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THE DATE OF TAKING IN CALIFORNIA CONDEMNATION PROCEEDINGS: A PROPOSAL FOR CHANGE

In condemnation proceedings, there are two dates of particular significance—the date of “taking” and the date of valuation. The date of “taking” is the date on which control of condemned property passes from the condemnee to the condemnor.¹ The date on which property is appraised for condemnation award purposes is designated the date of valuation.² In California condemnation proceedings, these two dates do not concur in point of time. This lack of concurrence has created problems for the condemnee, the condemnor and the public at large. The purpose of this note is to explore the problems caused by the nonconcurrence of these two dates and to suggest possible solutions to these problems.

California “Taking” and Valuation Dates

Hardships Caused by the Late “Taking” Date

The date of “taking” in California is determined by statute to be the date on which the court’s “final order of condemnation” is recorded,³ and the condemnor cannot gain possession until such final order. The valuation date is the date the summons is served on the condemnee.⁴ Since the condemnor cannot gain possession of the property until a “final order of condemnation” is rendered,⁵ the commencement of construction for schools, streets, hospitals, and housing projects, although in great demand by the public, must often await the outcome of protracted litigation. This delay is a burden on both the condemnor and the public at large since the condemnor must postpone the construction and the public must postpone its use and enjoyment.⁶ The delay will also result in added construction costs since

¹ See, e.g., *Sebastian Bridge Dist. v. Missouri Pac. R.R.*, 292 F. 345, 349-51 (8th Cir. 1923); 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 3 (2d ed. 1953).

² See, e.g., *Sacramento Terminal Co. v. McDougall*, 19 Cal. App. 562, 563-64, 126 P. 503, 504 (1912); 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 21 (2d ed. 1953).

³ CAL. CODE CIV. PROC. § 1253: “The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county.”

⁴ CAL. CODE CIV. PROC. § 1249.

⁵ *San Mateo County v. Coburn*, 130 Cal. 631, 637, 63 P. 78, 80 (1900). *Contra*, CAL. CODE CIV. PROC. § 1243.4 (the only exception and it is applicable to rights of way or reservoir land).

⁶ Stalling tactics are sometimes used by one of the parties to prolong the

these costs routinely increase with the passage of time.

The condemnor and the public are not the only ones harmed by the delay. Between the commencement of the condemnation proceeding and the final adjudication, the condemnee's beneficial use of the property remains in a state of suspension. It is virtually impossible for him to sell, lease or rent the land, and any improvements constructed on the land after the service of summons will not be included in the condemnation award. California Code of Civil Procedure section 1249⁷ forbids compensation for improvements, whether necessary or not,⁸ made after the property valuation date. Since the valuation date often precedes the date of taking by a considerable amount of time, there may be a lengthy period during which the condemnee can neither protect nor sell his property. This creates many problems. The condemnee is faced with the undesirable alternative of either allowing his property to deteriorate, or of expending money for improvements without a right of reimbursement. The condemnor, on the other hand, is permitted by statute to reduce the amount of the condemnation award where the condemned property is injured after the date of valuation but before the date of the taking.⁹ The condemnor in California, then, enjoys a more advantageous posi-

court proceedings further. Letter from Harold W. Culver to the California Law Revision Commission, June 30, 1966, in Taylor, *Possession Prior to Final Judgment in California Condemnation Procedure*, 7 SANTA CLARA LAW. 37, 47 n.34 (1967).

⁷ CAL. CODE CIV. PROC. § 1249: "For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed . . . provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages."

⁸ See *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS & STUDIES B-1, B-54-55 (1960) [hereinafter cited as CAL. L. REVISION COMM'N]. It is not clear even in California if compensation is allowed for improvements made prior to service, but after notice of pending condemnation.

