Possession Cases

In eminent domain cases in which possession is not taken prior to judgment, interest at seven percent upon the award runs from the entry of judgment to the date the award is paid into court for the defendants.\textsuperscript{217}

Before 1959 there was no statutory provision governing the payment of interest in immediate possession cases. Also, there was no statutory method for compensating the defendant for the use of his property for the period between the taking of possession and the entry of judgment. In the absence of any statute, the California Supreme Court had held that compensation for such use must be made, and that an appropriate way of computing the amount is to award interest at seven percent from the taking of possession to the date of payment.\textsuperscript{218}

In 1959, Code of Civil Procedure section 1255b was added to provide that, in immediate possession cases, the compensation and damages awarded in the proceeding draw interest from the effective date of the order for possession. In 1961, on recommendation of the Law Revision Commission,\textsuperscript{219} the previously uncodified rules on interest were gathered together and restated in Code of Civil Procedure section 1255b. The revision of that section continued the substance of the 1954 provision. The section now provides that the award accrues interest from "the date after which the plaintiff may take possession of the property as stated in the order authorizing the plaintiff to take possession." An additional provision was added, however, specifying that if, after the date that interest begins to accrue, the defendant remains in actual possession of the property or re-

\textsuperscript{216} See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE § 1.37: "The attorney should obtain an appraisal of the property as soon as possible after accepting the case. Until he has this appraisal in his possession and has thoroughly analyzed it, the lawyer is not in a proper position to evaluate his case completely or to open or respond to negotiations with the condemnor's agents or attorneys."

\textsuperscript{217} CAL. CODE CIV. PROC. § 1255b; Bellflower City School Dist. v. Skaggs, 52 Cal. 2d 278, 339 P.2d 848 (1959).

\textsuperscript{218} Metropolitan Water Dist. v. Adams, 16 Cal. 2d 676, 107 P.2d 618 (1940).

\textsuperscript{219} 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-9, B-48, B-56 (1961).
ceives rent or other income, the value of such possession and the amount of such income must be offset against interest.220

There is little, if any, disagreement over the policy expressed in these provisions, since if the property is physically taken, the condemnee has for all practical purposes lost his property and should be allowed legal interest until he is paid the award.

A more difficult problem is presented as to termination of interest in immediate possession cases. Section 1255b now provides that interest ceases on the date the deposit is withdrawn. This permits the property owner to decline to withdraw the deposit and to recover seven percent interest on the final award from the date that interest begins to accrue. Unlike California, the federal government and a number of states stop interest on the money deposited from the time of the deposit.221 Interest must be paid, of course, on any difference between the final award and the amount deposited. The federal policy is underscored by an administrative directive preventing the use of federal highway funds to pay interest on any amount “available to” the property owner.222

In other jurisdictions, the policy is to the contrary. A recent Indiana decision, for example, reasons as follows:

It seems logical that the Legislature, in its wisdom, intended to give the defendants in a condemnation proceeding an option whether or not to withdraw their share. One defendant desiring and perhaps needing immediate return for his property could file a written request for payment and assume the burdens and terms of the statute. On the other hand, another defendant could wait the orderly determination of the eminent domain proceedings with assurance that he would be put in as good position moneywise by the addition of interest as he would have been had his property not been taken. The statutory language permits such construction, and not only equitable, but constitutional principles require such construction.223

220 Before the amendment of 1961, neither rent received by the land owner nor the value of possession could be offset against the interest accruing after the effective date of an order for possession. People v. Podrat, 194 Cal. App. 2d 696, 15 Cal. Rptr. 343 (1961) (rent); People v. Forster, 58 Cal. 2d 257, 23 Cal. Rptr. 582, 373 P.2d 630 (1962) (possession).


222 Bureau of Public Roads, U.S. Dep't of Commerce, Instructional Memorandum 21-9-65 (Sept. 13, 1965), provides, in part: “Federal funds will not be available for reimbursement of any interest payments to the property owner after the date payment is made available to him, on the portion of the final settlement or award represented by such partial payment.”

