#36 9/25/69

Memorandum 69-116

Subject: Study 36 - Condemnation (Constitutional Revision)

The Constitutional Revision Commission has taken up the provisions of the California Constitution relating to eminent domain. The Committee that is considering the eminent domain provisions has solicited our comments on what revisions should be made in those provisions.

The Commission has published its tentative recommendation indicating needed revisions in Article 1, Section 14. Moreover, the Commission has determined that Article I, Section 14 1/2 should be repealed. It is desirable, however, to review our tentative recommendation at this time in light of our experience since then in attempting to deal with eminent domain problems. I believe that some changes should be made in the provisions as we suggested it be revised.

For background, we are enclosing the Minutes of the Committee meeting of the Constitutional Revision Commission (Exhibit I), the staff background study prepared by the Constitutional Revision Commission staff (a rather superficial job but a good summary), and our printed tentative recommendation on this subject.

The revision of Article 1, Section 14, is set out on page 1167 of our pamphlet. We suggest that the second sentence be revised to read:

> Unless the parties otherwise agree, the owner is entitled to have the Just compensation determined by a jury.

This change is suggested for two reasons: First Section 23a of Article II would be replaced by Section 1206 of the Public Utilities Code (see Chapter 585 of the 1969 Statutes). Second, the Commission is recommending that the

parties be permitted to submit the issue of just compensation to arbitration. Moreover, it is possible that the Legislature might wish to establish a procedure of arbitration or some other special procedure which would be available at the option of the property owner. To permit the Legislature to establish such a procedure in the future, Section 14 of Article I should not guarantee the condemnor the right to a jury trial.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Minutes of the Article I Committee

Constitution Revision Commission

August 27, 1969

The meeting was called to order by Chairman Burnham Enersen at 10:00 a.m., on Wednesday, August 27, 1969 at the Hilton Hotel, San Francisco, California. Present were Commissioners Babbage, Busterud, McClure and Patsey and Staff Attorney Williams.

Outside observors included Mr. Joseph Easley, California Department of Public Works; Mr. Dugald Gillies, California Real Estate Association; Mr. Paul N. McCarron, California Builders Council; and Mr. Stuart Hall, Consultant, Assembly Committee on Elections and Constitutional Amendments.

Chairman Enersen indicated that the next Committee meeting would take place at 6:00 p.m. on September 24 in Newport Beach.

Staff Attorney Williams directed the Committee's attention to Background Study 1 and explained that the Article would be broken into four categories for purposes of revision consideration. He then summarized the study and some revision issues posed by Sections 14 and 14 1/2 concerning eminent domain.

Section 14

Commissioner McClure moved to retain Sections 14 and 14 1/2. Commissioner Busterud made a substitute motion that the sense of the Committee be to retain some eminent domain provisions in the Constitution. Both motions were withdrawn to permit more extensive analysis of several issues presented by Section 14.

The Staff was instructed to solicit comment from those concerned with this Section on the following issues, among others:

1. Should the California Constitution contain any limitations on the power of eminent domain?

2. Since the Federal Constitution and Federal statutes require payment of just compensation for property taken by eminent domain, are any State provisions in this area necessary or desireable?

3. Should the present rule requiring payment before land is taken be retained?

4. Should exceptions to the "pay first" rule now existing in favor of the State and various public bodies to permit preliminary possession be retained? If so, should the exceptions be specified in the Constitution or should the Legislature be granted authority to determine who might take possession before paying.

Following further discussion, it was the consensus of the Committee that the provision in Section 14 declaring certain logging railroads to be a public use should be considered for deletion.

Section 14 1/2

Following a lengthy discussion on the theory and practice of excess condemnation, the Committee agreed that no action should be taken on this Section pending further analysis.

The meeting adjourned at 3:15 p.m.

ARTICLE I

DECLARATION OF RIGHTS

BACKGROUND STUDY 1

Constitution Revision Commission
August, 1969

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Introduction

Article I of the California Constitution contains the "Declaration of Rights." For purposes of consideration by the Article I Committee this Article has been divided into four topics:

Eminent Domain

- Sec. 14 - Eminent Domain
- Sec. 14 1/2 - Acquisition of Land for Public Improvement - Excess Condemnation

Government and Laws

- Sec. 2 - Purpose of Government
- Sec. 3 - United States Constitution Supreme Law
- Sec. 11 - Uniform General Laws
- Sec. 12 - Civil Power Supreme - the Military
- Sec. 21 - Privileges and Immunities
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- Sec. 1 - Inalienable Rights
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- Sec. 5 - Habeas Corpus
- Sec. 6 - Bail - Unusual Punishment - Detention of Witnesses
- Sec. 7 - Trial by Jury
- Sec. 8 - Pleading Guilty Before Magistrate - Prosecutions

Sec. 13 - Criminal Prosecutions - Rights of Accused - Due Process of Law - Jeopardy - Comment on Failure of Defendant to Testify - Depositions
Sec. 19 - Unreasonable Seizure and Search - Warrant
Sec. 20 - Treason

The Committee will be furnished with a staff prepared background study on each topic.

Sections 14 and 14 1/2 of Article I pertain to eminent domain and are discussed together in this initial background study. The provisions in these Sections are divided by topic as follows: eminent domain in general, jury determination of compensation, preliminary possession, railroads and excess condemnation. With respect to these subjects, this study sets forth the pertinent text of the constitutional provisions, the history of those provisions, a comment analysis and revision issues.

Eminent Domain In General

Section 14, part of sentence one

> 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 . . . which 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 . . . .