⁹ *Redevelopment Agency v. Maxwell*, 193 Cal. App. 2d 414, 419, 14 Cal. Rptr. 170, 174 (1961); CAL. CODE CIV. PROC. § 1249.1: "All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation, damages and special benefits unless they are removed or destroyed before the earliest of the following times: (a) The time the title to the property is taken by the plaintiff. (b) The time the possession of the property is taken by the plaintiff. (c) The time the defendant moves from the property in compliance with an order of possession."

tion than that of the condemnee. Most other states have recognized the inequity of this situation, and have allowed recovery for good faith improvements up to the time of the taking.¹⁰

Abandonment and Estoppel

In California, the condemnor may abandon the condemnation "proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment . . ." ¹¹ Because of this provision, the condemnee who may have substantially changed his position in reliance on the condemnor's statement of proposed condemnation (e.g., by allowing his property to deteriorate, or by turning down opportunities to sell or relocate in another area) often was left with substantial damages when the condemnor abandoned the proceedings. To alleviate this situation, the California courts formulated a doctrine of estoppel to prohibit the abandonment of a condemnation proceeding "where justice and right" required compensation.¹²

*Times-Mirror Company v. Superior Court*¹³ illustrates the application of this estoppel theory. In that case, the plaintiff was assured by the city council that his property would be taken by condemnation and that there would not be an abandonment.¹⁴ Relying on those assurances, the plaintiff relocated his plant on other property at a cost of 4.6 million dollars.¹⁵ The city council subsequently abandoned the condemnation. Because the situation was *exceptional*, and *all* the equities were in the favor of the plaintiff, the court estopped the abandonment.¹⁶

Unfortunately, this estoppel doctrine was limited by the courts to those cases in which all equities appeared to be in favor of the

¹⁰ See, e.g., *Showalter v. Arizona*, 48 Ariz. 523, 363 P.2d 189 (1963); *Louisville S.R.R. v. Cogar*, 15 Ky. L. Rptr: 444 (Super. Ct. 1893); *Maher v. Commonwealth*, 291 Mass. 343, 197 N.E. 78 (1935); *In re New York City*, 196 N.Y. 255, 89 N.E. 814 (1909); *In re Wall Street*, 17 Barb. 617 (N.Y. Sup. Ct. 1854); *Portland v. Lee Sam*, 7 Ore. 397 (1879); *Driver v. Western U.R.R.*, 32 Wis. 569 (1873). For collection of cases see, 27 AM. JUR. 2d *Eminent Domain* § 294 (1966). *Contra*, *Lloyd v. Fair Haven*, 67 Vt. 167, 31 A. 164 (1894).

¹¹ CAL. CODE CIV. PROC. § 1255a(a): "The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding." See *People ex rel. Department of Pub. Works v. Superior Court*, 47 Cal. App. 2d 393, 399, 118 P.2d 47, 51 (1941).

¹² *Times-Mirror Co. v. Superior Court*, 3 Cal. 2d 309, 328, 44 P.2d 547, 556 (1935); *Los Angeles v. Cohn*, 101 Cal. 373, 377, 35 P. 1002, 1004 (1884).

¹³ 3 Cal. 2d 309, 44 P.2d 547 (1935).

¹⁴ *Id.* at 324-25, 44 P.2d at 554-55.

¹⁵ *Id.* at 326, 44 P.2d at 555.

¹⁶ *Id.* at 331, 44 P.2d at 557.

condemnee.¹⁷ For example, in *Gibson Properties v. Oakland*,¹⁸ the plaintiff contemplated building a warehouse on his property but was informally notified that part of his land was to be taken by the city to widen a street.¹⁹ The plaintiff, nevertheless, began work on the warehouse.²⁰ After an ordinance was passed evidencing the city's intention to take the property, the city commissioner ordered the plaintiff to cease and desist any building operations near the property to be condemned.²¹ The plaintiff, in compliance with the setback order, ceased that construction and built his warehouse on adjacent land, which was twenty feet from the proposed widened street, at an additional expense of \$5,696.60.²² The city subsequently abandoned the condemnation proceedings and the plaintiff sued for damages.²³

The appellate court ruled that the plaintiff could not recover because there was nothing "exceptional" in his claim. The court thereupon distinguished *Times-Mirror*, and, further, held that the estoppel rule was "governed by the general rule which holds that by a dismissal of a condemnation proceeding after judgment fixing the value of the property sought to be condemned, a municipality is not liable for damages in the absence of statute authorizing such recovery."²⁴ It appears the court felt that since the plaintiff had begun building after he received notification of the proposed condemnation, all the equities were not in his favor.