223 State v. Young, 199 N.E.2d 694, 698 (Ind. 1964).
Ideally, procedure in eminent domain cases would be such that interest ceases upon an amount deposited by the condemnor, whether the amount is or is not withdrawn by the property owner. Fairness does not require that the property owner be given an option to withdraw the deposit or to leave the amount on deposit and draw interest at seven percent. Even though the public entity or agency may place the amount deposited in the state Condemnation Deposits Fund in the state treasury and partially recoup the amount of such interest, the income from that fund does not approach the seven percent rate that must be paid on the award in the eminent domain proceeding.

Denial of interest is appropriate, however, only if the amount deposited may be withdrawn promptly and easily. Although the provisions for withdrawal of a deposit made prior to judgment can be and should be streamlined, there appears to be no way to overcome the obstacle presented by the possible existence of separate interests in the property. On trial of the issue of compensation, the condemnor is entitled to have the property valued as a whole, irrespective of the existence of separate interests.\(^\text{224}\) Thus, deposits before judgment are made in the aggregate and are not segregated among severable interests in the property.\(^\text{226}\) These privileges are regarded as pivotal by condemnors. Hence, there is little justification for tolling interest at the time of the deposit as the condemnee may no longer have possession and yet be faced with obstacles in withdrawing the deposit. Accordingly, even though withdrawal procedures may be simplified, the general rule on termination of interest should not be changed.

Under existing law, however, interest does not cease upon an amount deposited prior to judgment even upon entry of judgment.\(^\text{226}\)

\(^{224}\) Cal. Code Civ. Proc. § 1246.1, added in 1939, provides that the plaintiff is entitled to have the total amount of the award first determined as between the plaintiff and all defendants, and that, thereafter in the same proceeding, the respective rights of the defendants shall be determined. With respect to this statute, similar statutes, and the problems to which they are directed, see 1 Orgel, Valuation Under the Law of Eminent Domain §§ 107-112 (2d ed. 1953).

\(^{225}\) Before adoption of Cal. Code Civ. Proc. § 1246.1, case law required a condemnor to make separate deposits for each “parcel” and for each separate interest in a given parcel. See Weller v. Superior Court, 188 Cal. 729, 207 Pac. 247 (1922); Marblehead Land Co. v. Superior Court, 61 Cal. App. 777, 215 Pac. 922 (1923). Condemnors assume that this view has been changed by enactment of section 1246.1, and the uniform practice is to make an unsegregated deposit. Problems may remain, however, especially in view of the fact that the earlier cases were based upon an interpretation of Cal. Const. art. I, § 14.

\(^{226}\) Cal. Code Civ. Proc. § 1255b(c)(4) provides as follows: “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 [interest ceases on] the date of such payment.” The effect of the language is to preclude further accrual of interest when the full amount of the judgment is deposited in court after judgment, whether or not the
Since the justification for the rule requiring payment of interest on amounts deposited prior to judgment is that the property owner may not be free to withdraw the amount deposited, and since upon the entry of judgment such amount becomes immediately available for withdrawal, interest on amounts deposited prior to judgment should cease upon the entry of judgment.

Before 1959, case law permitted the defendant to show that a higher rate of return than the legal rate of interest was required to give him fair compensation for the loss of possession prior to judgment. This showing was made to the jury in jury trials. After the Legislature provided in 1959 that such compensation should be computed in all cases as seven percent interest, this element of compensation has been determined by the court. Since 1961 it has been uncertain whether interest, and the offset against interest, are to be determined by the court or by the jury. Apart from the tendency of such issues to confuse the jury, determination by jury requires each of the parties to present evidence inconsistent with the position taken upon trial of the main issue of compensation. Section 1255b should therefore be clarified to provide that the court shall determine the amount of the interest in all cases, including interest constitutionally required as compensation for possession prior to payment. The section also should provide that the amount of any offset against interest should be determined by the court, and that evidence on that issue should be presented to the court, rather than to the jury.

