#36(L) 7/19/65

Memorandum 65-51

Subject: Study No. 36(L) - Condemnation Law and Procedure (The Right to Immediate Possession)

Attached are two copies of a Tentative Recommendation relating to the right to immediate possession. The proposed constitutional amendment set out in the Tentative Recommendation is the same as the one recommended by the Commission in 1961.

Please mark any revisions you believe should be made on one copy of the attached tentative recommendation.

Also attached is a copy of the 1961 Recommendation relating to taking possession and passage of title in eminent domain proceedings. See pages B-28--B-38 for the portion of the study pertinent to the proposed constitutional amendment. We are planning to revise this portion of the study and to bring it up to date. We suggest that the revised study ultimately be published with the tentative recommendation.

Assuming we retain the jury system of assessing just compensation, we believe that the proposed constitutional amendment is highly desirable. In 1961, the Senate Judiciary Committee did not approve the proposed constitutional amendment, but we are hopeful the situation has changed in view of the enactment in 1961 of procedures that permit the withdrawal of all or any portion of the deposit in immediate possession cases.

The question is presented whether the last sentence of the present constitutional provision should be retained. It is likely that this sentence was included in order to make clear that the taking of property for a logging railroad is a public use. See the extract from 86 A.L.R. 552 (1933) attached as Exhibit I. In Oregon, for example, it was held that taking of property

for use of a logging right of way was a private use. However, after the Oregon Constitution was amended to declare such taking a public use, such a taking was upheld as a public use.

In addition, it is perhaps desirable to retain the portion of the last sentence of the constitutional provision that makes a railroad a common carrier if it exercises the power of eminent domain for logging or lumbering purposes. See Exhibit II attached. It seems, however, if this principle is sound, it should be extended to analogous cases. Should or does a different rule apply if an oil pipeline company exercises the power of eminent domain?

Note also that the constitutional provision, on its face, appears to preclude use of a diesel powered engine. It seems likely, however, that the provision would not be so construed. See People v. Garden Grove Farms, 231 A.C.A. 713 (1965) (provisions of Constitution authorizing excess condemnation do not preclude Legislature from authorizing excess condemnation in other cases).

Although the staff recommends that the Constitutional amendment be tentatively approved as set out on page 7 of the tentative recommendation, it is further recommended that the tentative recommendation be sent to the Public Utilities Commission with a request that the Commission provide us with any views they may have concerning the need for the last paragraph of the constitutional provision and any suggestions they believe will be helpful in redrafting the last paragraph if it is needed.

An alternative solution to the problem would be to delete the last paragraph from the constitutional provision and to enact its substance as a statute contingent upon approval of the constitutional amendment.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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EXHIBIT I

EXCERPTS FROM 86 ALR 552-563 (1933)

Exercise of power of eminent domain for purposes of logging road or loggin railroad

Where the logging road or railroad is merely for the use of private parties in lumbering operations, the right of eminent domain cannot generally be exercised for the obtaining of a right of way, under the usual constitutional provisions relating to the taking of property for public use; the use cannot be said to be a public one. Thus, it has been held that the power of eminent domain cannot be exercised to secure a right of way for a road to connect timberland of a single individual with a road, steamboat landing, or railroad station.

* * * * *

Prior to the amendment of the Oregon Constitution in 1920 the courts of that state denied the right to condemn a right of way for private use by one party over lands of another for the transportation of timber. Apex Transp. Co. v. Garbade (1898) 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L.R.A. 513; Anderson v. Smith-Powers Logging Co. (1914) 71 Or. 276, 139 Pac. 736, L.R.A.1916B, 1089.

* * * * *

Some statutes conferring the right of eminent domain for the purpose of logging roads and railroads attempt to obviate the rule that the purpose of such roads must be public, by prescribing that all roads established under their provisions shall be public or available to the public. Thus, in Chapman v. Trinity Valley & N. R. Co. (1911; Tex. Civ. App.) 138 S. W. 440, where it was objected that the proposed railroad was organized primarily to subserve the interest of a certain lumber company by which it was owned, in transporting its lumber to market, it was held that, in view of the duties to the public imposed by statute upon it as a railroad, it must be deemed to be for the use of the public.

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And under a clause in a statute giving the power of eminent domain to companies organized to construct logging railroads, which requires such a railroad to "transport all timber products offered to it for carriage," the public service required is held, in State ex rel. Clark v. Superior Ct. (1911) 62 Wash. 612, 114 Pac. 444, to be sufficient to support the grant of the right of eminent domain.