In order to provide a more effective theory of estoppel against abandonment by the condemnor, the California Legislature in 1961 adopted Code of Civil Procedure section 1255a(b), which states:

The court may, upon motion made within 30 days after such abandonment, set aside the abandonment if it determines that the position of the moving party has been *substantially changed* to his detriment in *justifiable reliance* upon the proceedings and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.²⁵

This provision will solve many of the problems caused by abandonment, provided the words "substantial" and "justifiable" are liberally construed by the courts.²⁶ No cases have, as yet, directly construed

¹⁷ *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N B-1, B-54-55 (1960).

¹⁸ 12 Cal. 2d 291, 83 P.2d 942 (1938).

¹⁹ *Id.* at 293, 83 P.2d at 943.

²⁰ *Id.*

²¹ *Id.* at 294, 83 P.2d at 943.

²² *Id.* at 294, 83 P.2d at 944.

²³ *Id.*

²⁴ *Id.* at 301, 83 P.2d at 947.

²⁵ CAL. CODE CIV. PROC. § 1255a(b) (emphasis added).

²⁶ Section 1255a(c) of the California Code of Civil Procedure, a closely related section, was designed to aid victims of an abandonment in providing for reimbursement for "necessary attorneys fees" in a condemnation proceed-

this amendment; however, one California appellate court has stated that the statute merely codifies the old equity rule limiting the right of a public entity to abandon a condemnation proceeding.²⁷

Advantages of Present System of Valuation

A solution of the difficulties caused by the existence of different dates for taking and valuation does not lie in changing the valuation date to make it coincide with the "taking" date. It is desirable to have the valuation date early in the proceedings, and any attempt to move this date to a later stage of the proceedings should be resisted. The advantage gained from an early valuation date is that it avoids many of the problems caused by the fluctuations in property values that usually accompany condemnation proceedings.²⁸

These fluctuations are generally created by attempts of land speculators to profit from a potential condemnation.²⁹ Normally, during the period between the beginning of feasibility studies and the time of final site selection, property values in the area under study tend to move upwards. This increase in value is due primarily to speculative anticipation of a generous award.³⁰ After the condemnation proceedings commence, the fluctuations in the value of the property will depend upon whether a large or small award is expected from the court.³¹

In California, because the valuation occurs at the commencement of the action (i.e., the date of the service of summons), fluctuations that occur after that date are excluded. Thus, the only fluctuations that the California courts must take into consideration are those that occur before the condemnation action commences. In many states there is a considerable lag between the date on which notice of the condemnation proceeding is made and the date on which the property is valued. When the valuation date is delayed until the date of the final court judgment, or the date of entry by the condemnor onto the

ing incurred before a subsequent abandonment. The word "necessary" has, however, been narrowly applied, and the condemnee has not been able to get full reimbursement for attorneys fees. See *California Interstate Tel. Co. v. Prescott*, 228 Cal. App. 2d 408, 39 Cal. Rptr. 472 (1964); *Inglewood v. Johnson*, 113 Cal. App. 2d 587, 248 P.2d 536 (1952). This strict construction given section 1255a(c) may be indicative of the judicial treatment which section 1255a(b) can expect.

²⁷ *In re Mercantile Guarantee Co.*, 263 A.C.A. 356, 365, 69 Cal. Rptr. 361, 367 (1968) (dictum): "The application of the estoppel doctrine in this area is a fairly old and well-established practice. Section 1255(a) subdivision (b) codifies the doctrine . . ."

²⁸ *Burt v. Merchants' Ins. Co.*, 115 Mass. 1, 14 (1874).

²⁹ Glaves, *Date of Valuation in Eminent Domain*, 30 U. CHI. L. REV. 319, 348 (1963).

³⁰ Note, *Updating The Time of Taking in Condemnation Proceedings in Oklahoma*, 4 TULSA L.J. 95, 100 (1967).

³¹ *Id.*

property, there is more time for fluctuating market activity. In other words, if the valuation date is the date of the judgment, the courts are faced with the burdensome task of sorting out what percentage of the rise in value during the proceedings is natural, and what percentage is induced by the condemnation proceeding itself. Since the valuation date in California is the date the action is commenced, this burden on the court is reduced. The court merely must determine the value of the property at the commencement of the proceedings, and any fluctuation or inflationary changes after that date need not be considered.

