Commissioner primarily responsible: Yale

#36 7/11/68

Memorandum 68-65

Subject: Study 36 - Eminent Domain (The Right to Take - "Byroads")

Civil Code Section 1001 provides:

> Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of Title 7, Part 3, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such Title is "an agent of the State," or a "person in charge of such use," within the meaning of those terms as used in such Title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.

Code of Civil Procedure Section 1238 lists a great number of "public uses" for which the power of eminent domain may be exercised. In preparing a comprehensive eminent domain statute, we will need to repeal Civil Code Section 1001 and Code of Civil Procedure Section 1238 and substitute clear statements in the various codes as to who may condemn for what purposes. This is a major effort and the staff is still engaged in preparing the necessary background analysis.

One of the more difficult problems that must be considered in the resolution of the right to take problems is the extent to which a private person may exercise the right of condemnation. In Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955), a private individual was permitted to condemn a sewer easement across his neighbor's land. This memorandum is concerned with another aspect of so-called "private" condemnation--condemnation of access to landlocked land.

The background study (attached) traces the historical development of the California law on this problem. The staff recommendations are found on pages 7-8 of the background study. See also Senate Bill No. 18, as introduced and as amended, for language designed to implement in part the staff recommendations.

Respectfully submitted,

John H. DeMoully
Executive Secretary

THE DECLARED PUBLIC USES

"Byroads" and Ways of Necessity

As enacted in 1872, Code of Civil Procedure Section 1238 authorized takings for "byroads" in subdivision (4) and for "byroads leading from highways to residences and farms" in subdivision (6). Subdivision (6) was amended in 1895[1] to cover "byroads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes."[2]

The need for resort to eminent domain to provide byroads is partially alleviated by the common law doctrine of "ways of necessity." A way of necessity arises when a grantor conveys land shut off from access to a road by the grantor's remaining land or by his land and the land of a stranger or where a similar situation is created by a partition, either voluntary or involuntary.[3] Subdivision (6), however, is not merely a statutory substitute for the common law way of necessity.[4] When the facts that give rise to a common law way of necessity are established,[5] the right will be recognized; there is no need to institute eminent domain proceedings or to compensate the owner of the land over which the way of necessity is located.[6] Nevertheless, situations exist where a landowner lacks access to an established road and does not have common law way of necessity. The right to take property by eminent domain for a "byroad" may provide a solution to this problem where the owner's efforts to purchase a right of access across his neighbor's land fail.

In the leading California decision, Sherman v. Buick,[7] the taking of private property for a byroad was held proper where

the road was in fact to be a public road, open to all who desired to use it, even though the road was designed to provide access for the land of a private person and he bore the cost of establishing and maintaining the road. In Sherman, the court held constitutional an 1861 act that authorized the county board of supervisors to take private property to establish "public" and "private" roads. The court held that the term "private road" was used merely to designate a particular kind of public road,[9] and that, notwithstanding the somewhat inaccurate language,[10] the use was public:

> Roads, leading from the main road, which run through the county to the residences or farms of individuals, are of public concern and under the control of the Government. Taking private property for the purposes of such roads is not a taking for private use. They are open to everyone who may have occasion to use them, and are therefore public. Their character as public roads is unaffected by the circumstances, that in view of their situation, they are but little used, and are mainly convenient for the use of a few individuals, and such as may have occasion to visit them socially or on matters of business, nor by the circumstance that in view of such conditions the Legislature may deem it just to open and maintain them at the cost of those most immediately concerned instead of the public at large. The object for which they are established is none the less of a public character, and therefore within the supervision of the Government. To call them "private roads" is simply a legislative misnomer, which does not affect or change their real character. By-roads is a better name for them and one which is less calculated to mislead the uninitiated.

In drafting subdivision (6) of Section 1238, which superseded a part of the 1861 act referred to in the Sherman case, the 1872 Code Commissioners adopted the court's suggestion that roads used primarily for the convenience of a few individuals be described as "byroads."[11] The pertinent portion of the remainder of the 1861 act was compiled in Section 2711 of the 1872 Political Code, which read:

> Private or by-roads may be opened for the convenience of one or more residents of any road district in the same manner as public roads are opened, whenever the Board of Supervisors may for like cause order the same to be viewed and opened, the person for whose benefit the same is required paying the damages awarded to the landowners, and keeping the same in repair.