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So, it was held in State ex rel. Oregon-Washington R. & Nav. Co. v. Superior Ct. (1930) 155 Wash. 651, 286 Pac. 33, that the Toll Logging Railroad Act of Washington was not unconstitutional, as taking property without due process of law, when applied to the taking by eminent domain, under its sanction, of a right of way for a logging railroad organized as a common carrier, even conceding that the principal shippers would be the owners and promoters of the road.

It has been held, also, under the Texas Constitution, declaring that railroads which had theretofore been constructed or which might thereafter be constructed in the state were public highways, and that railroad companies were common carriers, that a railway company by its act of incorporation becomes a common carrier, and that it is not a valid objection to the taking of land under eminent domain for its right of way that it was incorporated solely or primarily for the purpose of hauling lumber and mill products for the mill of a lumber company which owned and controlled the railway company, and that almost all the material and passengers would belong to or be connected with the lumber company. Chapman v. Trinity Valley & N. R. Co. (1911; Tex. Civ. App.) 138 S. W. 440.

* * * * *

Where the logging road is open to use by the public, it seems to be immaterial, as regards the present question, to what extent the public has availed itself of the privilege of such use.

* * * * *

The rule in Oregon was changed by the constitutional Amendment of 1920. Prior to that time the right to condemn a right of way for private use by one party over lands of another for the transportation of timber was denied. See cases from this state cited under subd. II. supra. In 1920, the constitutional provision declaring that private property shall not be taken for public uses was amended by an additional provision declaring that "the use of all roads and ways necessary to promote the transportation of the raw products of mine or farm or forest is necessary to the development and welfare of the state, and is declared a public use." Following this amendment, in 1921, the legislature enacted a statute relating to the condemnation of lands for logging railways, and expressly granting to any person or corporation the right to acquire land necessary for logging roads or ways to promote the transportation of logs or raw products of the forest, and to condemn so much thereof as necessary for such purposes. The statute further declared that any logging road necessary for the transportation of a single tract of timber should come within the provisions of the act, whether the same is a common carrier or otherwise, and that the road should not come under the jurisdiction of the public service commission of the state unless the owners thereof declare it to be a common carrier. See Flora Logging Co. v. Boeing (1930; D.C.) 43 F. (2d) 145, holding that the statute was constitutional, and that a logging company which owned a large tract of timberland was entitled to condemn a right of way for a logging railroad over land which constituted the only feasible route for the transportation of its timber.

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EXHIBIT II

EXCERPTS FROM 67 ALR 588 (1930)

Logging or mining road as a common carrier

As already indicated, the mere fact that a company owns and operates a logging or mining railroad does not make it a common carrier. In fact, in the great majority of the cases the courts have held that the railroad in question was not a common carrier. If there is no holding out of the railroad for use by the public generally, but the line of road is used exclusively in the interest of a lumber company, which owns it, in getting its products to market, it has been held that the railroad is not a common carrier.

* * * * *

In some cases special constitutional or statutory provisions have affected the question under consideration.

Thus, it has been held that a constitutional provision making all railroad companies common carriers does not apply to a lumber company which operates a logging railroad upon its own property for its own purposes, in bringing logs from the lands of the company to a sawmill. Wade v. Lutcher & M. C. Lumber Co. (1896) 33 L.R.A. 255, 20 C. C. A. 515, 41 U. S. App. 45, 74 Fed. 517.

* * * * *

And see the reported case (CODD v. McGOLDRICK LUMBER CO. ante, 580), holding that a constitutional provision making all railroads public highways does not apply to a logging railroad built by a lumber company merely for the purpose of hauling its own materials, and never operated as a common carrier, or holding itself out as such.

* * * * *

Logging companies were expressly declared common carriers by the Washington statute which is cited in State ex rel. Clark v. Superior Ct. (1911) 62 Wash. 612, 114 Pac. 444. The statute declared that two or more persons might incorporate a company having for its principal object the construction, maintenance, and operation of logging roads, etc., for the transportation of logs and other timber products; that such corporation should have power to build and operate logging roads, etc.; that, after any such logging road was constructed, the company should transport all timber products offered to it for carriage that its means of transportation were adapted to carry; and that such a company should be deemed a quasi public company and public carrier, and should have the right of eminent domain. The case was one of eminent domain proceedings, in which it was held that the proposed railroad was not a private enterprise merely by reason of the fact that all of its stock was held by a timber company or its stockholders, which company was the owner of the largest part of the timber accessible to the line of the proposed road.

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The question whether a logging or mining railroad is a common carrier does not depend necessarily on the right to exercise, or the exercise of, the power of eminent domain. At least this is true under some constitutional and statutory provisions.

