

MTg.
8/5/60

Memorandum No. 68 (1960)

Subject: Study No. 36(L) - Condemnation: Pre-Trial and Discovery

Attached is a draft recommendation and statute on discovery in eminent domain proceedings. As suggested by the Commission, the statute tends to follow the Wisconsin statute contained in the study.

The suggested addition to the code was placed in the general discovery section so that all discovery rules might be found in one place. The subdivision in which the amendment was placed is the subdivision dealing with the scope of discovery; this seemed to be the logical place for the amendment. The Commission may wish to consider, however, the possibility of placing the amendment in a separate section or in the title on eminent domain. Subdivision (xii) of the added language refers to matter that is admissible under Section 1256.2 of the Code of Civil Procedure.

The suggested amendment is limited to eminent domain proceedings, although it might logically be extended to any action in which the value of property is in controversy; however, the scope of the Commission's authority is limited to eminent domain.

Your attention is directed to the last sentence of subdivision (b) (3) of Section 2016. This is existing language. Your attention is also directed to Rust v. Roberts, 171 C.A.2d 772, 341 P.2d 46 (1959) which holds that some of the matters listed in our amendment are privileged. The Commission may wish to consider whether the last sentence of subdivision (b) (3)

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Pre-Trial and Discovery

The Law Revision Commission has considered and reports herein on the problems arising in eminent domain proceedings under the existing law relating to pre-trial procedure and discovery.

The Commission recommends no legislation relating to pre-trial procedure because, under present California law, pre-trial procedure is governed by court rules promulgated by the Judicial Council. The enactment of statutes in this area would result in a confusing and hybrid pre-trial system partly governed by statute and partly by rule.

There is considerable uncertainty among the bench and bar concerning the scope of discovery in eminent domain proceedings under California's statutory discovery rules. The study prepared for the Law Revision Commission reveals that some judges believe that virtually all information contained in an appraisal report prepared for an attorney is privileged, while others believe that the report itself and similar communications to the attorney are privileged but the knowledge and opinion of the appraiser are not privileged.

The more restrictive decisions dealing with discovery in eminent domain proceedings are inconsistent, the Commission believes, with the general development of California law relating to discovery. In other areas of litigation, recent decisions have greatly clarified the scope of discovery.

For example, recent decisions discussed in the study, while holding that communications by an expert to an attorney may be privileged and that communications made in confidence by an attorney's client to an expert for the purpose of transmission to the attorney are privileged, have also held that the knowledge of the expert is not privileged and is subject to discovery even though the expert may have reported such knowledge to an attorney on the ground that knowledge which is not otherwise privileged does not become privileged merely by being communicated to an attorney.

The Commission does not believe that the discovery rules in eminent domain proceedings should be any different than the discovery rules applicable to other actions and proceedings. It recommends, therefore, that the scope of discovery in eminent domain proceedings be clarified by legislation. The legislation proposed by the Commission would simply reaffirm that the established proposition - that any matter, not privileged, which is relevant to the subject matter of a lawsuit is subject to discovery - is fully applicable to eminent domain proceedings. In an eminent domain proceeding, such relevant matter includes the opinions of experts upon the value of the property and the supporting data upon which they rely, for this is the evidence upon which the findings of value must be based. Such relevant matter also includes information which may be used for impeachment, such as information relating to an expert's expenses and fees which is admissible under Code of Civil Procedure Section 1256.2.

If information of this character is subject to discovery prior to trial, the trial itself may be expedited in some cases, and in others settlement may be facilitated. Even more important, such discovery will tend to assure the accuracy of the data relied on in appraisal testimony. Unless the

opposing party knows in advance of the data upon which an expert at the trial has relied in determining the value he cannot effectively test the reliability of such data through cross-examination. This is because the expert usually relates facts that he has learned from others and the participants in the transactions relied upon are seldom before the court. The opposing party may not be able to introduce evidence to impeach the reliability of such data because it may be too late to obtain such evidence or even to learn of its existence. If such data is discoverable this problem is obviated. Fruitless cross-examination to test the reliability of data that is accurate may be thus avoided. Moreover, value is usually proven by expert testimony; and if both parties know in advance of the trial the range of expert opinion as to the value of the property, they may be willing to settle the case rather than run the risk of a verdict anywhere within the range of the expert testimony.

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

An act to amend Section 2016 of the Code of Civil Procedure relating to depositions and discovery.

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

SECTION 1. Section 2016 of the Code of Civil Procedure is amended to read:

2016. (a) Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. Such depositions may be taken in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein. After commencement of the action, the deposition may be taken without leave of court, except that leave of court, granted with or without notice, and for good cause shown, must be obtained if the notice of the taking of the deposition is served by the plaintiff within 20 days after service of the summons on, or appearance of, the defendant. The attendance of witnesses may be compelled by the use of subpoena as provided in Chapter 2 (commencing with Section 1985), Title 3, Part 4 of this code.

(b) (1) Unless otherwise ordered by the court as provided by subdivision (b) or (d) of Section 2019 of this code, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of the other party, including the existence, description, nature, custody, condi-

tion and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

(2) Unless otherwise ordered by the court as provided by subdivision (b) or (d) of Section 2019 of this code, in a proceeding in eminent domain the deponent may be examined regarding the value of the property sought to be condemned and his opinion thereof and upon any matter, not privileged, relevant thereto, including but not limited to (i) the highest and best use of the property, (ii) the applicable zoning, (iii) sales and other market data relating to the same or comparable property, (iv) severance damage, if any, (v) special benefits, if any, (vi) the value of the land and the cost of reproduction or replacement of the improvements thereon less depreciation, and the rate of depreciation used, (vii) the capitalization of the income from the property, (viii) his qualifications to express an opinion of the value of the property, (ix) the existence, description, custody and location of any maps, plans, or pictures of the property, (x) the identity and location of any persons having knowledge of the value of the property or of any matter relevant thereto, (xi) the qualifications of any persons having knowledge of the value of the property to express opinions relating to such value and (xii) the expenses and fees paid or to be paid by any party to the proceeding to the deponent or to any person to obtain his opinion of the value of the property or to testify in the proceeding. Nothing in subdivision (b) (2) shall be deemed to limit the extent to which any person may be examined under subdivision (b) (1) of this section in eminent domain proceedings.

(3) It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably

calculated to lead to the discovery of admissible evidence. All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction.

(c) Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of this code.

(d) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party to the record of any civil action or proceeding or of a person for whose immediate benefit said action or proceeding is prosecuted or defended, or of anyone who at the time of taking the deposition was an officer, director, superintendent, member, agent, employee, or managing agent of any such party or person may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is dead; or (ii) that the witness is at a greater distance than 150 miles from the place of trial or hearing, or is out of the State, unless it appears

that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) Subject to the requirements of this section, a party may offer in evidence all or any part of a deposition, and if such party introduces only part of such deposition, any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) Subject to the provisions of subdivision (c) of Section 2021 of this code, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. Except where the deposition is

used under the provisions of paragraph (2) of subdivision (d) of this section, the introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent, or for explaining or clarifying portions of the said deposition offered by an adverse party, makes the deponent the witness of the party introducing the deposition, as to the portions of the deposition introduced by said party. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by another party.