

File

7/18/60

Memorandum No. 64 (1960)

Subject: Study No. 36(L) - Condemnation: Allocation of Award.

Attached is a proposed recommendation and statute that may be considered by the Commission in connection with the study on allocation and apportionment of the award. The statute was prepared by the consultant and has been revised by the staff.

The recommendation and statute are presented so that consideration of this subject may be expedited if the consultant's recommendations are approved.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

July 18, 1960

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford, California

T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

Relating to

ALLOCATION AND APPORTIONMENT OF THE AWARD IN  
EMINENT DOMAIN PROCEEDINGS

NOTE: This is a tentative recommendation and proposed statute prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

7/18/60

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Allocation and Apportionment of the Award in

Eminent Domain Proceedings

When the ownership of property taken by eminent domain is divided, problems are presented as to the manner in which the various lessors, lessees, life tenants or remaindermen are to be compensated. Under existing California law, the value of the entire parcel of property sought to be condemned is determined as if there were but one owner, and the value so determined is then allocated among the owners of the various interests in the property. Although the Commission does not recommend a change in the basic method of determining the value of the various interests in property taken by eminent domain, the Commission believes that the trial procedure followed in California in determining the value of the various interests should be revised. In addition, the rules governing apportionment of the award between a lessor and lessee when property subject to a lease is partially taken should be revised. Accordingly the Commission makes the following recommendations.

Trial Procedure

Under existing California law the trial in an eminent domain case is divided into two phases if there are several estates or interests in the property being taken. During the first phase of the trial, the jury determines the total amount that the condemner is to pay for the property. After this amount is determined, the jury considers additional evidence and determines the manner in which the total award is to be divided among

the various persons owning interests in the property.

The requirement that the value of the various interests be determined separately from the total amount of the award operates unfairly. A lessor may find that the evidence he presents to show the value of the entire property is not given full credence during the first phase of the case, for at that time the jury may discount the evidence because it appears self-serving. Yet in the second phase of the case, when the amount of the award to be given the lessee is to be determined, the jury may give more weight to this evidence. Moreover, a lessee, who must be compensated out of the total award determined by the jury in the first phase of the trial, is often precluded from introducing evidence to show the bonus value of his lease during the first portion of the trial--even though that value would reflect on the value of the fee. Many times this procedure serves to keep from the jury facts and data of which it should be aware in order to make an accurate determination of the total value of the property.

The Law Revision Commission believes that the trier of fact would be in a better position to determine the total value of the property to be taken by eminent domain if it hears all of the evidence relating to the value of the separate interests at the same time it hears the evidence relating to the total value of the property and if, at the same time it determines the total value, it also determines the value of the various interests in the property. Therefore, the Commission recommends the enactment of legislation to eliminate the two-phase trial in eminent domain proceedings and to require that the value of all separate interests in the property be determined at the same time as the value of the entire property is determined.

### Apportionment in Partial Taking Cases.

When property subject to a lease is partially taken by eminent domain, the court first determines the amount of the rent provided in the lease that is allocable to the part of the leased premises that is taken and the amount of the rent allocable to the part not taken. The lessee is then given out of the total award the present value of the future rental obligation that is allocable to the portion of the property taken. In addition, the lessee receives the amount by which the economic value of the lease exceeds the future rental obligation.

This rule is unfair to lessors of property for it deprives them of their security for the lessee's performance. During the term of the lease, the lessor's best security for the performance of the lessee's obligations is the property itself; for if the lessee fails to perform, the lessor may always reclaim the property. But, under this rule, the condemner has the property and the lessee has all of the money representing the future rent; and the lessor is required to trust the lessee's good faith and solvency for the payment of the rest of the rent. The larger the portion of the property subject to the lease that is taken by the condemner, the more acute is the lessor's problem for the property remaining may be of little value and the amount given the lessee may approach the total rental obligation.

Under existing law when all of the property subject to a lease is taken, the lease is deemed terminated. The rental obligation ceases, and the lessor does not have to trust the lessee for payment. There is no reason to have a different rule when only a portion of the leased premises is condemned. When the amount of the rental obligation allocable to the

portion of the property taken has been determined, that part of the rental obligation should also cease to exist.

At the same time, if the portion of the leased property which was the material inducement to the lessee to enter into the lease is taken by the condemner, the entire lease should be subject to termination. The situation so far as the lessee is concerned is little different than if a portion of the premises had been destroyed. Just as the lease could be terminated under Civil Code Section 1932 if the premises were substantially destroyed, so also the lease should be terminable if the premises are substantially taken by condemnation. In such a situation, though, the lessee should receive in compensation for his loss the value of the entire lease, not merely the value of the portion of the lease covering the portion of the property taken. However, only the value of that portion of the lease allocable to the property taken by the condemner should be apportioned to the lessee out of the total award. As the total award is merely the market value of the portion of the property taken plus the damage caused to the remainder, only the value of the separate interests in the portion of the property taken should be apportioned to the various owners out of the award. The value of the lease allocable to the portion of the premises not taken should be paid by the condemner to the lessee in addition to the amount paid for the property actually taken.

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

7/18/60

An act to amend Section 1246.1 of the Code of Civil Procedure and to add Sections 1246.2 and 1246.3 to the Code of Civil Procedure, relating to eminent domain.

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

SECTION 1. Section 1246.1 of the Code of Civil Procedure is amended to read:

1246.1. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for ~~[said]~~ the property ~~[first]~~ determined as between plaintiff and all defendants claiming any interest therein [;] thereafter in the same proceeding At the same time the amount of the award is determined, the respective rights of ~~[such]~~ the defendants in and to the award shall also be determined by the court, jury [;] or referee and the award apportioned accordingly. The costs of determining the apportionment of the award shall be allowed to the defendants and taxed against the plaintiff except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

SEC. 2. Section 1246.2 is added to the Code of Civil Procedure, to read:

1246.2 (1) When all of the property that is subject to a lease is taken by eminent domain, the lease terminates upon the taking of possession or title by the plaintiff, whichever is earlier.

(2) Subject to Section 1246.3, when only a part of the property that is subject to a lease is taken by eminent domain, the lease is cancelled as to the part taken upon the taking of possession or title by the plaintiff, whichever is earlier, but the lease remains in force as to the remainder; and the portion of the rent reserved in the lease that the court, jury or referee determines to be allocable to the portion of the lease that is cancelled is thereupon extinguished.

SEC. 3. Section 1246.3 is added to the Code of Civil Procedure, to read:

1246.3 (1) When part of the property subject to a lease is sought to be condemned, the lease terminates upon the taking of possession or title by the plaintiff, whichever is earlier if the court determines, upon motion of either party to the lease made prior to the admission of any evidence as to value or damages, that:

(a) An essential part of the real property subject to the lease is being taken; or

(b) The part thereof which was the material inducement to the lessee to enter into the lease is being taken.

(2) If the lease terminates as provided in subdivision (1) of this section, the plaintiff shall pay to the lessee, in addition to all other compensation and damages the plaintiff is required to pay, the amount that the court, jury or referee determines to be the value of the lease allocable to the portion of the property not taken.