When the courts of states that have a valuation date *subsequent* to commencement of the condemnation proceedings are faced with fluctuations in value, they usually circumvent the problems caused by these fluctuations by estimating the value of the property before the taking was authorized. This is done by admitting evidence of the value of the same or similar property prior to the date that notice of the condemnation was given.³² In California, since the valuation date is early in the proceedings, there are fewer fluctuations with which to contend. Further, the California valuation date always occurs at a fixed point, *i.e.*, the date of service of summons, and both sides can rely on the fact that the value of the property is to be determined as of that date.³³ In other states, where the valuation can occur on more than one date, there can be no such reliance.³⁴

Changing the valuation date to a later point in the condemnation proceedings, *e.g.*, the date of taking, would avoid the hardships resulting from the time interval between the valuation and taking dates. However, the advantages of avoiding undue fluctuations in property value, in addition to the advantage of having the valuation date predetermined, outweigh the benefit that can be gained from delaying the valuation date.

Changing the Time of Taking

The law of condemnation must accommodate two fundamental rights. The first is the right of the public acting through its governmental bodies to take private property for public use, and the second is the right of the individual to receive just compensation for property so taken. Often in California, because the date of taking is after the final order of condemnation, neither right is efficiently served.

If the taking date were changed to correspond to the valuation date, the problems occurring in the time between the valuation and taking dates would be eliminated. The condemnee would be relieved of his property at an earlier date, and would avoid the risk of an abandonment. The condemnor also would be aided by an earlier taking date, since delays in the commencement of government proj-

³² *United States v. Miller*, 317 U.S. 369, 379 (1943).

³³ 13 *RUTGERS L. REV.* 284, 287 (1958).

³⁴ See *Metler v. Easton & A.R.R.*, 37 N.J.L. 222, 224 (Sup. Ct. 1874); *Yara Eng'r Corp. v. Newark*, 136 N.J. Eq. 453, 464, 42 A.2d 632, 638 (Ch. 1945).

ects would be reduced.

The reason for delaying the "taking" until the final adjudication is to protect the condemnee by ensuring that all relevant matters are examined before the "taking."³⁵ Theoretically, the judicial aspect of the condemnation proceeding is designed to provide a forum for deciding whether the condemnation is a necessity,³⁶ whether the "taking" is for a public use,³⁷ and whether the compensation is indeed "just."³⁸

In practice, however, condemnation proceedings in most states accomplish much less than this. The *necessity* of the "taking" has been effectively eliminated as a justiciable issue in California because there is, in all practicality, immunity from judicial reversal on the determination of necessity.³⁹ It is provided by statute that

. . . when the [governing body] shall by resolution or ordinance . . . have . . . determined that the public interest and necessity require the acquisition . . . the property described in such resolution or ordinance, shall be conclusive evidence: (a) of the public *necessity* of such proposed public utility or public improvement, (b) that such property is necessary therefor, and (c) that such proposed public utility or improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury . . .⁴⁰

In *People ex rel. Department of Public Works v. Chevalier*,⁴¹ the California Supreme Court refused to consider allegations of fraud, bad faith, or abuse of discretion because the ordinance and resolution authorizing the condemnation action were said to be conclusive evidence of the necessity for the proposed public improvement.⁴²

The determination of whether the "taking" is for a *public use* is also rarely an issue. California courts hold that the power to determine what uses are public rests solely with the legislature.⁴³ Almost

³⁵ See *Sanborn v. Belden*, 51 Cal. 266, 268-69 (1876).

³⁶ *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 532, 28 P. 681, 682 (1891).

³⁷ *University of So. Cal. v. Robbins*, 1 Cal. App. 2d 523, 525, 37 P.2d 163, 164 (1934).

³⁸ *Id.*

³⁹ *People ex rel. Department of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959); *Anaheim Union High School Dist. v. Vieira*, 241 Cal. App. 2d 169, 171-72, 51 Cal. Rptr. 94, 96 (1966).

⁴⁰ CAL. CODE CIV. PROC. § 1241(2) (emphasis added).

⁴¹ 52 Cal. 2d 299, 340 P.2d 598 (1959).

⁴² *Id.* at 307, 340 P.2d at 603.

