

#36(L)

6/9/65

Memorandum 65-39

Subject: Study No. 36(L) - Condemnation Law and Procedure (The Right to Immediate Possession)

Attached are two copies of a Tentative Recommendation relating to the right to immediate possession. The proposed constitutional amendment set out in the Tentative Recommendation is the same as the one recommended by the Commission in 1961. In 1961, the Senate Judiciary Committee did not approve the proposed constitutional amendment, but we are hopeful the situation has changed in view of the enactment in 1961 of procedures that permit the withdrawal of all or any portion of the deposit in immediate possession cases.

Also attached is a copy of the 1961 Recommendation relating to taking possession and passage of title in eminent domain proceedings. See pages B-28--B-38 for the portion of the study pertinent to the proposed constitutional amendment. We are planning to revise this portion of the study and to bring it up to date. We suggest that the revised study ultimately be published with the tentative recommendation.

Please mark any revisions you believe should be made on one copy of the attached tentative recommendation. If the tentative recommendation is approved by the Commission, we plan to distribute it as soon as the current legislative session is concluded.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

TEMPERATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

CONDEMNATION LAW AND PROCEDURE

No. 5. The Right to Immediate Possession

BACKGROUND

Section 14 of Article I of the California Constitution grants to certain specified public agencies the right to take possession of property sought to be condemned immediately upon commencement of eminent domain proceedings, or at any time thereafter, if the condemnation is for right-of-way or reservoir purposes. The Constitution forbids the taking of possession prior to judgment when the eminent domain proceeding is instituted by a different agency or for a different purpose.

The constitutional provisions authorizing immediate possession require that the condemning agency deposit a sum of money, in an amount determined by the court, sufficient to secure to the owner payment of the compensation he is entitled to receive for the taking "as soon as the same can be ascertained according to law." The Constitution does not require, however, that the deposit or any other sum of money be paid to the owner when the possession of his property is taken or at any other time prior to the judgment.

The statutes implementing the constitutional provision provide that, prior to the taking of possession, the condemner must deposit in court such amount as the court determines to be the "probable just compensation" which will be made for the taking of the property and any damage incident thereto. At any time after the deposit is made, the condemnee may obtain a court order permitting him to withdraw the amount deposited.

RECOMMENDATION

The Commission has concluded that the provisions of Section 14 of Article I of the Constitution that grant the right to take immediate possession should be revised. These provisions severely limit the agencies by and the purposes for which possession prior to judgment may be taken and do not provide adequate guarantees to the property owner whose property is so taken.

The taking of immediate possession of property often benefits both the public condemner and the private condemnee. So far as the condemner is concerned, the right to take immediate possession permits it to follow an orderly and systematic program of property acquisition and project construction. Many public improvements are financed by bond issues, and an undue delay in the acquisition of one essential parcel may delay construction to a sufficient extent that the improvement cannot be constructed at all with the funds realized by a particular bond issue or, at least, must be drastically curtailed in scope. To avoid such a delay, the condemner may be forced to pay the owner of one parcel far more than the property is worth and far more than the owners of the surrounding property received. The right of the condemner to take the property is rarely disputed. In virtually all condemnation actions the only question for judicial decision is the value of the property. But because possession cannot be obtained prior to judgment except in those few instances specified in the Constitution, many vitally needed public improvements are delayed or prevented even though there is no real issue as to the public's right to take the property.

And if the condemnee's right to payment prior to the taking of possession is adequately guaranteed, the taking of immediate possession frequently benefits him as well as the condemner. Upon commencement of condemnation proceedings, a landowner is deprived of many of the valuable incidents of ownership. He

cannot receive any compensation for improvements to the property made after that time. He is precluded, as a practical matter, from selling or renting the property, for few persons wish to purchase a law suit. He is deprived of any increase in the value of his property occurring thereafter, for the condemnation award is based on the value of the property at the commencement of the proceeding. Yet, no compensation is given for these inconveniences. Moreover, because his property is being taken, he must seek out and purchase new property to replace it and prepare to move. At the same time he must incur the expenses attendant upon litigating the condemnation action. While these expenses must be incurred whether immediate possession is taken or not, the landowner receives no compensation until the conclusion of the litigation unless immediate possession is taken. If he has no available funds to meet these expenses, the landowner may be forced to settle for an inadequate amount in order to relieve the immediate economic hardship caused by the condemnation action. Where immediate possession is taken, however, the existing statutory law assures that the condemnee will have available to him an amount fixed by the court as the probable compensation that will be paid in the eminent domain proceeding. This enables the condemnee to go to trial on the issue of value, if he wishes, and still receive sufficient funds to obtain other property while awaiting trial. Condemnees without substantial assets other than the condemned property have found this to be of great assistance in meeting the problems that arise when property is condemned. If the condemnee does not need the money immediately, he may decline to withdraw it from the court, in which case the use of his property by the condemner is compensated for by interest on the final condemnation award computed at the rate of seven percent from the date immediate possession was taken.