History

The 1849 Constitution provided: "No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."[1]

1. 1849 Const., art. I, §8 (Emphasis added.).

In 1879 this compensation provision was segregated and expanded to provide in a separate section:

> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into Court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which 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.[2]

This Section was amended in 1911, 1918, 1928 and 1934 to add provisions which are discussed in subsequent subjects of this study.

Comment

This discussion is devoted to the general provisions concerning eminent domain.

Eminent domain is the right of the people or government to take private property for public use.[3] Since this right or power is inherent in sovereignty, it is not expressly provided in our Constitution. Instead, the above provision in Section 1 limits the power by requiring, among other things, payment of compensation when the power is exercised.[4]

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2. 1879 Const., art. I, §14.
3. Code Civ. Proc. §1237.
4. People v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598 (1959).

Property which may be taken by eminent domain includes all private property, and, subject to certain conditions, state lands and property appropriated to a different public use than the use for which it is taken.[5]

The Legislature has specified numerous public uses for which property may be taken including use for public buildings, public utilities, city or county uses, drainage, highways, parks, wharves, dams, mining facilities, sewers, lumbering facilities, cemeteries, fairs, airports, slum clearance and any use authorized by the federal government.[6]

The power of eminent domain is usually exercised for these and other public purposes by the federal government, the State and other public entities. However, any person, public or private, may acquire property by eminent domain so long as it is taken for one of the public uses specified by the Legislature.[7]

The above provisions are "self-executing and hence neither consent to sue the State nor the creation of a remedy by legislative enactment is necessary to obtain relief thereunder."[8]

The above portion of Section 1, as previously stated, is a limitation upon the exercise of this power. Its provisions have been judicially construed and the following words or phrases each contribute a different dimension to this limitation: private property, taken, damaged, public use and just compensation.

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5. Code Civ. Proc. §1240.
6. Code Civ. Proc. §1238.
7. Civil Code §1001.
8. Bacich v. Board of Control, 23 C.2d 343, 346, 144 P.2d 818 (1943).

Private Property

This phrase brings to mind the traditional concept of property as a plot of real estate, and, of course, real estate is included within the phrase. In addition, the phrase includes personal property.[9]

Certain intangible property rights with measurable economic value also are within this phrase. A good illustration is People v. Ricciardi[10] in which the State appealed from a judgment favorable to the owners of a slaughterhouse and meat market in an eminent domain proceeding brought by the State to take part of their land for highway enlargement purposes. The State's principal objections to the judgment related to the inclusion of compensation based on (a) substantial impairment of direct access from the remaining property to the highway formerly abutting it due to the construction of a highway underpass and service road as part of the project and (b) loss of visibility to and from the highway with respect to the remaining property because highway traffic would pass the property in an underpass. These interests, although their impairment was shown to have injured the market value of the remaining land, were, according to the State's contentions, non-compensable "inconveniences" of the kind which property owners often sustain in the interest of the general welfare when the police power is being exercised by the State.

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9. Sutfin v. State, 261 Cal. App. 2d 50, 67 Cal. Rptr. 665 (1968)
(Owner of automobile damaged by state flood control project entitled to compensation.).
10. 23 Cal. 2d 390, 144 P.2d 799 (1943).

The California Supreme Court opinion observes that, "in the absence of a declaration by other competent authority," the courts were necessarily placed in the position of declaring and defining the existence of "rights" protected by Section 14 from taking or damaging. The Legislature had provided no assistance to the courts in their discharge of this function: "Neither in the Constitution nor in statutes do we find any declaration of the incidents of ownership or elements of value which specifically creates or defines or limits the two rights which are involved here." Since no statutory guidance had been provided by the Legislature, other than certain general statutory definitions of property found in the Civil Code, it became "necessary for this court to determine whether the claimed items are, or shall be, included among the incidents or appurtenances of real property . . . for which compensation must be paid when the same is taken or damaged for a public use." Upon an evaluation of the judicial precedents both in California and elsewhere, and of relevant policy factors, the court held that both interests being asserted were protected by Section 14 against substantial impairment and affirmed the judgment.

As the foregoing discussion indicates the concept of private property is fluid rather than fixed. Whether a particular economic interest is private property for eminent domain purposes is determined by the courts on a case by case basis. This process of determination has been described as follows by a noted commentator:

> The propriety of legislation declaring the scope and extent of constitutionally protectible property interests is supported also by forthright judicial acceptance of the fact that the determination whether private property has been taken or damaged is essentially a problem of balancing of competing policies. Thus: "If the question [of

extent or character of a claimed property right] is one of first impression its answer depends chiefly upon matters of policy, a factor the nature of which, although at times discussed by the courts, is usually left undisclosed."

Typically in cases where a property owner is asserting damage to an interest not previously adjudicated, one finds the courts struggling with the task of balancing the opposing considerations, conscious of the fact that, in determining the extent of protectible property interests, "the problem of definition is difficult" although identification "of the opposite extremes is easy."[11]

Taken

Private property usually is "taken" in eminent domain proceedings by the condemning authority acquiring title to and possession of the property.

