

mtg

8/5/60

Memorandum No. 67(1960)

Subject: Study No. 36 - Condemnation - Apportionment and Allocation  
of Award

Attached is a draft recommendation and statute on apportionment and allocation of the award in eminent domain proceedings. The following comments may assist you in your consideration of the draft statute.

SECTION 1-4. These sections contain the basic recommendation of the Commission relating to compensation of the owners of separate interests in the same parcel of property. Section 1 repeals the existing requirement that the property be valued as if owned by a single owner. The last sentence of Section 1246.1, which is repealed by Section 1, has been placed in Section 1255 of the Code of Civil Procedure by Section 4 of this act. Section 2 amends C.C.P. Section 1248 to make it clear that the court, jury, or referee is to determine the value of each interest in the property. Section 1248a appears to contain a special rule of severance damage when railroad rights of way are condemned for certain specified purposes. The amendment suggested in Section 3 eliminates the enumeration of the specific purposes, thus permitting this type of severance damage to be paid whenever railroad rights of way are condemned for any purpose.

SECTIONS 5-6. These sections contain the Commission's recommendation of compulsory consolidation of proceedings relating to the same parcel of property. Even if Section 1244 is left unchanged, the last subdivision grants the plaintiff the option to consolidate such proceedings.

The additional language that appears in subdivision 1 of Section 1244 is merely some language taken from subdivision 5 which appears to belong more properly in subdivision 1. The remaining language that has been deleted from subdivision 5 is contained in the new Section 1244.1 together with the compulsory consolidation provision.

SECTIONS 7-8. These sections have been added to state the rule recommended by the Commission when leasehold property is partially taken. These sections were originally drafted by the consultant and have been revised by the staff.

Section 1246.2, proposed by Section 8 of this act, provides for the termination of a lease when an essential part thereof or the part that was the material inducement to the lessee is taken. This language does not exactly correspond to the equivalent provision of Civil Code Section 1932. Note, too, that while Civil Code Section 1932 only gives the lessee the option to terminate the lease, Section 1246.2 will give the option to either party. If the Commission wishes to consider a section more closely corresponding with existing law relating to destruction of leasehold property, the following may be considered:

1246.2. When part of the property subject to a lease is sought to be condemned, the court, upon motion of the lessee made prior to the admission of any evidence as to value or damages, shall adjudge the lease terminated as of the date possession of or title to the property is taken by the plaintiff, whichever is earlier, if the court determines that the greater part of the property subject to the lease, or that part thereof which was and which the lessor at the time the lease was entered into had reason to believe was the material inducement to the lessee to enter into the lease, is being taken.

For comparison, the pertinent part of Civil Code Section 1932 is set out below:

1932. The hirer of a thing may terminate the hiring before the end of the term agreed upon: . . . when the greater part of the thing hired, or that part which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the want of ordinary care of the hirer.

If the alternative Section 1246.2 suggested above is approved, the last sentence of the recommendation should be revised to read as follows:

Procedurally, the lessee should be required to elect whether or not he will terminate the lease because of a partial taking prior to the reception of any evidence on the question of value, for the amount the parties are entitled to receive cannot be determined until the lessee's future obligations under the lease are settled.

SECTION 9. This is a proposed savings clause which will exempt from the proposed changes any eminent domain proceeding commenced prior to the effective date of the act. The Commission may wish to consider having this act go into effect later than the usual 90 days after the close of the session. It may require a greater length of time for condemners to make the administrative changes this act will make necessary.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

## RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

## Allocation and Apportionment of Award

When the ownership of property taken by eminent domain is divided among such persons as lessees, life tenants, easement owners, reversioners and remaindermen, problems are presented as to the manner in which the owners of the various interests are to be compensated. The Law Revision Commission has concluded that both the substantive law and the procedure followed in valuing the separate interests should be changed. The Commission has also concluded that revision of the law is needed in regard to the compensation to be awarded a lessee when only a portion of the property subject to the lease is taken by eminent domain.

Valuation of Separate Interests

Under Section 1246.1 of the Code of Civil Procedure, the value of the parcel of property to be taken by eminent domain is first determined as if it were owned by a single person regardless of the separate interests in it. Then, in a subsequent phase of the proceeding, the value of all interests that encumber the fee are determined and awarded to the owners of such interests out of the total award first determined. The owner of the fee receives what is left. The assumption that is thus made for purposes of valuation - that the property is owned by a single owner - is, of course, false in many cases. Because this assumption is false the existing law sometimes yields unjust results. As the consultant's

study demonstrates, the amount the owner of the fee receives sometimes exceeds the amount that he could obtain for his interest on the open market. In other cases the property owner receives less for his interest than its market value.