* * * * *

But the fact that a logging railroad is authorized to exercise the right of eminent domain may apparently be a factor in reaching the conclusion that it is a common carrier.

* * * * *

And the fact that a lumber company which operates a logging railroad has never exercised the right of eminent domain, and does not claim that right, will not preclude its being a common carrier if its conduct otherwise stamps it as such.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

CONDEMNATION LAW AND PROCEDURE

No. 5. The Right to Immediate Possession

BACKGROUND

Section 14 of Article I of the California Constitution grants to certain specified public agencies the right to take possession of property sought to be condemned immediately upon commencement of eminent domain proceedings, or at any time thereafter, if the condemnation is for right-of-way or reservoir purposes. The Constitution forbids the taking of possession prior to judgment when the eminent domain proceeding is instituted by a different agency or for a different purpose.

The constitutional provisions authorizing immediate possession require that the condemning agency deposit a sum of money, in an amount determined by the court, sufficient to secure to the owner payment of the compensation he is entitled to receive for the taking "as soon as the same can be ascertained according to law." The Constitution does not require, however, that the deposit or any other sum of money be paid to the owner when the possession of his property is taken or at any other time prior to the judgment.

The statutes implementing the constitutional provision provide that, prior to the taking of possession, the condemner must deposit in court such amount as the court determines to be the "probable just compensation" which will be made for the taking of the property and any damage incident thereto. At any time after the deposit is made, the condemnee may obtain a court order permitting him to withdraw the amount deposited.

RECOMMENDATION

The Commission has concluded that the provisions of Section 14 of Article I of the Constitution that grant the right to take immediate possession should be revised. These provisions severely limit the agencies by and the purposes for which possession prior to judgment may be taken and do not provide adequate guarantees to the property owner whose property is so taken.

The taking of immediate possession of property often benefits both the condemner and the condemnee. Insofar as the condemner is concerned, the right to take immediate possession permits it to follow an orderly and systematic program of property acquisition and project construction. Many public improvements are financed by bond issues, and an undue delay in the acquisition of one essential parcel may delay construction to a sufficient extent that the improvement cannot be constructed at all with the funds realized by a particular bond issue or, at least, must be drastically curtailed in scope. To avoid such a delay, the condemner may be forced to pay the owner of one parcel far more than the property is worth and far more than the owners of the surrounding property received. The right of the condemner to take the property is rarely disputed. In virtually all condemnation actions the only question for judicial decision is the value of the property. But because possession cannot be obtained prior to judgment except in those few instances specified in the Constitution, many vitally needed public improvements are delayed or prevented even though there is no real issue as to the public's right to take the property.

And if the condemnee's right to payment prior to the taking of possession is adequately guaranteed, the taking of immediate possession frequently benefits him as well as the condemner. Upon commencement of condemnation proceedings, a landowner is deprived of many of the valuable incidents of ownership. He

cannot receive any compensation for improvements to the property made after that time. He is precluded, as a practical matter, from selling or renting the property, for few persons wish to purchase a law suit. He is deprived of any increase in the value of his property occurring thereafter, for the condemnation award is based on the value of the property at the commencement of the proceeding. Yet, no compensation is given for these inconveniences. Moreover, because his property is being taken, he must seek out and purchase new property to replace it and prepare to move. At the same time he must incur the expenses attendant upon litigating the condemnation action. While these expenses must be incurred whether immediate possession is taken or not, the landowner receives no compensation until the conclusion of the litigation unless immediate possession is taken. If he has no available funds to meet these expenses, the landowner may be forced to settle for an inadequate amount in order to relieve the immediate economic hardship caused by the condemnation action. Where immediate possession is taken, however, the existing statutory law assures that the condemnee will have available to him an amount fixed by the court as the probable compensation that will be paid in the eminent domain proceeding. This enables the condemnee to go to trial on the issue of value, if he wishes, and still receive sufficient funds to obtain other property while awaiting trial. Condemnees without substantial assets other than the condemned property have found this to be of great assistance in meeting the problems that arise when property is condemned. If the condemnee does not need the money immediately, he may decline to withdraw it from the court, in which case the use of his property by the condemner is compensated for by interest on the final condemnation award computed at the rate of seven percent from the date immediate possession was taken.

Despite the fact that expansion of the right to take immediate possession would provide substantial benefits to both condemners and condemnees, it is difficult to achieve under the existing California constitutional scheme. A constitutional amendment must be submitted to the voters each time any expansion of the right to immediate possession is necessary. In the past, such constitutional amendments have been rejected, possibly because the voters did not fully appreciate the complex factors involved and possibly because previous proposals to expand the right to immediate possession did not include any provision for the payment of compensation to the landowner at the time his property was taken.