There also is a judicial trend toward a rule that governmental interference with property which causes destruction of or substantial injury to the property interests of the owner constitutes a "taking" and is compensable even though the owner retains the property.[12] For example, when government military planes, coming into a nearby airport, flew so low over plaintiff's poultry farm that chickens were frightened and killed, and plaintiffs themselves were so disturbed that the business was ruined it was held by the United States Supreme Court that this invasion of the lower airspace was as much

11. Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727, 777-78 (1967). (Citations omitted.).
12. See 3 Witkin, Summary of California Law, pp. 2022-24 (7th ed. 1960).

the taking of an easement as an invasion of the land itself and was compensable.[13]

In another case the federal government built a dam, which raised the level of a river and not only permanently flooded part of plaintiffs' land, but also damaged the new bank of the river by erosion. It was held that the plaintiffs were entitled to compensation for the erosion as well as for the easement gained by flooding. In answer to the government's contention that the erosion was merely consequential damage, the Supreme Court said:

> The mere fact that all the United States needs and physically appropriates is the land up to the new level of the river, does not determine what in nature it has taken. If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking.[14]

This expanding scope of the word "taken" is more pertinent in federal eminent domain proceedings than in California where the need to expand the meaning of this particular word has been reduced by the provision in our Constitution which requires compensation for property which is "damaged."

Damaged

The 1849 provision simply stated ". . . nor shall private property be taken for public use, without just compensation." In 1879 the provision was expanded to its present scope to require compensation for property which is either "taken or damaged."

13. United States v. Causby, 328 U.S. 256 (1946).
14. United States v. Dickinson, 331 U.S. 745, 750 (1947).

The history of this change is particularly interesting.[15]

Prior to 1879 the 1849 language was construed by the California Supreme Court to be limited to actual physical appropriations and invasions of private property. It was held not to impose liability for consequential damages resulting from lawful governmental projects. Although the harshness of this view, which often left a private property owner remediless notwithstanding substantial economic loss occasioned by public improvements, was in some states cured by statute, not all legislatures were sensitive to the problem. Finally, in 1870 Illinois adopted a new state constitution which required payment of just compensation not only where there was a "taking" of private property but also where such property was "damaged" for public use. Illinois thus pioneered the path which California was to follow.

The addition of the damage clause, it was readily conceded by the courts, was an extension of the common provision for the protection of private property. In Rigney v. City of Chicago,[16] decided in 1882, the Illinois Supreme Court, after an exhaustive review of the subject, concluded that the change of language had "enlarged the right of recovery by extending its provisions to a class of cases not provided for under the old constitution. . . ." The United States Supreme Court later pointed out that this change in Illinois' organic law "would be meaningless if it should be adjudged that the

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15. The history of this change is taken substantially verbatim, without citations, from Professor Van Alstyne's excellent article, which is cited in footnote 11.
16. 102 Ill. 64 (1882).

Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former constitution."[17] Thus, for example, a property owner whose physical possession was wholly intact but whose access to an adjoining street had been substantially impaired by construction of a viaduct by the city, resulting in a diminution of the value of his property by two-thirds, was held to have sustained a compensable "damaging" of his property.

Other states soon followed Illinois' lead. By the time of the California constitutional convention in 1879 similar "damaging" clauses had already been added to the constitutions of West Virginia (1872), Arkansas (1874), Pennsylvania (1874), Alabama (1875), Missouri (1875), Nebraska (1875), Colorado (1876), Texas (1876), and Georgia (1877). In keeping with this trend, Section 14, as first proposed by the convention committee charged with drafting the new California bill of rights, contained the "or damaged" language. However, to resolve a dispute as to whether the common-law jury system should be modified, the original proposal, together with other proposed sections dealing with administration of justice, was referred to the convention committee on judiciary. The committee, however, did not limit itself to jury matters, but discarded the first proposal entirely, submitting to the convention a new version which

17. Chicago v. Taylor, 125 U.S. 161, 168-9 (1888).

limited liability to cases of private property "taken for public use." In this form, the language of what was to become Section 14 continued unchanged throughout most of the convention, until, toward the end, a successful motion was finally made to reinsert the phrase "or damaged." John Hager of San Francisco, who made the motion, pointed out his reasons for wanting the change:

> In some instances a railroad cuts a trench close up to a man's house and while they do not take any of his property, it deprives him of the use of it to a certain extent. This was brought to my notice in the case of the Second Street cut in San Francisco. There the Legislature authorized a street to be cut through, which left the houses on either side high in the air, and wholly inaccessible. It was destroyed, although none of it was taken or moved away. There are many such cases, where a man's property may be materially damaged, where none of it is actually taken. So I say, that a man should not be damaged without compensation.[18]

Delegate Wilson opposed the motion on these grounds:

> I think it would be dangerous to change this provision in this respect . . . Now, to add this element of damage is to enter into a new subject. It is open-in up a new question which has no limit. You take the case of street improvement, and this question of damage will open up a very wide field for discussion . . . I regard it as very dangerous to undertake to enter into a new field.[19]

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18. 3 Debates and Proceedings of the Constitutional Convention of the State of California 1190 (1880).
19. Id.

Judge Hager responded by citing the constitutions of Illinois and Missouri as examples of identical language then in effect in other states. Mr. Wilson thought "that the fact that it is found in the recent constitutions is no argument in its favor," for, in his opinion, "these new constitutions . . . are simply untried experiments." Delegate Horace Rolfe, addressing himself to the merits, argued that the "or damaged" clause might prove to be fiscally imprudent:

> [M] any reasons [may be] urged why these words should be left out. A man's property might be damaged, when he would be entitled to no compensation. A man might have a public house on a public highway, and the highway might be changed for some good cause or other. The value of his property would be lessened by reason of the travel being diverted, and yet he would not have a just right to claim damages. He would be damaged by reason of a public use. I think it would be dangerous to insert such a provision as this.[20]

The amendment inserting the words "or damaged" into Section 14 was then carried by a convention vote of sixty-two to twenty-eight. As thus altered, Section 14 became part of Article I of the Constitution of 1879. In this respect, there has been no subsequent change of language.