In 1883, Section 2711 was repealed and substantially re-enacted as Political Code Section 2692.[12] Section 2692 was amended in 1913[13] to include coverage for ways for "a canal" and in 1919[14] the words "irrigation, seepage, or drainage" were inserted before "canal."[15] The section was repealed in 1943, the portion relating to canals being compiled in Water Code Sections 7020-7026 and the portion relating to private or byroads not being continued. In 1949, Political Code Section 2692 was again repealed,[16] and Streets and Highways Code Sections 1128-1133 were enacted by the same act[17] to permit "private or by-roads" to be opened, laid out, or altered for "timber access purposes." A 1955 amendment[18] made these sections applicable to any private or byroad but the sections were repealed in 1961.[19] No special statutory procedure now exists[20] whereby an individual or public entity may condemn to provide the "byroads" described in subdivision (6).

In City of Los Angeles v. Leavis,[21] it was held that a city could condemn property for a public street relying solely on Civil Code Section 1001 and Section 1238. Hence, although no appellate decision on this question has been found, it seems fairly clear that subdivision (6) of Section 1238 is itself authority for a public entity to exercise the power of eminent domain to provide "byroads."[22] However, it seems unlikely that any

county or city would be willing to institute condemnation proceedings to provide a "byroad" even if the benefited person were willing to bear the cost of acquiring and maintaining the road.

Appellate courts in California have not decided whether a private person may maintain an action under Civil Code Section 1001 to acquire private property for the sort of byroad described in subdivision (6).[23] Nevertheless, a series of cases has established the proposition that such a byroad is a public use,[24] and the California Supreme Court held in Linggi v. Garovotti[25] that a private individual may maintain an eminent domain proceeding to provide a sewer connection for a single residence. Although land-locked property does not present the health hazard present in the Linggi case, it is likely that California would follow the holdings in numerous other states[26] and permit a private person to acquire a byroad in an appropriate case.

Private corporations have sought unsuccessfully in two cases to condemn access to land. In General Petroleum Corporation v. Hobson[27] the holder of an oil and gas prospecting permit granted by the State under a 1921 act[28] brought an eminent domain proceeding in the federal court to acquire an easement over private property from the highway to the place where it planned to prospect for oil. A demurrer to the corporation's complaint was sustained. The corporation contended that the taking was a public use authorized both under the 1921 act and under Code of Civil Procedure Section 1238. The 1921 act included a provision giving the right of eminent domain to permittees to acquire a right of way over

private property, but the court held this provision void as not embraced within the title of the act. An alternative ground for the holding was that the complaint did not show that the taking was for a public purpose:

> Nor can section 1238, subd. 5, C.C.P. of California, authorize the taking of private property for "roads * * * for working mines." Subdivision 6: "By-roads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes." The plaintiff has no working mines, nor any active industry, nor is it in any sense within any of the provisions of this section, nor is the property covered by the permit used or contemplated to be used for a public purpose, nor can the court assume a public use or purpose where none is claimed, or none can be reasonably deduced from conceded or established facts. Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577, is not elucidating, nor is Monterey County v. Cushing, 83 Cal. 507, 23 P. 700; nor was this issue before the court in County of Madera v. Raymond Granite Co., 139 Cal. 128, 72 P. 915. These cases are cited because particularly relied upon by the plaintiff. All cases cited have been examined, but have not [sic] application.
>
> Eminent domain can only be invoked because the interest of the public is greater than the interest of the private individual, and may not be invoked by a private person for private gain or advantage. The plaintiff's permit prospecting for oil enterprise by reason thereof is speculative and wholly private, and the private property may not be taken for a private purpose. Clearly the complaint does not state a cause of action; complainant does not show that it has legal capacity to maintain the action, nor that the taking is for a public purpose. [Emphasis in original.][29]

The meaning of this language is not entirely clear. It is clear, however, that the court concluded that the use for which the property was sought to be acquired--prospecting for oil--was not one within any of the provisions of Section 1238. The court may have overlooked the general authorization to condemn for "byroads" in subdivison (4). Some of the language indicates that the court also may have had in mind the well-established proposition that the mere fact that a particular use is listed in Section 1238 does not mean that the use is a public use under the facts of a particular case.[30] The court also seems to take the position that the

residence, farm, mine, mill, factory or buildings for operating machinery referred to in subdivision (6) must already be in existence at the time access is sought to be conedmned. This line of reasoning would not apply to subdivision (4) which authorizes exercise of the power of eminent domain for "byroads" without any limitation or description such as that found in subdivision (6), but the court did not refer to subdivision (4). The opinion does not appear absolutely to preclude a private person from taking private property for a byroad described in subdivision (6). At the same time, the holding in the case would permit no significant application of the "byroad" authorization in subdivision (4).