3. Date of Valuation and Decreases in Value Before the Date of Valuation

After a half-century of experience with "immediate possession," California law has worked out suitable distinctions and adaptations for early possession cases with a single general exception. Neither legislation nor case law dealing with the date of valuation in eminent domain proceedings attaches any significance to the taking of possession, the depositing of probable compensation, or the withdrawal of the funds. Consideration of the date of valuation raises problems and

plaintiff resorts to the possession provisions of section 1254. However, the words "finally determined" apparently preclude application of the provision to prevent further accrual of interest after the entry of judgment in immediate possession cases. See People v. Loop, 161 Cal. App. 2d 466, 326 P.2d 902 (1958); compare People v. Neider, 55 Cal. 2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961). See People v. Loop, 161 Cal. App. 2d 466, 326 P.2d 902 (1958).


For a remarkable example of the extent to which the effects of possession prior to judgment have been woven into California law, see the contentions of the appellant in State v. Whitlow, 243 A.C.A. 641, 52 Cal. Rptr. 336 (1966).
presents alternatives beyond the range of "immediate possession" or of any provisions for the exchange of possession and approximate compensation. Nevertheless, the subjects are, or should be, interrelated. Especially if much broader provisions for early possession and preliminary payment are to be enacted, careful consideration should be given to the date of valuation and to the connected problem of changes in the market value of the property before the date of valuation caused by the project itself.

Since 1872, section 1249 of the Code of Civil Procedure has fixed the date of issuance of summons as the date of valuation in all eminent domain proceedings. The single judicially created exception is that the date of valuation in takings of public utility property is the date of trial rather than the date of summons. In an attempt to improve the position of the property owner and to compel the condemnor to expedite the proceeding, a provision was added in 1911 specifying that, if a case is not tried within one year from its commencement, and the delay is not caused by the defendant, the date of valuation is the date of trial. In cases in which the issue of compensation is once tried, and a new trial is necessary, the California Supreme Court recently held that the date of valuation remains the same date used for that purpose in the original trial.

Under existing law, the dates of valuation specified in Code of Civil Procedure section 1249 are not affected in any way by the plaintiff's taking possession of the property and depositing probable just compensation prior to trial. This result has been reached because no explicit provision for a different date of valuation is made in such cases and, secondly, because section 1249 is viewed as a purely "procedural" statute.

The principal criticism of section 1249, however, has not been directed to its anomalous application in immediate possession cases. Rather, the view of property owners and their advocates has been that fixing the basic date of valuation as the date of summons, instead of the date of trial or payment of the award is supported only by analogy to other civil actions; that in eminent domain proceedings, however, commencement of the proceedings is not logically relevant to ascertaining the date at which the level of the general

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231 As to the purposes of the alternate date of valuation, see People v. Murata, 55 Cal. 2d 1, 9 Cal. Rptr. 601, 357 P.2d 833 (1960); Redevelopment Agency v. Maxwell, 193 Cal. App. 2d 414, 14 Cal. Rptr. 170 (1961).
market, and the value of the particular property in that market, should be considered; and that, in a rising market, by the time the property owner receives the award, property values often will have increased so much that he cannot purchase equivalent property with the award.

Before the adoption of section 1249 in 1872, the rule appears to have been to value the property as of the time of taking or the date of the actual payment of compensation. Immediately after its adoption, the date-of-issuance-of-summons rule was held unconstitutional, but that departmental decision was overruled by the full supreme court. Since that time, the rule has been challenged, but uniformly sustained by the appellate courts, on many occasions.

Although the matter soon became highly controversial as a question of compensation and economics, it seems clear that the draftsmen of the Code of Civil Procedure considered the date of valuation to be purely a point of civil procedure. Under the law of that era, issuance of summons in actions in rem was deemed to mark inception of the court’s jurisdiction over the property, and that date was accordingly chosen.