⁴³ *Kern County High School Dist. v. McDonald*, 180 Cal. 7, 13, 179 P. 180, 183 (1919); *Stockton & V.R.R. v. Common Council*, 41 Cal. 147, 168-69 (1871). The United States Supreme Court leaves the determination of public use to the governmental agency in a federal condemnation action. *Berman v. Parker*, 348 U.S. 26, 32-34 (1954). The California Law Revision Commission states that the question of public use is no longer of importance to the courts, and the only issue left to litigate is just compensation. *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure*, 8 CAL. L. REVISION COMM'N 1109 (1967).

any objective that the legislature or other authorized governing body determines is for the public welfare will be upheld by the courts.⁴⁴ The only time the courts investigate whether the "taking" is for a "public use" is when it appears that the property might be going to a private concern.⁴⁵

Since the condemnee cannot prove want of necessity for the "taking," and the existence of a "public use" is generally presumed in favor of the condemnor, the basic problem in this type of litigation is usually the determination of "just compensation."⁴⁶ Since "just compensation" could be determined with the same degree of precision after the "taking" as before, there appears to be no reason to prohibit a "taking" by the condemnor prior to the determination of damages. In other words, the fact that the "taking" date is advanced to a point earlier in the condemnation proceedings (e.g., the date of valuation) would not affect the process of computing the award, nor would it change the "justness" of the compensation.

Constitutionality of the California Condemnation Procedure

It is questionable whether the California policy of setting the valuation date prior in time to the "taking" date fulfills the constitutional requirement that just compensation be paid for the public taking of private property. The United States Supreme Court has ruled that in federal condemnation actions the condemnee is entitled to the full market value of his property at the date of the taking.⁴⁷ The Supreme Court allows an alternate basis for recovery only when price fluctuations, caused by land speculator activity, have made the market price an inaccurate indicator of the normal value of the property.⁴⁸ Although every state has adopted a constitutional provision providing that "just compensation" be paid an individual whose property is taken by a state,⁴⁹ many states do not require that the valuation occur at the date of the taking.⁵⁰

⁴⁴ *Los Angeles County v. Anthony*, 224 Cal. App. 2d 103, 106, 36 Cal. Rptr. 308, 310 (1964).

⁴⁵ See *People ex rel. Department of Pub. Works v. Mahabedian*, 171 Cal. App. 2d 302, 307-08, 340 P.2d 1053, 1056 (1959), where the court stated that evidence may be introduced to show that the condemned land was to go to a private auto park.

⁴⁶ *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure*, 8 CAL. L. REVISION COMM'N 1109 (1967).

⁴⁷ *Danforth v. United States*, 308 U.S. 271 (1939); *Murray v. United States*, 130 F.2d 442 (D.C. Cir. 1942); see *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

⁴⁸ *United States v. Miller*, 317 U.S. 369 (1943); *Shoemaker v. United States*, 147 U.S. 282 (1892); *Kerr v. South Park Comm'rs*, 117 U.S. 379, 386 (1881); *United States v. Vilbig*, 208 F.2d 663 (5th Cir. 1953).

⁴⁹ See, e.g., *Beals v. Los Angeles*, 23 Cal. 2d 381, 387, 144 P.2d 839, 843 (1943); *Frost Coal Co. v. Boston*, 259 Mass. 354, 359, 156 N.E. 676, 677 (1927); 3 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 8.1(2) (rev. 3d ed. 1965).

⁵⁰ *Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 173, 370 P.2d 652,

The United States Supreme Court has refused to invalidate California Code of Civil Procedure section 1249, which provides that valuation be determined on the date of summons, because the Court felt it could not "reverse the decisions of the state courts in regard to questions of general justice and equitable considerations in the taking of property."⁵¹ The Court thereby implied that a state could follow its own methods, within reason, of ensuring just compensation. Massachusetts⁵² and New York,⁵³ however, have declared unconstitutional statutes similar to the California Code of Civil Procedure section 1249 on the grounds of a taking of property without "just compensation." Both courts held that in order to satisfy the requirement of "just compensation," the condemnee must be compensated for the full value of his property as of the date of the "taking." It was felt that any valuation date prior to the "taking" would not satisfy this requirement. The California courts have affirmed the constitutionality of section 1249 on the rationale that valuation must be placed at some time prior to the "taking" if compensation is to be paid at the *time* of the "taking."⁵⁴ One appellate decision, not followed elsewhere in California, circumvented the question of the constitutionality of separating the taking and valuation dates by classifying the valuation date as a "constructive taking."⁵⁵ However, since a "taking" only occurs on the date that a final order of condemnation is rendered, any theory of a "taking," constructive or otherwise, before the date is unfounded.

