

4/15/60

Memorandum No. 33(1960)

Subject: Study #36 - Taking Possession, Interest, Passage of
Title and Allocation of Risk.

Attached is a draft statute and constitutional amendment to carry out the Commission's and the consultant's recommendations in regard to taking possession, interest, passage of title and allocation of risk.

The statute has been drafted to express the Commission's tentative conclusion that title should pass when the condemner takes possession. It does not appear from the cases that the constitutionality of the statute would be helped a great deal by deferring the passage of title to the final order of condemnation. In Steinhart v. Superior Court, 137 Cal. 575, 577 (1902), it was argued that the Constitution requires only that the damages must be paid before title will pass. The court rejected the argument with this quotation from Davis v. San Lorenzo R.R. Co., 47 Cal. 517, 523-524 (1874): " [T]he occupation of land by a corporation, for its own purposes, pending the proceedings for condemnation, is a taking of the property within the meaning of the constitution" The authority of these cases was reaffirmed by a unanimous court in People v. Peninsula Title Guar. Co., 47 Cal.2d 29 (1956). In that case the condemnee was held by the trial court to be liable for an improvement assessment, the lien of which attached to the condemned property after immediate possession had been taken but before title had passed under the final order of condemnation. The trial court's theory was that the taking of possession does not accelerate the passage of title,

that title was in the condemnee at the time the assessment was levied, and that the lien therefore attached to the property, and, hence, to the condemnation award. The Supreme Court reversed. It again held that there is a "taking" within the meaning of the Constitution when possession is taken from the owner. Under the Constitution, the owners are entitled to compensation undiminished by any assessment liens attaching to the property after the date of taking.

In the light of these cases, it appears that if a condemner takes all of the incidents of title pursuant to an order of immediate possession, it is unlikely that a court would say that there has been no taking merely because bare legal title has not passed. The cases indicate that the constitutionality of a statute extending the right of immediate possession to all condemners will be decided upon the basis that the property is "taken" when the condemner acquires possession.

Section 14 of Article I has been amended considerably. This is because the section, as it presently reads, requires that a jury first determine the full compensation to be made before property can be taken for public use by a private corporation. As the Commission decided to extend the right of immediate possession to all condemners, it was necessary to eliminate the requirement that the jury determination precede the taking. As the Commission wanted the procedure for immediate possession uniform for all condemners, it was also necessary to delete a great deal of the language concerned with the right of public agencies to obtain immediate possession for right of way and reservoir purposes.

Two sections in this draft which are to be added to the Code of Civil Procedure are shown here in strike-out and underline. The sections are 1244.5 and 1249.1. This was done because these sections actually amend

language presently in the code. Section 1244.5 is an amendment of present Section 1243.5 and Section 1249.1 is an amendment of the last sentence of Section 1249. The strike-out and underline show how the existing language has been amended.

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT I

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

Resolved by the Senate, the Assembly concurring, That the
Legislature of the State of California at its 1961 Regular
Session commencing on the 2nd day of January, 1961, two-thirds
of the members elected to each of the two houses of the Legis-
lature voting therefor, hereby proposes to the people of the
State of California that the Constitution of the State be
amended by amending Section 14 of Article I thereof, to read:

SEC. 14. Private property shall not be taken or damaged
for public use without just compensation having first been made
to, or paid into court for, the owner, ~~[, and no right-of-way or
lands to be used for reservoir purposes shall be appropriated to
the use of any corporation, except a municipal corporation or a
county or the State or metropolitan water district, municipal
utility district, municipal water district, drainage, irrigation,
levee, reclamation or water conservation district, or similar
public corporation until]~~ When private property is taken or
damaged for public use, full compensation therefor shall be
~~[first made in money or ascertained and]~~ made to, or paid into
court for, the owner, irrespective of any benefits from any

improvement proposed by [such] the person, firm, company or corporation in whose favor the power of eminent domain is exercised, which compensation shall be ascertained, except as provided in Section 23a of Article XII of this Constitution, 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-eminant-domain-proceedings,-after-such-notice-to-the
other-parties-as-the-court-may-prescribe,-alter-the-amount
of-such-security-as-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.

The provisions of Sections 1244.5, 1249, 1249.1, 1252.1,
1253, 1254, 1254.5, 1254.7, 1255a and 1255b of the Code of
Civil Procedure as enacted and amended by the 1961 Regular
Session of the Legislature are hereby ratified and declared
to be fully and completely effective. The laws hereby
ratified and declared to be fully and completely effective
may, at any time, be amended or repealed by the Legislature.

An act to amend Sections 1249, 1253, 1254, 1254.5, 1254.7, 1255a and 1255b of the Code of Civil Procedure, to repeal Section 1243.5 of the Code of Civil Procedure, and to add Sections 1244.5, 1249.1 and 1252.1 to the Code of Civil Procedure, all relating to eminent domain.

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

SECTION 1. Section 1243.5 of the Code of Civil Procedure is hereby repealed.