In effect, this 1879 addition to our Constitution requires that just compensation be paid to the property owner who still has title to and possession of his property but who has suffered a loss in value of his property caused by government action. It has been explained that by the addition of this provision "a step had been

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20. Id.

taken toward recognition of the indemnity principle, under which the objective is to compensate the owner to the full extent of his loss rather than to the extent of the government's gain."[21]

Public Use

A public use is any use which the Legislature declares to be a public use.[22] These legislative determinations are binding upon the courts unless a determination is clearly unreasonable.[23]

California Courts have adhered to a broad view of what constitutes a public use. In a case involving the question of whether condemnation of private property for slum clearance was a public use the Court of Appeals stated:

> It might be pointed out that as our community life becomes more complex, our cities grow and become overcrowded, and the need to use for the benefit of the public areas which are not adapted to the pressing needs of the public becomes more imperative, a broader concept of what is a public use is necessitated. Fifty years ago no court would have interpreted under the eminent domain statutes, slum clearance even for public housing as a public use, and yet, it is now so recognized. In addition, slum clearance for redevelopment purposes is likewise so recognized. To hold that clearance of blighted areas as characterized by the act and as shown in this case and the redevelopment of such areas as contemplated here are not public uses, is to view present day conditions under the hyopic eyes of years now gone.[24]

21. Kratovil & Harrison, Eminent Domain - Policy and Concept, 42 Calif. L. Rev. 596, 600 (1954).
22. E. g., Los Angeles v. Anthony, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308, 310, cert. denied, 376 U.S. 963 (1964). See Berman v. Parker, 348 U.S. 26, 32 (1954).
23. University of Southern California v. Robbins, 1 Cal. App. 2d 523, 37 P.2d 163, cert. denied, 295 U.S. 738 (1935); Los Angeles v. Anthony, supra note 22.
24. Redevelopment Agency v. Hayes, 122 C.A. 2d 777, 802-3, 266 P.2d 105 (1954).

Some of the public uses which have been specified by statute are summarized above on page 4, and include, for example, flood control, highways and parks.

Since the public uses for which private property is needed change with changes in society this is an area of legislative flexibility in which the Constitution imposes no rigid restrictions.

Just Compensation

With respect to compensation Section 14 requires that the compensation be (a) just, (b) determined by a jury, and (c) paid to the owner, or into court for the owner, before the condemning authority takes possession of the property.

The measure of just compensation is the "actual value" of the property when the eminent domain proceedings commence[25] which has been interpreted to mean "market value."

> In a condemnation proceeding the measure of damages is the market value of the parcel taken, plus the depreciation in the market value of the area retained, if such depreciation occurs. Market value is the price that would be paid by a willing purchaser from a willing seller purchasing with a full knowledge of all the uses and purposes for which the property is reasonably adapted. It is hornbook law that it is market value that is involved, and not the value to the owner or to the condemner. For that reason it is generally held that value in terms of money for a particular use is not admissible in such cases.[26]

25. Code of Civ. Proc. §1249.
26. Daly City v. Smith, 110 C.A. 2d 524, 531, 243 P.2d 46 (1952).

The requirement that the amount of compensation be determined by jury is related to, but not duplicated by Article I, Section 7, which provides in pertinent part that "the right of trial by jury shall be secured to all, and remain inviolate . . . ." Although Section 7 appears to assure a jury trial in civil actions the critical question is which issues at trial will be decided by the jury and which will be decided by the judge. The Legislature has declared that:

> In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code.[27]

An eminent domain action does not fall within the classes of actions specified by the Legislature in which issues of fact must be determined by a jury. Therefore, just compensation would be decided by the judge in a condemnation action but for the requirement in Section 14 that this issue be determined by jury.[28] In fact, the amount of compensation is the only issue which must be submitted to a jury in eminent domain proceedings.[29]

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27. Code Civ. Proc. §592 (Applied to eminent domain proceedings by Code Civ. Proc. §1256).
28. See People v. Ricciardi, 23 Cal. 2d 390, 402, 144 P.2d 799 (1943); People v. Kubic, 62 Cal. Rptr. 287, 291 (1967).
29. Id.

The requirement of payment prior to possession was considered at length in Steinhart v. Superior Court[30] in which the Court stated:

> At the time the present constitution was adopted (in 1879), the law as declared by the Supreme Court was as follows. The possession and use in terms authorized by the statute, before compensation had been made and while the proceeding was pending, is a taking within the meaning of the constitution, but the requirement of the former constitution, which only provided that private property should not be taken for public use without just compensation, was satisfied by a provision which insured the payment on reasonable terms as to delay and difficulty in the enforcement of the right. Viewed in the light of these facts, the change made in the language by the new constitution becomes significant. The following italicized words were added, and no other change was made in the general provision: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner."
>
> The purpose of the amendment is perfectly obvious. If the preliminary possession during the pendency of the proceeding is a taking within the meaning of the constitution, it cannot be authorized until the damage resulting therefrom has been judicially determined and the amount has been paid or tendered to the owner.

Related Provisions in the California Constitution

Existing Article XII (Public Utilities) provides in Section 8 that the power of eminent domain shall be applicable to corporations as well as individuals. Section 23 of the same Article permits the

30. 137 Cal. 575, 578, 70 Pac. 629 (1902).

Legislature to authorize the PUC to determine the just compensation for public utility property taken by eminent domain.

The Commission has recommended deletion of Section 8 and revision of Section 23a to permit PUC valuation only if the condemnor and condemnee both consent.

Existing Article XV (Harbors) provides in Section 1 that the power of eminent domain extends to frontages on navigable water, which the Commission has recommended for removal from the Constitution.