Alternatives to California's Rules

Federal Rule

The federal condemnation procedures illustrate that many of California's problems may be alleviated by providing an earlier date of "taking." The original federal rule required federal courts to follow the procedure of the state in which the condemned land was located.⁵⁶ This meant that emergency federal projects were delayed for long periods of time when the federal government instituted condemnation proceedings in states like California. The new federal condemnation rules⁵⁷ eliminate reliance on state procedures and provide a uniform

659 (1962); see 3 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 8.5(2) (rev. 3d ed. 1965), for a compilation of states that assess compensation before the taking.

⁵¹ *Hooker v. Los Angeles*, 188 U.S. 314, 320 (1902).

⁵² *Edwards v. Bruorton*, 184 Mass. 529, 69 N.E. 328 (1904).

⁵³ *Forster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (1893).

⁵⁴ See, e.g., *Pasadena v. Porter*, 201 Cal. 381, 390, 257 P. 526, 530 (1927); *California S.R.R. v. Kimball*, 61 Cal. 90 (1882).

⁵⁵ *Los Angeles v. Blondeau*, 127 Cal. App. 139, 141, 15 P.2d 554, 555 (1932).

⁵⁶ *In re Secretary of Treasury*, 45 F. 396, 397 (S.D.N.Y. 1891).

⁵⁷ Rule 71A of Federal Rules of Civil Procedure, 28 U.S.C. Rule 71A (1964).

practice to be followed in federal courts. Although this procedure is efficient, in order to eliminate any delay in emergency situations the Federal Declaration of Taking Act⁵⁸ was passed. It provides for an immediate taking of property by the federal government whenever necessary:

Upon the filing said declaration of taking and of the deposit in the court . . . of the estimated compensation . . . title . . . shall vest in the United States, and the right of just compensation for the same shall vest in the persons entitled thereto⁵⁹

The Act cannot be used in condemnation proceedings where no immediate need to acquire possession of the property is shown.⁶⁰

The Court of Claims explains the mechanics of the Declaration of Taking Act as follows:

[T]hat in any condemnation action, the Government may, contemporaneously with the filing of the petition or any time prior to judgment, file a declaration of taking covering the lands described in the petition. The declaration must contain certain prescribed statements and descriptions and if, at the time the declaration is filed the United States deposits the estimated compensation for the lands with the court, title in fee simple absolute or some lesser estate, if requested, will then vest in the United States. At the same time, the right to immediately receive the estimated compensation vests in the landowner.⁶¹

Once the declaration of taking is filed⁶² and title vests, the federal government is bound to pay some award. Since the amount of the "estimated compensation" deposited in court, as provided by the Act, is only tentative and does not prejudice the ultimate award, it is not reviewable except when wanton abuse of discretion by the condemnor in estimating damages is alleged.⁶³

The amount deposited in court as an estimate binds neither party to an amount of damages equal to the estimate; indeed, it has "no bearing whatsoever on value."⁶⁴ An opportunity for a court determination of damages is afforded the condemnee after the "taking," and he may have a jury trial on all relevant issues.⁶⁵ Moreover, if

⁵⁸ Federal Declaration of Taking Act, 40 U.S.C. § 258a (1964).

⁵⁹ *Id.*

⁶⁰ Rule 71A of Federal Rules of Civil Procedure, 28 U.S.C. Rule 71A (1964).

⁶¹ *Travis v. United States*, 287 F.2d 916, 918-19 (Ct. Cl. 1961).

⁶² Federal Declaration of Taking Act, 40 U.S.C. § 258a (1964). The Declaration must contain the following when filed: "(1) A statement of the authority under which and the public use for which said lands are taken. (2) A description of the lands taken sufficient for the identification thereof. (3) A statement of the estate or interest in said lands taken for said public use. (4) A plan showing the lands taken. (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken."

⁶³ *Lee v. United States*, 58 F.2d 879, 880 (D.C. Cir. 1931).