In a minority of states in which the date of valuation is fixed at the inception of the proceedings, however, justifications have been found for the rule. An early Massachusetts decision puts these succinctly, as follows:

This affords a definite and invariable rule, which has relation to the time at which the property is designated and set apart for the pub-

238 See Harrington v. Superior Court, 194 Cal. 185, 228 Pac. 15 (1924).
239 In most jurisdictions in the United States, including many in which no date of valuation is specified by statute, the date of valuation is deemed to be the date of “taking.” “Taking,” in turn, may refer to a number of events in the acquisition process, including the taking of possession or the filing of a document that passes title to the condemnor. See 3 NICHOLS, EMINENT DOMAIN § 8.5[1] (3d rev. ed. 1965); 4 id. § 12.23[1]. This is also federal practice. See United States v. Dow, 357 U.S. 17 (1958). It is only in those jurisdictions in which compensation is determined prior to the “taking” that it is necessary to fix a more or less arbitrary date of valuation. See 3 NICHOLS, EMINENT DOMAIN § 8.5[2] (3d rev. ed. 1965); 4 id. § 12.23[2]. Even in these states, the majority rule is to assess compensation and damages as of the date of trial. See 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 21 n.29 (2d ed. 1953).
lic use, the owners ascertained who are entitled to be compensated, and the judicial proceedings instituted for the purpose of determining such compensation; and is not liable to be affected by the duration of these proceedings, or by increase or diminution in value, whether occasioned by the taking itself, or by the acts of the owners, lapse of time, or other circumstances. In all these respects, it is a juster measure of compensation than a valuation of the estate at any subsequent point of time.\textsuperscript{240}

This reasoning obviously is much more persuasive in those states employing the so-called "administrative method" of condemnation in which the estimated amount of compensation is deposited for withdrawal by the property owner at the outset of the court proceedings.

Proposals for change in California’s basic rule have been many and well considered. Counsel for property owners uniformly urge adoption of the date of trial as the basic date of valuation. The following suggestion is typical:

Generally, the client will be better off if the date of valuation is the date of trial. As a matter of equity, there should be legislation providing that in all condemnation proceedings the date of valuation shall be the date of trial. The client will have to replace his property or otherwise reinvest the award at the price that is prevailing after the trial. It therefore seems that just compensation would be better provided by the trial date valuation in every case, except perhaps where the defendant deliberately stalled the proceeding.\textsuperscript{241}

A refinement of this change in the date of valuation would select the date \textit{initially set} for trial, and add a provision that if the trial is continued upon motion of either party, the date of valuation would be, at the option of the opposing party, either the date then set for trial or the date to which trial is continued. The considerations favoring this change in existing law have been stated as follows:

1. It would provide for valuation in eminent domain proceedings at current prices in keeping with the real estate market in general where properties are bought and sold at current prices rather than, as under the existing CCP 1249, as of a price level existing approximately 8 to 12 months prior to trial. This is both fair and realistic whether the market be rising, falling or remaining static.

2. It would facilitate the trial of eminent domain proceedings, particularly when tried to a jury in that the trier of fact would not be required to perform the mental gymnastic feat of projecting his thinking backward for a period of 8 to 12 months.

3. It would eliminate the frequently occurring and troublesome question of who caused a delay in the trial of an eminent domain proceeding, which exists under the present form of CCP 1249.


\textsuperscript{241} \textit{California Continuing Education of the Bar, California Condemnation Practice} § 1.25 (1960). See also \textit{id.} §§ 9.1-.29.
4. It would eliminate the anomalous and unfair situation where, on a falling market, (a) the condemnee by his own delay can secure a higher price for his property than its market value at date of trial and (b) the condemnor by delaying can acquire the property at a lower price. \(^{242}\)

On the other hand, counsel for condemnors uniformly urge retention of the existing rules. They believe that these rules work well and equitably in practice and that any alternative would provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation. \(^{243}\) They also point out that as a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date when the trial begins, as appraisals and appraisal testimony must be directed to market value as of a specific date.

Although these conflicting views and considerations cannot be completely reconciled, reasonable compromises seem possible. The first change in existing rules should permit any condemnor to establish an early date of valuation by depositing probable just compensation for withdrawal by the property owner. If it does so, the date of valuation should be the date of the deposit. A date of valuation thus established should not be subject to change by any subsequent development in the proceeding. In other cases, a compromise should be made between California’s two existing rules, and the date of valuation fixed as the date six months after the filing of the complaint. The provision making the date of valuation the date of trial if, without fault of the defendant, the case is not tried within one year, should be retained. In case of a new trial, the date of the new trial, rather than the date used in the original trial, should be the date of valuation unless the condemnor deposits the amount awarded in the original trial within a specified and reasonably brief period after the entry of judgment in the original trial.