It has been argued that the present procedure for determining the value of separate interests is proper on the ground that the condemner should only pay for what it receives, i.e., if the condemner gets a fee simple, it should pay for a fee simple even though the holders of the various interests in the property are paid more or less than their respective interests are worth. This view reflects the "in rem" theory of condemnation. Here and elsewhere in its recommendations, however, the Commission has rejected the "in rem" theory because it does not adequately effectuate the constitutional objective of just compensation. The Commission believes that the owner of an interest in property is justly compensated for the loss of his property only when he is given the market value of what was taken from him and he is not justly compensated when he is given either more or less than the value of property taken from him. The cost of improvements constructed for the benefit of the public should be borne by the public, and no portion of this cost should be shifted to the owner of an interest in the property taken for the construction of the improvement by a procedure which requires him to accept less than his interest is worth. On the other hand, the owner of an interest in property should not be given a windfall at the expense of the public merely because his property is acquired for public use.

The Commission recommends, therefore, that the law and procedure applicable to valuing property in eminent domain proceedings be revised

so that each person whose property is taken will receive compensation measured by the value of the property or property interest taken from him. The Commission recommends the elimination of the present procedure which proceeds from a false assumption and often either rewards or penalizes owners of property interests that are taken for public use.

#### Compensation of the Lessee in Partial Taking Cases

1. Under present California law, when property subject to a lease is partially taken by eminent domain, the court first apportions the total rental obligation under the lease between the portion of the property taken and the portion not taken. The lessee is then awarded the present value of the future rental obligation allocable to the part of the property taken, and he remains liable to pay the rent as it falls due over the remainder of the lease. In addition, the lessee is awarded any bonus value which the part taken may have, i.e., the amount by which the economic value of the lease upon the part of the property taken exceeds the future rental obligation on that part.

The present law is unfair to lessors of property for it deprives them of their security for the lessee's performance. In the absence of condemnation, the lessor's best security for the performance of the lessee's obligations during the term of the lease is the property itself; if the lessee fails to perform, the lessor may always reclaim the property. But, under existing law, the condemner takes the security while the lessee is given all of the money representing the future rent, and the lessor is required to trust the lessee's good faith and solvency for the payment of the future rent. The larger the portion of the property subject to the lease that is taken by the condemner, the more acute is the lessor's

problem, for the property remaining may be of little value and the amount given the lessee may approach the total rental obligation.

Under existing law when all of the property subject to a lease is taken, the lease is deemed terminated. The rental obligation ceases, and the lessor does not have to trust the lessee for payment. This rule is fair to both lessors and lessees. There is no reason to have a different rule when only a portion of the leased premises is condemned.

Accordingly, the Commission recommends that when the amount of the rental obligation allocable to the portion of the property taken has been determined, that part of the rental obligation should cease to exist and the lessee should receive no award representing the rental obligation. The lessee would, of course, continue to receive an award for the bonus value, if any, of the portion of the leased property which is taken.

2. Related to the preceding problem is the question whether the lease should continue at all if a substantial part of the property is taken by eminent domain. Under Civil Code Section 1932 a lessee may terminate a lease if the premises are substantially destroyed. The situation so far as the lessee is concerned is little different when the premises are substantially taken by condemnation. Therefore, the Commission recommends the enactment of legislation providing that a lease is subject to termination if the portion of the leased property that was the material inducement to the lessee to enter into the lease is taken by condemnation. Procedurally, the court should determine whether the lease is terminated because of a partial taking prior to the reception of any evidence on the question of value, for the amount the parties are entitled to receive cannot be determined until the lessee's future

obligations under the lease are settled.

---

The Commission's recommendations would be effectuated by the enactment of the following measure.



An act to amend Sections 1244, 1248, 1248a and 1255 of the Code of Civil Procedure, to repeal Section 1246.1 of the Code of Civil Procedure, and to add Sections 1244.1, 1246.1 and 1246.2 to the Code of Civil Procedure, all relating to eminent domain.

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

SECTION 1. Section 1246.1 of the Code of Civil Procedure is hereby repealed.

[1246.1.--Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly.--The costs of determining the apportionment of the award shall be allowed to the defendants and taxed against the plaintiff except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.]

SEC. 2. Section 1248 of the Code of Civil Procedure is amended to read:

1248. The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of each and every separate estate or interest in the property sought to be condemned, ~~[and]~~ including all improvements thereon pertaining to the realty ~~[, and of each and every separate estate or interest therein]~~; if ~~[it]~~ the property consists of different parcels, the value of each estate or interest in such parcels ~~[and each estate or interest therein]~~ shall be separately assessed;

2. If an estate or interest in the property sought to be condemned constitutes only a part of an estate or interest in a larger parcel, the damages which will accrue to the estate or interest in the portion not sought to be condemned ~~[,]~~ by reason of its severance from the portion sought to be condemned ~~[,]~~ and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much each estate or interest in the portion not sought to be condemned ~~[, and each estate or interest therein,]~~ will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs; and if the benefit to any such estate or interest ~~[shall be]~~ is equal to the damages assessed under subdivision 2, the owner of the ~~[parcel]~~ estate or interest shall be allowed no compensation except the value of his estate or interest in the portion taken; but if the benefit ~~[shall be]~~ is less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much each separate estate or interest in the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant,

will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such [~~property~~] estate or interest;