In City of Sierra Madre v. Superior Court,[31] a land developer sought to maintain a proceeding in the name of the city to acquire an access road to a planned subdivision in order to meet the requirements for subdivision approval. As the city had not authorized the proceeding, prohibition issued to prevent its prosecution. The opinion does not indicate whether the proceeding would have been permitted had the developer brought the suit in its own name.

In addition to establishing that the byroad would be a "public use" under the circumstances of the particular case, the condemnor would also have to show that the proposed taking is "necessary."[32] Reasoning from the common law way of necessity cases[33] and the Linggi decision,[34] it seems safe to predict that the courts would not allow condemnation if there were any other reasonable alternative to the taking.

This survey demonstrates the uncertainty that now exists as to whether property may be taken to provide an access road from an established highway to the land of a private person. This uncertainty

should be eliminated in any revision of the law of eminent domain. The following recommendations are made in this connection:

1. The provision in subdivision (4) of Section 1238 of the Code of Civil Procedure relating to "byroads" and subdivision (6) of the same section should also be eliminated. These provisions should be superseded by more explicit statutory provisions.

2. A statutory provision should be enacted to provide expressly that any public condemnor that acquires property for a public use may acquire by eminent domain such additional property as is necessary to provide access to property not taken which would otherwise become landlocked by the taking. It is fairly clear that the taking of property to provide access in this situation would be held to be a public use.[35] Although such a statute might be limited to takings for limited access highways, such a limitation is not recommended. Since it is the taking by the condemnor that creates the need for the access road, the condemnor should have authority to provide access where this would be the appropriate method of mitigating the adverse consequences of the taking. Any attempted abuse could be prevented by finding that the taking for the access road is not a public use under the facts of the particular case.[36] The California Supreme Court has recently taken a very liberal position toward "excess condemnation"[37] and a significant benefit of the recommended statutory provision would be elimination of the need for excess condemnation in some situations.

3. Consideration should be given to reenacting the substance of former Streets and Highways Code Sections 1128-1133. These sections were repealed in 1961. They permitted the county board

of supervisors to take property for a road, open to all who desired to use it, but required that the cost of acquisition, establishment, and maintaining the road be imposed on the person or persons primarily benefited. This procedure places the board of supervisors in the position of determining whether the access road should be established. On the other hand, it imposes the costs on the benefited persons. If this type of procedure were adopted, the statute probably should permit cities and other public entities concerned with road work to utilize the procedure.

4. As an alternative to the preceding recommendation, private persons might be authorized to condemn easements that would be dedicated to public use, be open to the public, and provide ingress and egress from private property to established roads. Such a taking should be permitted only upon a showing of strict necessity and not where the person has another method of access, even though the latter is inconvenient. The burden of maintaining the access road should be imposed on the person seeking access. Many of the other states authorize the use of the power of eminent domain to acquire property for such purposes. It is possible that this recommendation would merely restate existing California law.

Senate Bill No. 18, introduced at the 1968 session of the California Legislature, would have effectuated the substance of this recommendation.

As maximum utilization of land is important, and as a strict showing of necessity would adequately protect the condemnee, this seems to be one of the few instances in which "private condemnation" would be justified.