⁶⁴ *Chapman v. United States*, 169 F.2d 641, 644 (10th Cir. 1948).

⁶⁵ *United States v. Theimer*, 199 F.2d 501, 503-04 (10th Cir. 1952).

the condemnee is dissatisfied with the verdict, he is permitted an appeal to a higher federal court.⁶⁶

Recommendation of the California Law Revision Commission

The California Law Revision Commission recently has recommended an expansion⁶⁷ of the situations where the condemnor may acquire the right to immediate possession⁶⁸ of property. The commission called for legislation providing for immediate possession where "the court determines that (a) the plaintiff is entitled to take the property, and (b) the plaintiff's need for early possession clearly outweighs any hardship the owner . . . will suffer if possession is taken . . ."⁶⁹ In all other situations where the condemnor would not be harmed by possible delays, the current California condemnation procedure would be retained. It was also suggested that the right to immediate possession "be limited to public entities, public utilities, and common carriers."⁷⁰

The recommendation contains safeguards designed to eliminate abuse of the right to an immediate taking. The condemnee is given the right to answer the immediate possession order,⁷¹ and to introduce evidence of any hardship that he would suffer if immediate possession is authorized. Contrary to the Federal Declaration of Taking Act, title to the condemned property would not vest with the "taking," and could be obtained only after the final court adjudication.⁷² The purpose of withholding title is ostensibly to give the condemnee an opportunity to present his case before ownership is transferred.

The Commission's recommendation is not fully adequate since it fails to change the date of "taking." Even in those situations covered by the Commission's recommendation, no proposals regarding compensation for improvements, or eliminating the gap between the date of valuation and the date of "taking," were made. In those situations not covered by the proposed legislation, that is, where no need for immediate possession can be proved, the same problems relating to valuation, delay and abandonment would still exist.

An immediate "taking" without transfer of title, as recommended by the Commission, would not cure the problems of abandonment, since until the title passed there would always be the possibility that the condemnor would abandon. If the condemnor did take possession, however, there probably would be a significant change of position,

⁶⁶ See *Clarksville v. United States*, 198 F.2d 238, 240 (4th Cir. 1952).

⁶⁷ California Code of Civil Procedure section 1243.4 provides the only situations where immediate possession is allowed, and it only applies to rights of way and reservoir land.

⁶⁸ *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure*, 8 CAL. L. REVISION COMM'N 1109-10 (1967).

⁶⁹ *Id.* at 1110.

⁷⁰ *Id.*

⁷¹ *Id.* at 1222.

⁷² See *id.* at 1132-33.

which would invoke the estoppel doctrine of California Code of Civil Procedure section 1255 (b). However, if the abandoned land were originally vacant, there probably would be no change of position as contemplated in the statute, and no recovery could be obtained if the owner merely lost an opportunity to sell the land while it was under governmental control. Further, the Commission made no recommendation to ease the requirements for invoking the doctrine of estoppel.

Model Eminent Domain Code

Instead of vesting the power to transfer title to land in a judicial body, many states have given that power to governmental agencies.⁷³ The usual procedure of these states is to provide for an immediate "taking" with an automatic judicial review of the damages awarded.⁷⁴ Such an alternative is presented in the Preliminary Draft of the Model Code of Eminent Domain,⁷⁵ which has recommended a procedure allowing the condemnor to obtain title to property quickly while still providing judicial protection for the condemnee.

Under this procedure, the taking is to occur at the time of the filing of a petition by the condemnor in a court of proper jurisdiction:

Condemnation . . . shall be effected only by the filing in court of a declaration of taking, with such security as may be required . . . and thereupon the title . . . to the property condemned shall pass to the condemnor on the date of such filing⁷⁶

Since title does pass with the "taking," there is no risk of abandonment by the condemnor. If the condemnor abandons the condemnation proceedings, he has the obligation to dispose of the property. If the property has not been substantially improved, it must first be offered to the condemnee at the same price paid by the condemnor.⁷⁷

The Model Code further provides that the amount of compensation is measured by the value of the property at the time of the "taking." Judicial protection is provided for the condemnee by allowing either the condemnee or the condemnor to file a petition requesting the appointment of a commission, which is empowered to determine the final award of damages.⁷⁸ The parties, however, may waive com-

⁷³ This is commonly termed an administrative method of taking and is described in 6 NICHOLS, *THE LAW OF EMINENT DOMAIN* § 24.112 (rev. 3d ed. 1965) as follows: "A board of public officers, or the directors of a corporation seeking to acquire land by eminent domain and having the requisite authority from the legislature, passes a formal vote, ordinance or resolution to take certain designated land, and upon the filing of a copy of this vote, or "taking" . . . the title to the land at once vests in the condemnor." See, e.g., *Bates v. Boston Elevated R.R.*, 187 Mass. 328, 332, 77 N.E. 1017, 1019 (1905).