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences, along the line of such railroad, and the cost of cattle-guards, where fences may cross the line of such railroad; and such court, jury or referee shall also determine the necessity for and designate the number, place and manner of making such farm or private crossings as are reasonably necessary or proper to connect the parcels of land severed by the easement condemned, or for ingress to or egress from the lands remaining after the taking of the part thereof sought to be condemned, and shall ascertain and assess the cost of the construction and maintenance of such crossings;

6. If the removal, alteration or relocation of structures or improvements is sought, the cost of such removal, alteration or relocation and the damages, if any, which will accrue by reason thereof;

7. As far as practicable, compensation must be assessed for each source of damages separately.

8. When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid.

SEC. 3. Section 1248a of the Code of Civil Procedure is amended to read:

1248a. In any proceeding taken under the provisions of this title, where any railroad, street or interurban railway tracks are situated on, upon, along or across any lands or rights of way sought to be taken therein, ~~[for road, highway, boulevard, street or alley purposes, or for the purposes of a right of way for any public utility to be constructed, completed and maintained by a county, city and county, or any incorporated city or town, or by a municipal water district,]~~ the plaintiff shall ~~[, if the complaint contains a prayer therefor, and shows the matter hereinafter provided,]~~ obtain a final judgment of condemnation ordering, in addition to the condemnation of such lands or right of way for the purposes set forth in the complaint, the relocation or removal of any railroad, street or interurban railway tracks thereon. Where the removal or relocation of such tracks is sought in any such proceedings, the complaint must contain a description of the location and proposed location of such tracks, and must be accompanied by a map showing such location and the proposed location of such tracks. The compensation to be paid for such relocation or removal of tracks shall be ascertained and assessed in the action, as in other cases, and separately from other sources of damage.

SEC. 4. Section 1255 of the Code of Civil Procedure is amended to read:

1255. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the

Court; but the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

SEC. 5. Section 1244 of the Code of Civil Procedure is amended to read:

1244. The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled the plaintiff [;] . When application for the condemnation of a right of way for the purpose of sewerage is made on behalf of a settlement, or of an incorporated village or town, the board of supervisors of the county may be named as plaintiff.

2. The names of all owners and claimants, of the property, if known, or a statement that they are unknown, who must be styled defendants [;] .

3. A statement of the right of the plaintiff [;] .

4. If a right of way be sought, the complaint must be accompanied by a map showing the location, general route, and termini of said right of way, so far as the same is involved in the action or proceeding [;] .

5. A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property, but the nature or extent of the interests of the defendants in such land need not be set forth. ~~[All-parcels-of land,-or-other-property-or-interest-in-or-to-property,-lying-in-the-county, and-required-for-the-same-public-use,-may-be-included-in-the-same-or~~

separate-proceedings,-at-the-option-of-the-plaintiff,-but-the-court-may consolidate-or-separate-them-to-suit-the-convenience-of-the-parties.--When application-for-the-condemnation-of-a-right-of-way-for-the-purpose-of sewerage-is-made-on-behalf-of-a-settlement,-or-of-an-incorporated-village or-town,-the-board-of-supervisors-of-the-county-may-be-named-as-plaintiff.]

SEC. 6. Section 1244.1 is added to the Code of Civil Procedure, to read:

1244.1. All parcels of land, or other property or interest in or to property, lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties. If separate proceedings are commenced to condemn the interests of persons owning or claiming separate estates or interests in the same parcel of property, the court shall, on motion of the plaintiff or of any person owning or claiming an interest in such parcel, consolidate the proceedings.

SEC. 7. Section 1246.1 is added to the Code of Civil Procedure, to read:

1246.1. (1) When all of the property that is subject to a lease is taken by eminent domain, the lease terminates upon the taking of possession or title by the plaintiff, whichever is earlier.

(2) When only a part of the property that is subject to a lease is taken by eminent domain, the lease is cancelled as to the part taken

upon the taking of possession or title by the plaintiff, whichever is earlier, but except as otherwise provided in Section 1246.2, the lease remains in force as to the remainder; and the portion of the rent reserved in the lease that the court, jury or referee determines to be allocable to the portion of the lease that is cancelled is thereupon extinguished.

SEC. 8. Section 1246.2 is added to the Code of Civil Procedure, to read:

1246.2. When part of the property subject to a lease is sought to be condemned, the lease terminates upon the taking of possession or title by the plaintiff, whichever is earlier, if the court determines, upon motion of either party to the lease made prior to the admission of any evidence as to value or damages, that:

(1) An essential part of the real property subject to the lease is being taken; or

(2) The part thereof which was the material inducement to the lessee to enter into the lease is being taken.

SEC. 9. This act does not apply to any proceeding in eminent domain commenced prior to the effective date of this act. Such proceedings shall continue to be governed by the law applicable thereto prior to the effective date of this act.