

36.95

10/20/69

Memorandum 69-138

Subject: Study 36.95 - Condemnation (Jury Trial)

At the October 1969 meeting, the Commission considered the request of the Constitutional Revision Commission for comments on revisions of Article I, Section 14, of the California Constitution. The Commission published a tentative recommendation containing a suggested revision of this section in September 1967. Attached as Exhibit I is the 1967 revision.

At the October 1969 meeting, the Commission discussed its 1967 revision and determined that it is satisfactory except for the second sentence. The Commission determined that the second sentence should be revised to read: "The owner is entitled to have just compensation determined by a jury." The Commission also determined that whether the sentence should be retained in this form should be considered at the December 1969 meeting.

The question to be considered at the December meeting is whether the property owner should be guaranteed the right to a jury trial on the issue of just compensation.

It can be argued that the right to a jury trial on the issue of just compensation is a basic right that should be guaranteed the property owner in an eminent domain or inverse condemnation case and that such right is essential if the property owner is to be protected against governmental action. In response, it can be argued that the due process clause in the federal constitution guarantees the property owner only that the process for determining compensation will be a fair one. Moreover, if the provision on jury trial is omitted, it will be possible for the Legislature to develop better--nonjudicial--methods for determining just compensation. In this connection, the following quotation from the dissenting opinion in

State v. Wherity, 275 Adv. Cal. App. 279, 290 (July 1969) is of interest:

In this era of the law explosion no phase of judicial administration is more ripe for reform than eminent domain valuation. Trial judges, lawyers and appraisers are willy-nilly players in a supercharged psychodrama designed to lure twelve mystified citizens into a technical decision transcending their common denominator of capacity and experience. The victor's profit is often less than the public's cost of maintaining the court during the days and weeks of trial. . . .

One cannot claim that the present system is satisfactory to the property owner when we are advised by lawyers who specialize in these cases that they cannot handle a case unless it is likely that the property owner will receive \$3,000-\$5,000 more than the highest offer of the condemnor. An administrative system or some other alternative to the present jury system might provide a better system for determination of just compensation. It should be noted, however, that any nonjury system might be made available at the option of the property owner if he is willing to waive his right to a jury trial.

What is the view of the Commission on this matter? Does the Commission wish to advise the Constitutional Revision Commission concerning whether the Constitution should include a provision that the property owner have a right to a jury trial on the issue of compensation?

Respectfully submitted,

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Executive Secretary

RECOMMENDED CONSTITUTIONAL AMENDMENT

The Commission's recommendations would be effectuated by the adoption of the following Constitutional Amendment:

Amendment of Section 14, Article I

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. Subject to the provisions of Section 23a of Article XII, just compensation shall be assessed in a court of record as in other civil cases and, unless a jury is waived, shall be determined by a jury. The Legislature may provide for the taking of possession of property and the devoting of such property to public use following commencement of an eminent domain proceeding and may prescribe the persons who may take such possession, the public uses for which such possession may be taken, and the manner in and the time at which such possession may be taken. Legislation authorizing possession to be taken shall require that (1) before possession is taken, the probable amount of compensation to be made for the taking of the property be paid into court for the owner, (2) the amount to be paid into court be subject to determination by the court on motion of any interested party, and (3) the total amount paid into court be available immediately to the persons that the court determines to be entitled thereto and be withdrawable by such persons in accordance with such procedure as the legislation may provide; 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 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.

Comment. The effect of this revision of Section 14 is as follows:

First sentence. No change is made in existing constitutional law respecting "public use," "just compensation," "inverse condemnation," or the general requirement that property not be taken or damaged until compensation is made to or paid into court for the owner. See, e.g., *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959), and *City & County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955) (public use); *Metropolitan Water Dist. v. Adams*, 16 Cal.2d 676, 107 P.2d 618 (1940), and *Sacramento So. R.R. v. Heilbron*, 156 Cal. 408, 104 Pac. 979 (1909) (just compensation); *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), and *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942) (inverse condemnation proceedings); *Heilbron v. Superior Court*, 151 Cal. 271, 90 Pac. 706 (1907), and *McCauley v. Weller*, 12 Cal. 500 (1859) (prepayment or payment into court).

Second sentence. This sentence states the established judicial construction of deleted language that required that "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." See *City of Los Angeles v. Zeller*, 176 Cal. 194, 167 Pac. 849 (1917). With respect to the requirement that the power of eminent domain be exercised through judicial proceedings, see *Wilcox v. Engbretsen*, 160 Cal. 288, 116 Pac. 750 (1911); and *Weber v. Board of Supervisors*, 59 Cal. 265 (1881). Regarding the assurance of trial by jury in condemnation and inverse condemnation proceedings, see *Vallejo & No. R.R. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238 (1915), and *Highland Realty Co. v. City of San Rafael*, 46 Cal.2d 689, 298 P.2d 15 (1956). The words "Subject to the provisions of Section 23a of Article XII" are included to prevent any implication that Section 23a is superseded by the re-adoption of this section. Section 23a empowers the Legislature to authorize the Public Utilities Commission to determine the compensation to be made

in takings of public utility property. Section 23a is limited in application to property that is already devoted to a public use. See *S.H. Chase Lumber Co. v. Railroad Comm'n*, 212 Cal. 691, 300 Pac. 12 (1931). The procedure for determining just compensation adopted pursuant to Section 23a (see Public Utilities Code Sections 1401-1421) is not exclusive and is an alternative to proceedings under Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure. Further, in cases in which compensation is determined by the Public Utilities Commission, the procedures of the Code of Civil Procedure other than those for assessing compensation are available to the parties. See *Citizens Util. Co. v. Superior Court*, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963). No change is made in these rules.