SEC. 2. Section 1244.5 is added to the Code of Civil Procedure, to read:

1244.5. [~~(a)--In any case in which the State, a county, a municipal corporation, a public corporation, or a district takes immediate possession of lands to be used for reservoir purposes, or a right-of-way, pursuant to Section 14 of Article I of the Constitution of this State, the State, or such county, municipal corporation, public corporation, or district, as the case may be,~~]

(1) The plaintiff may at the time of filing the complaint or at any time thereafter apply to the court for an order authorizing him to take possession of and to use the property or interest therein sought to be condemned during the pendency and until the final conclusion of the proceedings brought to condemn the same.

(2) If the court determines that the plaintiff has the right to obtain the property by eminent domain and that it is necessary for the plaintiff to obtain immediate possession of the property sought to be condemned, the court

shall, by order, authorize the plaintiff to take possession of and to use the property or interest therein sought to be condemned after the plaintiff deposits in court the amount the court determines is the probable damages the owner of the property will be entitled to receive for the taking of the property and any damage incident thereto.

(3) The plaintiff shall, at least [three] 20 days prior to the time possession is taken, personally serve on [er-mail-to] the person or persons in possession of the property, if any, and upon the record owner or owners of the property or any interest therein, if known, [and-the-person-or-persons-in possession-of-the-property,-if-any,] either a copy of the order of the court authorizing such possession or a notice thereof. If a person upon whom service of the order or notice is [mailed-it-shall-be-sent-by-certified-mail and-if-sent-to-the-owners,-it-shall-be-addressed-to-them-at-their] required under this section resides out of the State, or has departed from the State, or cannot after due diligence be found within the State, the order or notice shall be sent by registered or certified mail to the last known address of such person. A single service upon or mailing to those at the same address [shall-be] is sufficient. The latest secured assessment roll in the county where the property is located may be used to ascertain the [names-and] addresses of the owners of the property.

(4) At any time after the court has made an order authorizing the plaintiff to take possession of the property sought to be condemned prior to entry of judgment, the court may, upon motion of the owner of the property or any interest therein, increase the amount that the plaintiff is required to deposit in court pursuant to the court's order authorizing the plaintiff to take possession.

(5) At any time after the court has made an order authorizing the plaintiff to take possession of the property sought to be condemned prior to entry of judgment and before the plaintiff has taken possession pursuant to such order, the court, upon motion of the owner of the property or an interest therein or of an occupant of the property, may:

(a) Stay the effective date of the order authorizing the plaintiff to take possession of the property.

(b) Vacate the order authorizing the plaintiff to take possession of the property if the court determines that there is no necessity for the taking of possession by the plaintiff prior to judgment or that the plaintiff does not have the right to acquire the property by eminent domain.

(6) If a motion to vacate the order authorizing the plaintiff to take possession of the property is made on the ground that the plaintiff does not have the right to take the property by eminent domain, the motion shall be supported by the affidavit of a person having knowledge of the facts. The facts stated in an affidavit in support of or in opposition to the motion shall be within the personal knowledge of the affiant and shall be set forth with particularity. Each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit. If the court determines that there is a triable issue of fact as to the plaintiff's right to acquire the property by eminent domain or that the plaintiff does not have the right to acquire the property by eminent domain, the court shall vacate the order authorizing the plaintiff to take possession of the property.

SEC. 3. Section 1249 of the Code of Civil Procedure is amended to read:

1249. Subject to Section 1249.1, for the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. ~~[Nothing in this section contained shall be construed or held to affect pending litigation.---If an order be made letting the plaintiff into possession, as provided in Section 1254, the compensation and damages awarded shall draw lawful interest from the date of such order.---No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.]~~

SEC. 4. Section 1249.1 is added to the Code of Civil Procedure, to read:

1249.1. No improvements put upon the property subsequent to the date of the service of summons, and no improvements that have been removed or destroyed either prior to the trial or prior to the date the title to the property or the possession thereof is taken by the plaintiff, whichever is earlier, shall be included in the assessment of compensation or damages. All improvements that are on the property on the date of the service of summons may be considered in the assessment of compensation and damages unless they are removed or destroyed either before the title to the property or the possession thereof

is taken by the plaintiff or before the trial, whichever is earlier.

SEC. 5. Section 1252.1 is added to the Code of Civil Procedure, to read:

1252.1. (1) If the defendant has paid any ad valorem taxes, or any ad valorem special assessments levied and collected as taxes, upon the property sought to be condemned for the fiscal year in which the title to the property vests in the plaintiff, the plaintiff shall pay to the defendant a sum equal to the amount of such taxes and assessments, together with any allocable penalties and costs thereon, that are allocable to that part of the fiscal year that begins on the date that the title to the property vests in the plaintiff.

(2) If the title to the property vests in the plaintiff prior to judgment, the amount claimed by the defendant under this section shall be claimed at the time and in the manner provided for claiming costs. If the plaintiff does not acquire the right to possession of the property prior to judgment, the amount claimed by the defendant under this section shall be claimed within 30 days after the title vests in the plaintiff and shall be claimed in the manner provided for claiming costs.

SEC. 6. Section 1253 of the Code of Civil Procedure is amended to read:

1253. (1) When payments have been made and the bond given, if the plaintiff elects to give one, as required by ~~[the last two]~~ Sections 1251 and 1252, the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county ~~[, and~~

thereupon] .