⁷⁴ PA. STAT. ANN. tit. 26, §§ 1-801 to -807 (Supp. 1967).

⁷⁵ ABA MODEL EMINENT DOMAIN CODE (Preliminary Draft, 1967), in 2 REAL PROP., PROB. & TRUST J. 365 (1967).

⁷⁶ *Id.* § 303, at 368.

⁷⁷ *Id.* § 313, at 372-73.

⁷⁸ *Id.* § 503, at 374.

mission proceedings by written agreement, stipulate damages,⁷⁹ and proceed directly to the court on the remaining issues of law.⁸⁰

The right to redress under the Model Code does not stop with a commission hearing. An appeal may be filed within thirty days after the conclusion of the commission hearing with the court in which the notice was originally filed.⁸¹ From there the decision can be appealed in the same manner as any other case.⁸² These provisions grant adequate protection to both parties.

The Model Eminent Domain Code, by not requiring a judicial proceeding prior to the taking, avoids the problems associated with a delayed "taking." By allowing the title to pass at the start of proceedings, the Model Code liberates the land from the inactivity that results when ownership is in one party and control in another. With such an early "taking," the condemnor can proceed more quickly with the public improvement, and the condemnee is assured of compensation.

Also, since title would pass as soon as the condemnor filed a petition, governmental agencies could make liberal use of the power to condemn property. But since the courts now, in reality, only review the compensation to be awarded, there would be no greater risk of more frequent condemnation activity than already exists. Governmental agencies have a natural tendency to try to expand their powers. Since the award of damages is most frequently the only justiciable issue, any attempts to control the agencies' power to condemn by cumbersome judicial procedures only succeeds in injuriously delaying condemnation actions.

While the provisions of the Model Eminent Domain Code are desirable, it is doubtful that they could be adapted in California without a constitutional amendment. Since the eminent domain clause of the California Constitution has been interpreted to require final adjudication *before* the taking,⁸³ the constitution would most likely have to be amended to allow for an earlier taking.⁸⁴

⁷⁹ *Id.* § 501, at 374.

⁸⁰ *Id.* § 502, at 374.

⁸¹ *Id.* § 504A, at 377-78.

⁸² *Id.* § 504A, at 379.

⁸³ CAL. CONST. art. I, § 14: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for the owner . . ." For even a minor change such as allowing an immediate taking in right-of-way and reservoir condemnation actions, an amendment to the constitution was passed. The California Law Revision Commission, in its recommendation, recognized the need for a constitutional amendment to carry out their limited proposals.

⁸⁴ An acceptable amendment might be: Private property shall not be taken or damaged for public use without an estimate of probable compensation having first been made, and a bond for that amount paid into court. If judicial proceedings to ascertain just compensation have not begun within ninety days from the date of the taking, a writ may be issued ordering the immediate commencement of proceedings. The amount determined as just

Conclusion

Because of the late date of taking in California, the parties to a condemnation action are faced with intolerable hardships and delays. The recommendation of the California Law Revision Commission, in failing to change the time of taking completely, does not solve all the problems. In condemnation actions where there would be no immediate possession under the Commission recommendation, the same problems of valuation and abandonment would still exist. Additionally, much litigation to contest the necessity of an immediate possession order probably would result from this proposal.

The Model Code on Eminent Domain provides a satisfactory solution to the problems surrounding the time of taking. Since the taking under the Code occurs upon the filing of a petition to condemn, the solution would eliminate the gap between the valuation and taking dates. The condemning agency would be able to begin its projects without delay, and the condemnee could obtain some immediate compensation. As title is transferred with the taking, there would be no risk to the condemnee of an abandonment.

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compensation must be paid to the condemnee within seven days of the final order.

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