Despite the fact that expansion of the right to take immediate possession would provide substantial benefits to both condemners and condemnees, it is difficult to achieve under the existing California constitutional scheme. A constitutional amendment must be submitted to the voters each time any expansion of the right to immediate possession is necessary. In the past, such constitutional amendments have been rejected, possibly because the voters did not fully appreciate the complex factors involved and possibly because previous proposals to expand the right to immediate possession did not include any provision for the payment of compensation to the landowner at the time his property was taken.

If there is to be any substantial improvement in this area of the law, the Constitution should be revised to give the Legislature the power to determine which agencies should have the right to immediate possession and the public purposes for which the right may be exercised. At the same time, the Constitution should be revised to guarantee the property owner that he will actually receive compensation at the time his property is taken. These revisions will make it unnecessary to amend the Constitution every time it is found that the existing immediate possession procedures are faulty and will permit California to follow the trend established in other states, the majority of which are far more liberal than California and allow the exercise of the right to immediate possession for many purposes.

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

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

2. The Legislature should be given the power to determine what agencies should have the right to take immediate possession and the procedure to be followed in such cases, subject to the constitutional right of the owner to be promptly compensated.

3. The phrase "irrespective of any benefits from any improvement proposed by such corporation" should be stricken from the Constitution. This phrase is applicable only to private corporations² and precludes such entities, in condemnations for rights of way or reservoirs, from setting off the benefits which would result to the condemnee's remaining land against the condemnee's claim for damages to such land.³ The phrase is discriminatory in that it is not applicable to unincorporated condemners⁴ and may be unconstitutional under the equal protection clause of the Federal Constitution.⁵ The phrase is uncertain in meaning, for some courts have held that it merely states a rule that is applicable to all condemners that "general" benefits may not be set off⁶ while others have indicated that it refers to "special" benefits which all other condemners are permitted to set off.⁷

, the purposes for which immediate possession may be taken.

¹ Moran v. Ross, 79 Cal. 549, 21 Pac. 958 (1889); People v. McReynolds, 31 Cal. App.2d 219, 223, 87 P.2d 734, 737 (1939).
² San Bernardino etc. Ry. v. Haven, 94 Cal. 489, 29 Pac. 875 (1892); Pacific Coast Ry. v. Porter, 74 Cal. 261, 16 Pac. 774 (1887).
³ Moran v. Ross, 79 Cal. 549, 21 Pac. 958 (1889).
⁴ See dissenting opinion of McFarland, J., in Beveridge v. Lewis, 137 Cal. 619, 620, 74 Pac. 1083, 1086 (1902), and the opinion of Department Two, referred to in the dissenting opinion of Mr. Justice McFarland, see 87 Pac. 1040 (1902); see also concurring opinion of Beatty, C. J., in Moran v. Ross, *supra* note 4, at 552, 21 Pac. at 959.
⁵ Beveridge v. Lewis, *supra* note 5; cf. People v. Thompson, 43 Cal.2d 13, 28, 271 P.2d 597, 616 (1954), and People v. McReynolds, 31 Cal. App.2d 219, 223, 87 P.2d 734, 737 (1939).
⁶ Cf. Coiler v. Merced Irr. Dist., 218 Cal. 554, 571, 2 P.2d 790, 796 (1921); People v. McReynolds, *supra* note 4.

It is important to note that the adoption of the proposed constitutional amendment would make no extension in the right to immediate possession for no change is made in the existing statutes which limit the right to immediate possession to those agencies and purposes now specified in the Constitution. The constitutional amendment would merely permit the Legislature to determine when an extension or contraction of the purposes for which the right to immediate possession may be exercised is warranted and when this power should be extended to or taken away from particular agencies.

RECOMMENDED CONSTITUTIONAL AMENDMENT

The Commission's recommendation would be effectuated by the adoption of the following constitutional amendment:

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

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

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

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