Former Article VI (Judicial) Section 4 (b) specified that District Courts of Appeal had appellate jurisdiction in eminent domain proceedings but that specification was superseded by the more general provisions in revised Section 11.

Federal Constitutional Provisions Concerning Eminent Domain

The Fifth Amendment to the United States Constitution provides ". . . nor shall private property be taken for public use, without just compensation." This provision was enacted verbatim in California's 1849 Constitution and is encompassed by the more extensive provisions in Section 14. It also is applicable to the states through the Fourteenth Amendment.[31]

The key difference between the protections afforded to private property by the Federal and California Constitutions is the express requirement in Section 14 that "damage" to property be compensated. See discussion above pages 8-14.

31. Chicago, B & Q R.R. v. Chicago, 166 U.S. 226 (1896); Marin Municipal Water Dist. v. Marin Water & Power Co. 178 Cal. 308, 173 Pac. 469 (1918).

Police Power Compared to the Power of Eminent Domain

The police power is another inherent sovereign power which, if properly exercised, may diminish or destroy the value of private property without compensation. The difficulties in drawing a line between police power and eminent domain are well summarized as follows:

> It has come to be recognized that only a difference in degree exists between non-compensable damage to a property owner under the police power and a deprivation of property rights under the power of eminent domain. And in appraising the damage to the property owner to determine whether or not the line between the police power and the power of eminent domain has been crossed, the extent of the diminution of the owner's rights must be weighed against the importance of that diminution to the public. Thus a building may be demolished without compensation under the police power to stop a conflagration, but not to establish a new building line. In this process of weighing burdens and benefits, considerable discretion is allowed the legislative body which must decide on the wisdom of a particular measure. But when the problem of the validity of the legislation is presented to the courts, they must do their own weighing of these burdens and benefits, in order to determine whether the legislative body has acted within its constitutional powers. If a court decides, then, that a police power regulation imposes a much more serious burden on a landowner than the public benefit seems to warrant, it will designate the regulation as "unreasonable" and hold it to be not a legitimate exercise of the police power. It cannot be helped that the items thus to be weighed, individual loss and public gain, neither allow accurate measurement nor have a common unit of measure for their surmised weights. In this process of establishing a line between police power measures and compensable takings, the courts are influenced by "...conflicting and seldom expressed considerations.... On the one hand, there is the belief that an emphasis upon the obligation to pay for injuries caused by public measures would mean that such measures would not and could not be carried out. On the other hand, there is the belief that an emphasis upon freedom to carry out public measures without liability for compensation would emasculate the Fifth Amendment and encourage resort to regulation as a means of taking without payment." Even the line so drawn will shift as the courts recognize changes in community needs and attitudes. "In a changing world, it is impossible that it should be otherwise." [32]

32. Kratovil & Harrison, Eminent Domain - Policy and Concept, 42 Calif. L. Rev. 596, 609-10 (1954) (Citations omitted.).

Zoning ordinances generally are regarded as a permissible exercise of the police power and furnish a good illustration of governmental impact upon property values without compensation for damage to values. In the Consolidated Rock[33] case the owner and lessee of 348 acres of land challenged a city zoning ordinance which prohibited rock, sand or gravel operations on the land. The trial court concluded that the property had great value if used for excavation of sand, rock and gravel but had "no appreciable economic value" for any other purpose. The effect of the ordinance therefore deprived the owner and lessee of any significant value the property might otherwise have had. The ordinance was defended as a necessary exercise of the police power to protect the health of residents in the area from the dangers of air pollution, increased traffic and other hazards of excavation activities.

Among other things, the owner and lessee contended this was a taking of private property which required compensation. The California Supreme Court disagreed and, after noting that the scope of the police power changes with the times, stated:

> As a corollary to this recognized principle of the capacity of the police power to meet the reasonable current requirements of time and place and period in history is the equally well settled rule that the determination of the necessity and form of such regulations, as is true with all exercises of the police power, is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity? Thus in Miller, supra, this court

33. Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342 (1962).

said in 195 Cal. at page 490: "The courts may differ with the legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation .... [W]hen the necessity or propriety of an enactment [is] a question upon which reasonable minds might differ, the propriety and necessity of such enactment [is] a matter of legislative determination."[34]

34. 57 Cal. 2d at 522.

Revision Issues

The Commission undoubtedly will explore many issues related to eminent domain. The following issues are suggested for inclusion:

1. Since the federal constitution assures compensation for property taken for a public use, should the general provisions in Section 14 be deleted?
2. Since the Legislature could provide by statute for the protections furnished by Section 14 should the Section be deleted in favor of statutory treatment?
3. If the Commission retains the requirement of just compensation should compensation be paid for property which is "damaged" as well as for property which is "taken?"
4. If the Commission retains the substance of these provisions, should any of the general provisions such as "public use" be clarified, expanded or restricted?
5. Is the requirement of jury determination of just compensation a sound provision and should it be deleted in favor of statutory treatment?

Preliminary Possession

Section 14, excluding last sentence

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 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; 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 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 of 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.

History

The requirement of payment of just compensation to the injured party or payment of the award into court before taking possession created some difficulties in the acquisition of rights of way by various governmental entities. Amendments to Section 14 occurring in 1918, 1928 and 1934 created many exceptions to this general rule to prevent delayed litigation on the question of compensation from causing unnecessary delay in the acquisition of rights of way demanded by public necessity.