THE DECLARED PUBLIC USES
BYROADS AND WAYS OF NECESSITY
FOOTNOTES

1. Cal. Stats. 1895, Ch. 98, §.1, p. 89.

2. It is interesting to trace the historical development of "byroads." In colonial times, statutes permitted individuals to condemn private property for access roads for their private use. As additional areas of the country were opened to settlement, similar statutes were enacted. It was generally assumed that these statutes were valid until the 1840's and 1850's when a narrowing of the concept of public use occurred; in all but a few states, the use of eminent domain to acquire land for private roads for the exclusive use of a few persons was held a private use. In California and some other states, the statutes were either construed or revised to permit the taking of lands for access roads only if the roads were open to public use. In a substantial number of states, constitutional provisions were adopted to permit the taking of private property by eminent domain for access roads. Ala. Const., Art. I, § 23 (1901); Ariz. Const., Art. II, § 17 (1910); Colo. Const., Art. II, § 14 (1876); Ga. Const., Art. I, § 2-301), para. 1 (1877); Ill. Const., Art. IV, § 30 (1870); Kan. Const., Art. 12, § 4 (1859); La. Const., Art. III, § 37 (1921); Miss. Const., Art. 4, § 110 (1890); Mo. Const. of 1945, Art. I, § 28 (1875); N.Y Const., Art. I, § 7, subd. (c) (1846); Okla. Const., Art. II, § 23 (1907); Wash. Const., Art. I, § 16 (1889); Wyo. Const., Art. 1, § 32 (1889). See also Fla. Const., Art. XVI, § 29 (1885); Ore. Const., Art. I, § 18 (1857). The California Constitutional Convention did not consider such a provision; only a passing reference was made in the debates to this problem. II Debates and Proceedings of the Constitutional

Convention of the State of California 1028 (1881)[1878-1879] (Remarks of Mr. Shafter).

It has been recognized in California and elsewhere that the taking of property for use as a public road is a taking for a public use, even though the road is used primarily to provide access to the land of a single individual. E.g., Sherman v. Buick, 32 Cal. 241 (1867). 29A C.J.S. Eminent Domain § 34 (1965)("[T]he principle to be deduced from the cases bearing on the question seems to be that if the road, when laid out, is in fact a public road, open to all who may desire to use it, it is a public use, and valid, although the road is primarily designed for the benefit of an individual, and although the cost of laying out and maintaining such road is borne in whole or in part by the petitioners therefor." [footnotes omitted]). Compare 26 Am. Jur.2d Eminent Domain § 47 (1966).

The historical development is traced in Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 Boston U. L. Rev. 615 , 617-626 (1940). For an historical account in a particular state, see Notes, 11 Ala. L. Rev. 182 (1958)(Alabama); 33 Ky. L. J. 129 (1944)(Kentucky).

3. E.g., Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104 (1916) (partition); Reese v. Borghi, 216 Cal. App.2d 324, 332-333, 30 Cal. Rptr. 868, 873 (1963); Tarr v. Watkins, 180 Cal. App.2d 362, 4 Cal. Rptr. 293 (1960). See also Daywalt v. Walker, 217 Cal. App.2d 669, 675, 31 Cal. Rptr. 899, 902 (1963). A way of necessity continues only so long as the necessity exists. See generally Martinelli v. Luis, 213 Cal. 183, 1 Pac. 980 (1931); Cassin v. Cole, 153 Cal. 677, 679, 96 Pac. 277, 278 (1908).

4. See Taylor v. Warnaky, 55 Cal. 350 (1880); Reese v. Borghi, 216 Cal. App.2d 324, 329, 30 Cal. Rptr. 868, 871 (1963).

5. The right exists only in case of extreme necessity and not where the landowner has another means of access, even though inconvenient. Marin County Hosp. Dist. v. Cicurel, 154 Cal. App.2d 294, 302, 316 P.2d 32, 37 (1957). See also Smith v. Shrbek, 71 Cal. App.2d 351, 360, 162 P.2d 674, 678 (1945).

6. Taylor v. Warnaky, 55 Cal. 350 (1880); Blum v. Weston, 102 Cal. 362, 369, 36 Pac. 778, 780 (1894); Reese v. Borghi, 216 Cal. App.2d 324, 30 Cal. Rptr. 868 (1963).

7. 32 Cal. 242 (1867).

8. Cal. Stats. 1861, Ch. 380, § 7, p. 392.

9. "[T]he legislature of this state . . . [i]n the plan devised by them . . . have for the purpose of classification divided roads into 'public and private,' and provided how they may be laid out and established and how maintained. The former are to be laid out and maintained at the expense of the county or road district at large, and are therefore called 'public.' The latter at the expense of such persons as are more especially and directly interested in them, and therefore called 'private.' But the latter are as much public as the former, for any one can travel them who has occasion--and no more can be said of the former." 32 Cal. at 253. See also 45 Ops. Cal. Atty. Gen. 98 (1965). Cf. Brick v. Keim, 208 Cal. App.2d 499, 503-504, 25 Cal. Rptr. 321, 323-324 (1962).

10. 32 Cal. at 255-256.