If there is to be any substantial improvement in this area of the law, the Constitution should be revised to give the Legislature the power to determine which agencies should have the right to immediate possession and the public purposes for which the right may be exercised. At the same time, the Constitution should be revised to guarantee the property owner that he will actually receive compensation at the time his property is taken. These revisions will make it unnecessary to amend the Constitution every time it is found that the existing immediate possession procedures are faulty and will permit California to follow the trend established in other states, the majority of which are far more liberal than California and allow the exercise of the right to immediate possession for many purposes.

Accordingly, the Commission recommends that Section 14 of Article I of the Constitution of the State of California should be amended as follows:

1. The Constitution should guarantee the owner the right to be compensated promptly whenever immediate possession of his property is taken.

2. The Legislature should be given the power to determine what agencies should have the right to take immediate possession, and the procedure to be followed in such cases, subject to the constitutional right of the owner to be promptly compensated.

, the purposes for which immediate possession may be taken,

3. The phrase "irrespective of any benefits from any improvement proposed by such corporation" should be stricken from the Constitution. This phrase is applicable only to private corporations[2] and precludes such entities, in condemnations for rights of way or reservoirs, from setting off the benefits which would result to the condemnee's remaining land against the condemnee's claim for damages to such land.[3] The phrase is discriminatory in that it is not applicable to unincorporated condemners[4] and may be unconstitutional under the equal protection clause of the Federal Constitution.[5] The phrase is uncertain in meaning, for some courts have held that it merely states a rule that is applicable to all condemners that "general" benefits may not be set off,[6] while others have indicated that it refers to "special" benefits which all other condemners are permitted to set off.[7]

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[2] Moran v. Ross, 79 Cal. 549, 21 Pac. 853 (1889); People v. McReynolds, 31 Cal. App.2d 219, 223, 87 P.2d 734, 737 (1939).

[3] San Bernardino etc. Ry. v. Haven, 94 Cal. 489, 29 Pac. 875 (1892); Pacific Coast Ry. v. Porter, 74 Cal. 261, 15 Pac. 774 (1887).

[4] Moran v. Ross, 79 Cal. 549, 21 Pac. 853 (1889).

[5] See dissenting opinion of McFarland, J., in Beveridge v. Lewis, 137 Cal. 619, 626, 70 Pac. 1083, 1085 (1902), and the opinion of Department Two, referred to in the dissenting opinion of Mr. Justice McFarland, see 67 Pac. 1048 (1902); see also concurring opinion of Beatty, C. J., in Moran v. Ross, *supra* note 4, at 552, 21 Pac. at 959.

[6] Beveridge v. Lewis, *supra* note 5; *cf.* People v. Thompson, 43 Cal.2d 18, 28, 271 P.2d 507, 513 (1954), and People v. McReynolds, 31 Cal. App.2d 219, 223, 87 P.2d 734, 737 (1939).

[7] *Cf.* Collier v. Merced Irr. Dist., 218 Cal. 564, 571, 2 P.2d 790, 795 (1931); People v. McReynolds, *supra* note 6.

It is important to note that the adoption of the proposed constitutional amendment would make no extension in the right to immediate possession for no change is made in the existing statutes which limit the right to immediate possession to those agencies and purposes now specified in the Constitution. The constitutional amendment would merely permit the Legislature to determine when an extension or contraction of the purposes for which the right to immediate possession may be exercised is warranted and when this power should be extended to or taken away from particular agencies.

RECOMMENDED CONSTITUTIONAL AMENDMENT

The Commission's recommendation would be effectuated by the adoption of the following constitutional amendment:

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 second day of January, 1961, two-thirds of the members elected to each of the two houses of the Legislature 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 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~~ *Such just* 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. *The Legislature may by statute authorize the plaintiff in a proceeding in eminent domain to take immediate possession of and title to the property sought to be condemned, whether the fee thereof or a lesser estate, interest or easement be sought, and may by statute prescribe the manner in which, the time at which, the purposes for which, and the persons or entities by which, immediate possession of property sought to be condemned may be taken. Any such statute shall require that the plaintiff shall first deposit such amount of money as the court determines to be the probable just compensation to be made for the taking and any damage incident thereto and that the money deposited shall be paid promptly to the person entitled thereto in accordance with such procedure and upon such security as the Legislature may prescribe.* ~~; 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 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.