The amendment of 1918 excepted counties from the provision requiring compensation to be first made or paid into court before rights of way could be taken. It also added a proviso authorizing the State and certain political subdivisions thereof, upon commencement of condemnation proceedings for rights of way, to take immediate possession upon posting of security determined by the court. The ballot argument favoring adoption of this provision stated in part:

> Experience has shown that cities, in acquiring long stretches of rights of way for public purposes, are often held up by unreasonable and arbitrary owners who attempt to take advantage of a rule which requires that the city cannot go into possession prior to a jury actually fixing the compensation to be paid.

This argument continued to state that flood control districts were frequently unable to respond through the exercise of eminent domain to emergency situations because of the requirement of payment before possession.

The 1928 amendment, according to the ballot statement, "confers upon the State the same power now possessed by municipal corporations and counties to appropriate a right of way without full compensation therefor being first made in money or ascertained and paid into court for the owner. . . ."

The final amendment of 1934 provided that no corporation could obtain rights of way or land to be used for reservoir purposes without first paying the compensating award but created exceptions to this rule in favor of the State, counties, municipal corporations and other specified public corporations. The ballot argument supporting this proposition declared a twofold purpose:

> 1. To extend to metropolitan water districts, municipal utility districts, municipal water districts and water conservation districts the same privilege and authority as now vested in irrigation districts, drainage districts, levee districts, reclamation districts, municipalities, counties and the State - namely, the right to take possession of property sought for rights of way immediately upon payment into court of the amount fixed by the court as compensation.
>
> 2. To extend this right to cover lands to be used for reservoir purposes, as well as lands to be used for rights of way.

This amendment broadened exceptions favoring acquisition of rights of way to include land needed for reservoirs. The policy behind these amendments is fairly well summed up by this ballot argument favoring the 1934 amendment:

> It has long been the policy of this State, approved by the people of California, that sovereign agencies such as the State itself, or counties or cities, should have the right, when lands are required for rights of way such as roads and highways, to take immediate possession upon payment into court of the amount fixed by the judge to cover any award by the jury as the value of the land. This same authority, so far as concerns land for rights of way, also now exists in the case of irrigation, drainage, levee and reclamation districts.
>
> The reasons for this policy are obvious. Unless the State highway authorities, or the county or city, could take possession, upon payment into court of the

amount fixed as compensation of property required for highways, roads or streets, private property owners could hold up for years the construction of our highways. Since the sovereign agency must be entitled to eventually obtain the required property, it has long been recognized that the practical and sensible thing was to allow the public agency to take possession at once so that construction work and development would not be delayed.

With the increased need for conserving and utilizing our water resources this same authority is found necessary insofar as applies to lands for reservoir sites.

Likewise, the authority which is found necessary for irrigation, drainage, levee and reclamation districts should obviously likewise be available to the new and recently created types of districts, municipal water districts and water conservation districts.

This amendment does away with the unfair discrimination which now exists between districts performing the same functions.

An owner of private property can in no way be injured by this amendment, for he is protected in his rights by full compensation, whereas the people as a whole are greatly benefited in enabling projects to be constructed immediately, instead of being subjected to long and expensive delay through the arbitrary action of an individual property owner in refusing to accept a reasonable price for his property.

No opposing ballot arguments accompanied any of these amendments to Section 14.

Comment

The main issue posed by the provisions for preliminary possession is whether they must be provided in the Constitution.

The 1849 Constitution required the payment of just compensation but did not specify when payment had to be made. The Legislature in 1861 enacted a statute which permitted the condemnor

to obtain a court order, upon posting a bond, permitting the condemnor to take possession of the property during the pendency of the condemnation proceedings. This statute subsequently was codified in 1872 as Section 1254 of the Code of Civil Procedure which is still in effect in amended form. This statute apparently was upheld on the theory the 1849 provision did not require payment before taking but only that payment be made certain without reasonable delay or expense to the property owner.[35]

In 1879 the constitutional provision was revised to prohibit the taking of private property "without just compensation having been first made to or paid into court for the owner." The relationship between this revised provision and Code of Civil Procedure Section 1254 was considered in 1902 by the California Supreme Court which held that the statute violated the Constitution.[36] The Court reasoned that preliminary possession was a "taking" of the property and could not "be authorized until the damage resulting therefrom has been judicially determined and the amount has been paid or tendered to the owner."[37]

This conclusion led to the subsequent constitutional amendments which authorized preliminary possession in specific situations.

It appears that the Supreme Court of California would reach the same result today if presented with the same problem. Its 1902 decision has never been overruled and has been referred to favorably by the Court as late as 1956.[38]

35. See Steinhart v. Superior Court, 137 Cal. 575, 576-77, 70 Pac. 629 (1902).
36. Id.
37. 137 Cal. at 578.
38. People v. Peninsula Title Guar. Co., 47 Cal. 2d 29, 33, 301 P.2d 1 (1956).

Prior possession of condemned property during eminent domain proceedings therefore requires constitutional authorization.

A revision alternative would be to delete the requirement that compensation "first" be paid to the owner. By returning to the 1848 provision the Commission would thereby permit the Legislature to provide by statute for preliminary possession as well as corresponding protection for the property owner.

If the Commission retains the payment "first" requirement it may wish to consider deletion of the above detailed provisions in favor of a general authorization to the Legislature to provide for preliminary possession by statute.

Railroads

Sec. 14, last sentence.

> 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.

History

According to the ballot argument favoring adoption of this provision, it was designed to permit small logging operators to construct branch feeder railroads to the main lines across intervening property owned by "large lumber companies." The legal device employed was to declare in the Constitution that such a use was "public," thereby satisfying the requirement in the law of eminent domain that any taking must be for a public use.