11. See Code Commissioners' Note to subdivision (6): "Subdivision 6 supersedes part of § 7 (Stats. 1861, p. 392), which prescribes

the mode for laying out private roads. This clause has been drawn to make it conformable to the decision in Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 597." The same word--"byroad"--was also used in subdivision (4) of Section 1238.

12. Cal. Stats. 1883, Ch. 10, p. 5. Section 2692 was held constitutional. Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700 (1890); Los Angeles County v. Reyes, 3 Cal. Unrep. 775, 32 Pac. 233 (1893); Lake County v. Allman, 102 Cal. 432, 36 Pac. 767 (1894); County of Madera v. Raymond G. Co., 139 Cal. 128, 72 Pac. 915 (1903).

13. Cal. Stats. 1913, Ch. 61, § 1, p. 62.

14. Cal. Stats. 1919, Ch. 73, § 1, p. 117.

15. Cal. Water Code § 150002, Cal. Stats. 1943, Ch. 368, p. 1895.

16. Cal. Stats. 1949, Ch. 883, § 6, p. 1652.

17. Cal. Stats. 1949, Ch. 883, §§ 1-5, p. 1652.

18. Cal. Stats. 1955, Ch. 1308, § 1, p. 2374.

19. Cal. Stats. 1961, Ch. 1354, § 1, p. 3133.

20. Streets and Highways Code Sections 969.5 and 1160-1197 provide a procedure for the improvement of a private easement or roadway not accepted or acceptable into the county highway system but upon which a permanent public easement is offered or a privately owned road where a right of way has been granted or leased to the county for its own use or for the use of the state or other public agency for public purposes, but these sections do not authorize condemnation. As to expenditure of public funds to maintain roads not accepted as county roads, see 45 Ops. Cal. Atty. Gen. 98 (1965).

24. See cases cited in note 12 supra.

25. 45 Cal.2d 20, 286 Pac. 15 (1955).

26. E.g., Komposh v. Powers, 75 Mont. 493, 244 Pac. 298 (1926), Derryberry v. Beck, 153 Tenn. 220, 280 S.W. 1014 (1926), State v. Superior Court, 145 Wash. 307, 260 Pac. 527 (1927). See also note 2 supra.

27. 23 F.2d 349 (1927).

28. Cal. Stats. 1921, Ch. 303, p. 404.

29. 23 F.2d at 350.

30. See discussion, supra, at p.___.

31. 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961).

32. See discussion supra, at p. ____.

33. See note 5, supra.

34. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

35. Department of Public Works v. Farina, 29 Ill.2d 474, 194 N.E.2d 209 (1963); Luke v. Mass. Turnpike Auth., 337 Mass. 304, 149 N.E.2d 225 (1958); May v. Ohio Turnpike Comm., 172 Ohio St. 555, 178 N.E.2d 920 (1962); Tracy v. Preston, Director of Highways, 172 Ohio St. 567, 178 N.E.2d 923 (1962).

36. See People v. Superior Court, 68 Cal.2d ___, 65 Cal. Rptr. 342, 436 P.2d 342 (1968).

37. Id.

38. The bill would have added a new Section 1238.8 to the Code of Civil Procedure to read, in part, as follows:

> 1238.8. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:
> The acquisition of an easement by the owner of private property for which there is a strict necessity for an easement for access to a public road from such property. The easement which may be taken shall afford the most

24. See cases cited in note 12 supra.

25. 45 Cal.2d 20, 286 Pac. 15 (1955).

26. E.g., Komposh v. Powers, 75 Mont. 493, 244 Pac. 298 (1926), Derryberry v. Beck, 153 Tenn. 220, 280 S.W. 1014 (1926), State v. Superior Court, 145 Wash. 307, 260 Pac. 527 (1927). See also note 2 supra.

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31. 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961).

32. See discussion supra, at p. ___.

33. See note 5, supra.

34. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

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> The acquisition of an easement by the owner of private property for which there is a strict necessity for an easement for access to a public road from such property. The easement which may be taken shall afford the most

reasonable access to the property for which the easement is taken consistent with other uses of the burdened land and the location of already established roads, and shall include the right to install or have installed utility facilities therein. The public shall be entitled, as of right, to use and enjoy the easement which is taken. The owner of the property for which the easement is taken shall maintain any such easement.

* * * * *

The bill was referred to interim study.