Third sentence. This sentence replaces the former authorization for the taking of "immediate possession" by certain entities in right of way and reservoir cases, and removes any doubt whether the Legislature may, by statute, provide for possession prior to judgment. See *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902). Compare *Spring Valley Water Works v. Drinkhouse*, 95 Cal. 220, 90 Pac. 218 (1892); *Heilbron v. Superior Court*, 151 Cal. 271, 90 Pac. 706 (1907). See also Taylor, *Possession Prior to Final Judgment in California Condemnation Procedure*, 7 SANTA CLARA LAWYER 37, 56-74 (1966). The sentence also permits the Legislature to classify condemners and public purposes in this connection.

Fourth sentence. This sentence clarifies the application of the first sentence of this section to the taking of possession in eminent domain proceedings. It requires that, before possession of the property is taken, the probable amount of compensation that eventually will be awarded in the proceeding be paid into court for the owner. It also adds a requirement, not heretofore imposed by this section, that the funds paid into court be available to the property owner prior to termination of the proceeding. This sentence thus accords with decisions of the California Supreme Court holding that, before property is taken, compensation must be paid into court for the owner. See *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902). The sentence will permit the Legislature to specify whether the amount paid into court is determined initially by the plaintiff, by the court, or in some other manner, but requires that such amount be subject to determination by the court on motion of an interested party. The sentence will also permit the Legislature to specify the circumstances under which the property owner must give security to protect the plaintiff in cases where the amount withdrawn may be in excess of the compensation eventually awarded in the proceeding.

Language deleted. In deleting the second portion of the first sentence of this section, this revision eliminates language that prohibited "appropriation" of property in certain cases, "until full compensation therefor be first made in money or ascertained and paid into court for the owner." This language was held to add nothing to the meaning of the first portion of the sentence. See *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902). A more explicit requirement is imposed by the fourth sentence of the section as revised.

The revision also deletes language which required that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed." This limitation as to the offsetting of benefits applied only to private corporations taking rights of way or lands for reservoir purposes and probably was inoperative under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. See *Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083 (1902). In deleting the language, this revision clarifies and unfetters the power of the Legislature to deal with the offsetting of benefits in eminent domain proceedings. The subject is now governed by Section 1248 of the Code of Civil Procedure.

The proviso to the first sentence of this section, and the next following sentence, which dealt with "immediate possession" in right of way and reservoir cases are superseded by the third and fourth sentences of the revised section.

This revision deletes the last sentence of the section which declared that the taking of property for a railroad "run by steam or electric power" for logging or lumbering purposes should be deemed a taking for a "public use." The provision was added by amendment in 1911 and was never construed or applied by the appellate courts. Its apparent purpose was to preclude a holding that takings for such purposes may not be authorized because they do not effectuate a "public use." (For a collection and discussion of the judicial decisions on this general question, see Annot., 86 A.L.R. 552 (1933).) Takings for such purposes are authorized by existing legislation. See CIVIL CODE § 1001, CODE CIV. PROC. § 1238(1), PUB. UTIL. CODE § 7526(g). The provision would appear to have been rendered obsolete by the replacement of steam and electric locomotives by diesel-powered ones. Moreover, in applying the "public use" limitation, the California courts have consistently refused to be bound by a general declaration and have held that the question must be resolved by reference to the facts of the particular case. For a thorough analysis of the California decisions on a closely analogous problem, see Comment, *Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations*, 7 U.C.L.A. L. REV. 327 (1960).

The last sentence of the section also declared that any person taking property for such purposes "shall thereupon and thereby become a common carrier." This declaration duplicates the result reached independently of any constitutional basis in *Producers Transp. Co. v. Railroad Comm'n.*, 176 Cal. 499, 169 Pac. 59 (1917). That decision held that the exercise by a carrier of the statutory power of eminent domain was conclusive evidence of a dedication of its condemned right of way to public use. (See also CAL. CONST., Art. 12, §§ 17, 23; CIVIL CODE § 2168; PUB. UTIL. CODE §§ 211, 218, 230. The judicial decisions on this problem are collected and analyzed in Annot., 67 A.L.R. 588 (1930).)

Deletion of the last sentence, therefore, makes no significant change in existing law respecting either the doctrine of public use or the status and obligations of common carriers.