Whether the date of valuation is fixed at the issuance of summons, the date of trial, or some other point in the condemnation proceeding, it has become increasingly clear that changing the statutory date is not an appropriate way of dealing with the pervasive problem of increases or decreases in value, because of the imminence


of the taking, prior to the established date of valuation.\textsuperscript{244} A more promising solution, enacted in a few states\textsuperscript{245} and embodied in proposed federal legislation, provides:

Any change in [market price] prior to the date of valuation caused by the public improvement for which the property is acquired, and any decrease in such price caused by the likelihood that the property would be acquired for the proposed public improvement, other than that caused by physical deterioration within the reasonable control of the owner, shall be disregarded in determining such price.\textsuperscript{246}

Other studies have reached the same conclusion. For example, the recent report of the New Jersey Eminent Domain Revision Commission concludes:

Property owners are similarly affected by public announcements by agencies of proposed projects, highway routes and the like. Years may elapse between the date of the announcement and the consumption, and the final plan may and probably will differ substantially from the original scheme. The Commission realizes that a public body must be afforded a wide range of time within which to reach its final conclusion, and to this end, will publicize various thoughts to test public opinion. But some consideration should be given to the persons whose property is thus placed in a test tube, and boiled in the cauldron of public and political bickerings . . . .

The Commission therefore suggests that any increase or decrease in the value of property caused by administrative actions, or public announcements of proposed public improvements (other than that due to physical depreciation within the reasonable control of the owner) shall be disregarded in determining the compensation for the taking . . . .\textsuperscript{247}

This problem of increase or decrease in market value prior to the date of valuation is not dealt with by the California Code of Civil Procedure. Case law establishes, however, that any increase in the value of the property directly resulting from the improvement itself is to be ascertained and deducted in arriving at the compensation to be made for the property.\textsuperscript{248} Notwithstanding the rule as to increases


\textsuperscript{246} See sections 102(a)(b)(1)(A) and 112 (c)(2) of the "Fair Compensation Act of 1965" as that act would have been adopted by Senate Bill 1201, 89th Cong. (1st Sess.). See also Staff of Select Subcomm. on Real Property Acquisition, House Comm. on Public Works, 88th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs 156 (Comm. Print 1964).

\textsuperscript{247} N.J. Eminent Domain Revision Comm'n, Report 27 (1965).

in value, demands by property owners that alleged decreases in value be ascertained and added to the value at the date of valuation have most frequently been denied. The reason commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in "unfathomable speculation." The injustice to the property owner is clear, however, if the proposed improvement has actually depreciated the value of the property prior to the date of valuation. Equitably, the amount awarded to the owner should be equivalent to what the "market value" of the property would have been on the date of valuation irrespective of the proposed improvement's influence on the market. Such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced. A provision should therefore be enacted requiring that any such changes in value be taken into account and providing a uniform rule for both increases and decreases.

V. CONCLUSION

A recent directive of the Legislature requires the California Law Revision Commission to study the law of eminent domain "with a view to recommending a comprehensive statute that will safeguard the rights of all parties." A basic question in comprehensive revision of the California eminent domain law is whether existing provisions for immediate possession should be broadened. A careful review of the benefits and detriments that result when the right of immediate possession is narrowly limited, as in California, leads to the conclusion that the broadening of this right would be of substantial benefit to both condemnors and condemnees if the condemnee is assured that he will receive the approximate value of his property at the time possession is taken and if procedural safeguards are provided to protect the condemnee from being seriously inconvenienced by having to vacate his property within a limited time.


Legislation enacted in recent years on recommendation of the Law Revision Commission has accomplished a great deal toward putting possession, payment, and related problems in condemnation law on a more rational basis. The possibilities for further improvement deserve the critical attention of those possessing the power of eminent domain, those groups having special knowledge of the subject, and, not least, property owners and their counsel.