Comment

Research has disclosed no judicial decisions construing this provision.

Presumably it is in the Constitution because the law of eminent domain in 1911 had not developed to the point that such a taking of property could be justified without constitutional sanction. By declaring that such a taking was for a "public use" and by compelling the condemnor to assume the public responsibilities of a "common carrier" the draftsmen apparently concluded that such a taking would be beyond attack.

The revision issues are whether the provision has any contemporary relevance, whether it deserves or requires constitutional status and whether it could be provided by statute.

No information has been discovered indicating that the provision serves any function at the present time.

It appears that the provision does not legally require constitutional status. The Legislature has provided that anyone can exercise the power of eminent domain so long as it is done for a public use. In turn, the Legislature has broad discretion in determining what constitutes a public use.[39] It is important to note that in Section 1238 of the Code of Civil Procedure the Legislature in fact has provided that "railroads, roads and flumes for quarrying, logging or lumbering purposes" are public uses. This statute encompasses the bulk of the above provision and suggests that the matter could be enacted solely by statute.

Whether the provision deserves constitutional status is a policy question for Commission determination.

39. See discussion at pages 13-14, supra.

Section 14 1/2

Sec. 14 1/2. The State, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvement; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

The Legislature may, by statute, prescribe procedure.

History

This Section was adopted on November 6, 1928 by legislatively proposed amendment.

Comment

The main thrust of this Section is to permit "excess condemnation" in conjunction with specific public improvments. "Excess condemnation" occurs when more land is taken than is strictly required by the "public use" involved. The practical effect of granting constitutional status to excess condemnation is to broaden the concept of "public use" to include the maintenance of marginal areas surrounding various public works. The following analysis of the operative terms of this Section will indicate its scope and revision issues.

"The State, or any of its cities or counties"

This phrase indicates those entities which are permitted to engage in excess condemnation as specified by the Section. The extension of the power of eminent domain to cities and counties is proper and does not present any significant issues.

"may acquire by gift, purchase or condemnation"

Although the historic purpose of Section 14 1/2 is clearly to permit excess condemnation, this Section is also addressed to acquisitions of land by gift and purchase. The reason for this is not clear. An exercise of eminent domain is a sovereign prerogative allowing the State to purchase land from an unwilling seller. It differs from a "purchase" in the ordinary sense of a willing seller and buyer mutually agreeing on the consideration to be paid.

Does this Section prevent the State or cities and counties from acquiring land by gift or purchase lying more than 150 feet from those public works specified by the Section? Although California courts have never construed this language, such a prohibition is a fair and reasonable application of Section 14 1/2. Clearly such a constitutional prohibition would be contrary to public policy and would severely curtail the power of the State to receive gifts of land and to purchase land in its proprietary capacity. The inclusion of gifts and purchases within this Section does not appear to be justifiable on any legal grounds and for this reason serious consideration should be given to their deletion.

"lands"

Because the power of eminent domain otherwise extends to all "private property", the phrase "lands" would appear to narrow somewhat the scope of excess condemnation permitted by this Section, although the term has never been judicially construed.

"for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations"

This language limits application of Section 14 1/2 to specified activities with regard to certain public works. The only judicial construction available has declared that "streets" includes public highways.[40]

"in and about and along and leading to any or all of the same"

This whimsical and somewhat overwrought phrase speaks for itself, but in language which the Commission might be able to improve upon if it determines to retain this Section in the Constitution. The meaning of these words has never been construed.

"providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvement"

This provision restricts the scope of Section 14 1/2 to parcels lying "wholly or in part" within 150 feet of the public work. The final proviso of this Section, to be discussed below, states that if a parcel lies only partially within 150 feet, only that portion which is within 200 feet of the public work may be taken through condemnation.

40. People v. Superior Court of Merced County 65 Cal. Rptr. 342

Although this language is clear enough, the recent decision by the California Supreme Court in People v. Superior Court of Merced County[41] raises many serious problems with respect to the meaning and scope of Section 14 1/2. This decision, determined by a vote of 5 to 2, is the only significant judicial comment on this Section.

The Merced County case involved the condemnation of highway rights of way by the Department of Public Works. The acquisition by the Department of .65 acres actually needed for the highway resulted in a landlocked 54 acre tract. The Department sought to take the entire 54 acre plot through excess condemnation. The owners of the property argued that Section 14 1/2 would prevent the State from condemning any land beyond a 150 strip on either side of the highway. The Supreme Court held that Section 14 1/2 did not impose any such inhibition and states:

> Section 14 1/2 was adopted in 1928 at a time when the validity of any excess condemnation was doubtful. It was not adopted to limit the power of eminent domain but to authorize condemnations that its sponsors believed would be permitted under the current rules of constitutional law. (1928 Ballot Phamphlet, Argument for Proposed Senate Constitutional Amendment No. 16). Although it includes limitations on the condemnations it authorizes and to that extent limits the state's inherent power of eminent domain, it in no way limits those condemnations which it does not authorize. Accordingly, since it only authorizes condemnations for protective purposes it does not restrict condemnations for other purposes.[42]

41. Id.
42. Id., p. 346.

Whether the purpose of Section 14 1/2 was indeed "protective" as announced by the court, the Commission can only judge from its own reading of the supporting ballot argument, which follows in full:

> This amendment is necessary to remedy a defect in our present acquisition laws and will mean a great savings of money in many cases to the state, the county, the city or any assessment district endeavoring to acquire land for public purposes.
>
> At the present time the public, when opening a street or acquiring a park, can only acquire the land actually necessary for the street or park itself. This frequently necessitates the leaving of little fractions of lots in the form of slivers or small triangles which are practically useless to the owners, a tremendous nuisance to the owners of adjoining property and an eyesore to the public. While the public can not, under our present constitutional provisions and laws, acquire these small pieces of property it frequently has to pay large severance damages to the owners for the injury done in connection with the taking of that portion of the lot actually used for public purposes.
>
> This amendment will make it possible for the public to acquire these parcels of land without the payment of severance damages and to later dispose of them in such a way as to prevent their becoming eyesores to the public.
>
> In order to prevent any abuse of this power, the land so acquired is strictly limited to parcels lying within a distance of 150 feet from the closest boundary of the public improvement except that where a parcel lies only partially within this limit the property to be acquired by the public must not extend more than 200 feet from the nearest boundary of the street or park being acquired.[43]

It is difficult to determine what the Court means by "protective purpose," in view of the foregoing ballot argument. The Court continues by stating that condemnation of the entire 54 acres is justified because of the resulting economic savings:

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43. 1928 Ballot Pamphlet, Argument for Proposed Senate Constitutional Amendment No. 16.

> Although a parcel of 54 landlocked acres is not a physical remnant, it is a financial remnant: its value as a landlocked parcel is such that severance damages might equal its value.
>
> . . .
>
> There is no reason to restrict this theory to the taking of parcels negligible in size and refuse to apply it to parcels negligible in value.[44]

Finally, the Court concludes that "It is sound economy for the State to take the entire parcel to minimize ultimate costs. Under these circumstances excess condemnation is constitutional."[45]

Although serious questions arise with respect to the Court's dismissal of Section 14 1/2 as a barrier to the excess condemnation permitted in that case, the emphasis upon economic savings to the State is clearly the gravamen of this decision and indicates the direction in which current judicial winds are blowing.

The dissent of Justices Mosk and Peters states that the majority opinion is wrong because it permits excess condemnation for purely economic reasons which do not constitute a public use. For this reason they argue due process requirements are not satisfied. They further assert that the Department of Public Works did not in fact propose any use whatever of the excess land, although the Department argued that the sale of the excess property would result in revenues which could be applied to reduce the cost

44. People v. Superior Court of Merced County, supra, p. 346.
45. Id., p. 347.

to the taxpayer of the highway construction. It should be noted that the practice of using excess condemnation in the manner proposed by the Department has received severe criticism in other jurisdictions and is generally not the law.[46]

Although this decision raises at least as many questions as it resolves, it does present several reservations concerning the current utility and legal significance of Section 14 1/2.

It is true that the judicial climate in 1928 which frowned upon excess condemnation and precipitated the enactment of this Section has changed radically since that time. The Merced County case is a good example of a liberalized attitude toward what constitutes a "public use" and the willingness of our courts to support excess condemnation which appears to be contrary to the limitations imposed by Section 14 1/2. Although constitutional provisions are supposed to be mandatory and prohibitory, the Merced County opinion refused to give such a prohibitory effect to Section 14 1/2 except within the very narrow "purpose" of the Section, whatever that "purpose" might be.

The basic question raised by the decision is whether this Section actually grants or prohibits any legislative action. It explicitly states that the Legislature has the inherent power to authorize excess condemnation for whatever purpose it sees fit. The Court states: "When, as in this case, the property is not needed for the physical construction of the public improvement, the question of public use turns on a determination of whether the taking is justified to avoid excessive severance or consequential damages."[47] Thus the question of public use becomes one of economics.

46. See City of Cincinnati v. Vester, 33 F. 2d 242 (1929); United States Tennessee Valley Authority v. Welch, 150 F. 2d 613 (1945).
47. People v. Superior Court of Merced County, supra, p. 348.

Because Section 14 1/2 does not grant to the Legislature powers which it lacks inherently and because the Section has not been construed as a limitation on the Legislature to classify and condemn excessively on a broad basis, the current vitality and significance of Section 14 1/2 is open to serious question. Although the practice of financing public works through the sale of property taken by excess condemnation is dubious, Section 14 1/2 has not served as a deterent to this practice. It should be pointed out that the Merced County did not specifically pass on this question and that issue was not really determined in that decision.

Section 14 1/2, as construed by the Merced County decision, did not serve to protect the individual landowner from a taking of 54 acres of his property for a highway occupying only .65 acres. The landowner, it must be remembered, opposed condemnation of the 54 acres. The Supreme Court was clearly more sensitive to the economic well being of the State than it was to the private property rights involved. Since Article I provisions profess a concern for individual rights, the Commission might consider whether Section 14 1/2 serves to protect these rights, and, if not, whether revision can really remedy the situation.

"provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works."

This final proviso limits the acquisition of tracts lying only partially within 150 feet of the public improvement to areas lying within 200 feet of the improvement. With the exception of the Merced County decision discussed above, this proviso has never been construed. It is important to note that it does not compel the sale of land acquired under its terms but says only that such sales "may" be permitted.

"The Legislature may, by statute, prescribe procedure."

This final sentence, permissive in nature, is an unnecessary expression of the inherent power of the Legislature to prescribe procedure. Such statutes have been enacted. See, for example, Article 4.5 of the Government Code (Acquisition and Sale of Excess Land) and Section 104.3 of the Streets and Highways Code.

Revision Issues

The following issues, among others, are suggested by an analysis of Section 14 1/2:

1. If the Legislature has the inherent power, as suggested by the Merced County decision, to engage in excess condemnation subject only to due process limitations, is retention of Section 14 1/2 justified?
2. Should the Constitution place any limits on excess condemnation in addition to the basic requirement of due process of law?