(2) The title to the property described [therein] in the final order of condemnation [shall] vests in the plaintiff for the purposes therein specified[.] upon the date that the final order of condemnation is filed in the office of the recorder of the county or upon the effective date of an order authorizing the plaintiff to take possession of the property under Section 1244.5 or Section 1254, whichever is earlier.

(3) The effective date of an order authorizing the plaintiff to take possession of the property under Section 1244.5 or Section 1254 is that date upon which the plaintiff is authorized by the terms of the order to enter into possession, whether possession is actually taken on that date or subsequently.

SEC. 7. Section 1254 of the Code of Civil Procedure is amended to read:

1254. At any time after trial and judgment entered or pending an appeal from the judgment to the Supreme Court, whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, the superior court in which the proceeding was tried may, upon notice of not less than 10 days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. In an action for condemnation of property for the use of a school district, an order so authorizing possession

or continuation of possession by such school district is not appealable. The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by depositing the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this section. The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate. The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceedings), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise

abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Sections 16430, 16431 and 16432, Government Code, or deposited in banks as provided in Chapter 4 of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations.

For the purposes of this section, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

Interest earned and other increment derived from investments or deposits

made pursuant to this section, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under this section, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct. In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

SEC. 8. Section 1254.5 of the Code of Civil Procedure is amended to read:

1254.5. When money is paid into court as provided by Section [~~14-of~~
~~Article-1-of-the-Constitution~~] 1244.5, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner

specified in that section.

SEC. 9. Section 1254.7 of the Code of Civil Procedure is amended to read:

1254.7. At any time after money has been deposited as ~~[security-as]~~ provided in Section ~~[14-of-Article-1-of-the-Constitution]~~ 1244.5 ~~[for-the condemnation-of-any-property-or-interest-in-property-for-state-highway-purposes]~~, upon application, in the manner hereinafter provided, of the party whose property or interest in property is being taken, the court may order from the money deposited in connection with such property or interest an amount not exceeding the amount which the court finds such party is entitled to receive ~~[75-percent-of-the-amount-originally-deposited]~~ for ~~[the]~~ his respective property or interest to be paid to such party. Such application shall be made by affidavit wherein the applicant shall set forth his interest in the property and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff and no withdrawal shall be made until at least ~~[twenty- ()]~~ 20 ~~[]~~ days after such service of the application, or until the time for all objections has expired, whichever is later. Within ~~[said twenty-(20)-days]~~ the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereof in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within ~~[ten- ()]~~ 10 ~~[-) -]~~ days after such service and object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in its objection the names and last known addresses of other

persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within ~~[said-twenty-]~~ the 20 ~~[-]-~~ day period, said money shall not be withdrawn until the applicant causes such personal service to be made. If such persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom . ~~[, - to a total amount not exceeding 75 percent of the amount deposited,]~~ No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served. If withdrawn, the receipt of any such money shall constitute a waiver by operation of law to all defenses in favor of the person receiving such payment except with respect to the ascertainment of the value of the property or interest in the manner provided by law ~~[, - and title to the property or interest as to which money is received pursuant to this section shall vest in the State as of the time of such payment]~~. Any amount so paid to any party shall be credited upon any judgment providing for payment ~~[and shall be considered payment upon the judgment as of the date the withdrawal is made so that no interest shall be payable upon the amount so withdrawn after the date of its withdrawal]~~. Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the condemnation proceeding shall be returned to the party who deposited it,

and the court in which the condemnation proceeding is pending shall enter judgment therefor against the defendant.

SEC. 10. Section 1255a of the Code of Civil Procedure is amended to read:

1255a. (1) Unless the title to the property sought to be condemned has vested in the plaintiff, the plaintiff may abandon the proceedings at any time after the filing of the complaint and before the expiration of thirty days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceedings.

(2) If the title to the property sought to be condemned has vested in the plaintiff, the plaintiff may not abandon the proceedings except with the consent of the defendants.

(3) Upon such abandonment, express or implied, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within [thirty- (] 30 [)] days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action.

SEC. 11. Section 1255b of the Code of Civil Procedure is amended to read:

1255b. [~~If the plaintiff in a condemnation proceeding obtains an order from the court for possession of the property sought to be condemned prior to the trial of the action, then~~] (1) [T]he compensation and damages awarded in a condemnation proceeding shall draw lawful interest from the [effective date of said order.] earliest of the following dates:

(a) The date of the entry of judgment.

(b) The date that the title to the property sought to be condemned vests in the plaintiff.

(c) The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.

(2) The compensation and damages awarded in a condemnation proceeding shall cease to draw lawful interest on the earliest of the following dates:

(a) Upon any amounts deposited in court for the owner, the date that such amounts are available for withdrawal by the person entitled thereto.

(b) The date of payment of the award to the person entitled thereto.

SEC. 12. The provisions of this act shall become effective only if Senate Constitutional Amendment No. _____ is approved by the vote of the people at the next general election, and in such case this act shall become effective on January 1, 1963.