APPENDIX

STATE OF CALIFORNIA

AGENCY

University of California
State Pub. Works Bd.
State Housing Comm'n
State Lands Comm'n
State Hwy. Comm'n
Cal. Toll Bridge Auth.
Dep't of Water Resources
Dep't of Water Resources
(Central Valley Project)
State Reclam. Bd.

STATUTE

ED. CODE § 23152
GOV. CODE § 15855
HEALTH & SAF. CODE § 34878
PUB. RESOURCES CODE § 6808
STS. & HY. CODE § 103
STS. & HY. CODE § 30404
WAT. CODE § 251
WAT. CODE § 11582
WAT. CODE § 8595

LOCAL PUBLIC ENTITIES

ENTITY

County
City
City

STATUTE

CODE CIV. PROC. § 1241 (2)
GOV. CODE § 38081
NA

(STreet Opening Act of 1903)
(Park and Playground Act of 1909)
(Street Opening Act of 1903)
(Improvement Act of 1911)
(Improvement Act of 1911)
(Pedestrian Mall Law of 1960)

STS. & HY. CODE § 4189
STS. & HY. CODE § 6121
STS. & HY. CODE § 11400

(Municipal Water District Act of 1911)
(Municipal Water District Act of 1911)

WAT. CODE § 71694
WAT. CODE APP. § 20-12 (7)

(Municipal Water District Act of 1911)

OTHER PUBLIC ENTITIES

County Sanitation Dist.
Irrigation Dist.
Public Utility Dist.
Rapid Transit Dist.
Sanitary Dist.

CODE CIV. PROC. § 1241 (2)
CODE CIV. PROC. § 1241 (2)
CODE CIV. PROC. § 1241 (2)

(Pub. Util. Code § 16404)
CODE CIV. PROC. § 1241 (2)
CODE CIV. PROC. § 1241 (2)
School Dist.
Transit Dist.
Water Dist.
San Francisco Harbor
Harbor Improvement Dist.
Harbor Dist.
Port Dist.
Recreational Harbor Dist.

River Port Dist.
Small Craft Harbor Dist.
San Diego Unified Port Dist.
Joint Muni. Sewage Disp. Dist.

Regional Sewage Disp. Dist.
Regional Park Dist.
Regional Shoreline Park and Recreation Dist.
Municipal Utility Dist.
Transit Dist. (Alameda or Contra Costa Counties)
S.F. Bay Area Rapid Transit Dist.

Orange County Transit Dist.
Stockton Metropolitan Transit Dist.
Marin County Transit Dist.
San Diego County Transit Dist.
Santa Barbara Metropolitan Transit Dist.

Los Angeles Metropolitan Auth.
Fresno Metropolitan Transit Auth.
West Bay Rapid Transit Auth.
Joint Highway Dist.
Bridge & Highway Dist.
Parking Dist.
Water Replenishment Dist.
American River Flood Control Dist.
Antelope Valley-East Kern Water Agency
Crestline-Lake Arrowhead Water Agency
Desert Water Agency
Donner Summit Public Utility Dist.
Lassen-Modoc County Flood Cont. & Water Conserv. Dist.
Mendocino County Flood Cont. & Water Conserv. Dist.
Metropolitan Water Dist.
Morris Creek Flood Cont. Dist.
Olivehurst Public Utility Dist.
Orange County Water Dist.
Plumas County Flood Cont. & Water Conserv. Dist.
San Diego County Flood Control Dist.
San Gorgonio Pass Water Agency
San Mateo County Flood Cont. Dist.
Santa Cruz County Flood Cont. & Water Conserv. Dist.
Sierra County Flood Cont. & Water Conserv. Dist.
Siskiyou County Flood Cont. & Water Conserv. Dist.
Sonoma County Flood Cont. & Water Conserv. Dist.

CODE CIV. PROC. § 1241(2)
CODE CIV. PROC. § 1241(2)
CODE CIV. PROC. § 1241(2)
HARB. & NAV. CODE § 1917
HARB. & NAV. CODE § 5900.4
HARB. & NAV. CODE § 6076
HARB. & NAV. CODE § 6296
HARB. & NAV. CODE §§ 6590, 6593, 6598 (repealed)
HARB. & NAV. CODE § 6896
HARB. & NAV. CODE § 7147
HARB. & NAV. CODE § 5740.01, 5740.06 (repealed)
HEALTH & SAF. CODE §§ 5991, 5998 (repealed)
PUB. RESOURCES CODE § 5542
PUB. RESOURCES CODE § 5722 (repealed)
PUB. UTIL. CODE § 12703
PUB. UTIL. CODE § 25703
PUB. UTIL. CODE § 28954
PUB. UTIL. CODE § 40162
PUB. UTIL. CODE § 50162
PUB. UTIL. CODE § 70162
PUB. UTIL. CODE § 90402
PUB. UTIL. CODE § 96002
PUB. UTIL. CODE APP. 1, § 4.7
PUB. UTIL. CODE APP. 2, § 6.3
PUB. UTIL. CODE APP. 3, § 6.6
STS. & HY. CODE § 25052
STS. & HY. CODE § 27166
STS. & HY. CODE § 35401.5
WAT. CODE § 60230(8)
WAT. CODE APP. § 37-23
WAT. CODE APP. § 98-61(7)
WAT. CODE APP. § 104-11(9)
WAT. CODE APP. § 100-15(9)
WAT. CODE APP. § 58-3
WAT. CODE APP. § 92-3(f)
WAT. CODE APP. § 54-3(f)
WAT. CODE APP. § 35-4(5)
WAT. CODE APP. § 71-3(f) (repealed)
WAT. CODE APP. § 56-3
WAT. CODE APP. § 40-2(8)
WAT. CODE APP. § 88-3(f)
WAT. CODE APP. § 105-6(12)
WAT. CODE APP. § 101-15(9)
WAT. CODE APP. § 87-3(8)
WAT. CODE APP. § 77-24
WAT. CODE APP. § 91-3(f)
WAT. CODE APP. § 89-3(f)
WAT. CODE APP. § 53-3(f)
Tehama County Flood Cont. & Water Conserv. Dist.
Upper Santa Clara Valley Water Agency
Vallejo Sanitation & Flood Cont. Dist.
Yolo County Flood Cont. & Water Conserv. Dist.
Bethel Island Municipal Improvement Dist.
Embarcadero Municipal Improvement Dist.
Estro Municipal Improvement Dist.
Fairfield-Suisun Sewer Dist.
Guadalupe Valley Municipal Improvement Dist.
Montalvo Municipal Improvement Dist.
Mt. San Jacinto Winter Park Auth.
Solvang Municipal Improvement Dist.

WAT. CODE APP. § 82-3(f)
WAT. CODE APP. § 103-15(7)
WAT. CODE APP. § 67-23
WAT. CODE APP. § 65-3(f)

Cal. Stats. (1st Ex. Sess.) 1960, Ch. 81, § 81, p. 447, CAL. GEN. LAWS ANN. Act 5239c (Deering Supp. 1965)
Cal. Stats. (1st Ex. Sess.) 1960, Ch. 82, § 81, p. 464, CAL. GEN. LAWS ANN. Act 5239d (Deering Supp. 1965)
Cal. Stats. 1951, Ch. 303, § 44, p. 555, CAL. GEN. LAWS ANN. Act 7551a (Deering Supp. 1965)
Cal. Stats. 1959, Ch. 2037, § 80, p. 4710, CAL. GEN. LAWS ANN. Act 5239b (Deering Supp. 1965)
Cal. Stats. 1955, Ch. 549, § 45, p. 1018, CAL. GEN. LAWS ANN. Act 5239a (Deering Supp. 1965)
Cal. Stats. 1945, Ch. 1040, § 4.9, p. 2013, CAL. GEN. LAWS ANN. Act 6385 (Deering Supp. 1965)
Cal. Stats. 1951, Ch. 1635, § 45, p. 3680, CAL. GEN. LAWS ANN. Act 5239 (Deering Supp. 1965)