

Memorandum 68-53

Subject: Study 36 - Condemnation Law and Procedure (The Condemnor's Privilege to Enter, Survey, and Examine Property)

At the April meeting, the Commission considered Professor Van Alstyne's suggestion (discussed in Memorandum 68-42) that a general statute be developed based on Section 1242.5 of the Code of Civil Procedure. The Commission discussed several difficulties that would be encountered and noted the public agencies' lack of enthusiasm for any significant changes in this limited corner of condemnation and inverse condemnation law.

The Commission, however, did direct the staff to:

(1) "Modernize" without substantive change the longstanding authorization conferred on condemnors to enter and survey now provided by Section 1242 of the Code of Civil Procedure;

(2) Retain without substantive change the deposit-and-court-order-system now provided by Section 1242.5 of the Code of Civil Procedure for surveys and explorations in cases of takings by public entities "for reservoir purposes"; and

(3) To prepare, for purposes of consideration at this meeting, a statute that would expressly recognize liability on the part of public entities for any "actual damage" or "substantial interference" with use or possession incident to a privileged entry and exploration, survey, or the like.

Included with this Memorandum is a draft tentative recommendation that might be a useful starting point if the Commission takes the view that a statutory provision should be formulated to state the liability

that now exists under the decisional law of "inverse condemnation." The staff believes, that there is a value, especially in this field of law, in statutory provisions directly covering a discrete group of factual situations, even though the rule of the particular provision could be derived from the interaction of other statutory provisions or could be gleaned from the case law.

The obvious difficulty in formulating a provision such as the new Government Code Section 815.8 proposed in this draft is that of providing meaningful "standards." It may be possible to improve upon this draft in this respect, but the Commission should recognize that it probably will be impossible to formulate a section that will specify, with any great precision, the specific activities or harmful results that give rise to liability. Nonetheless, the staff is of the view that the provision is desirable inasmuch as the Commission's and Legislature's effort in connection with the law of inverse condemnation is to ameliorate the existing state of affairs under which compensability is governed by a nebulous interaction of sovereign immunity, the constitutional assurance of just compensation, and the lack of any legislative voice addressed to the particular problem.

Whatever the Commission's view as to amending the Government Code, we probably should disseminate a tentative recommendation stating that we have considered Sections 1242 and 1242.5 and that we have tentatively concluded that those sections should be continued without substantial change. If that course brought forth no substantial criticisms, we would at least have cleared the way for disposition of those two sections in our revision of Title 7 (Sections 1237-1268) of the Code of Civil Procedure.

Respectfully submitted,

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May 1, 1968

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

THE CONDEMNOR'S PRIVILEGE TO ENTER, SURVEY, AND
EXAMINE PROPERTY

CALIFORNIA LAW REVISION COMMISSION
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WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE CONDEMNOR'S PRIVILEGE TO ENTER, SURVEY, AND

EXAMINE PROPERTY

BACKGROUND

Since the adoption of the Code of Civil Procedure in 1872, Section 1242 has authorized any condemnor to enter land it is contemplating acquiring and to "make examinations, surveys, and maps thereof." This longstanding privilege may be invoked before commencement of the condemnation proceeding or even before the adoption of any resolution relating to the proposed taking. The obvious purpose of the privilege is to enable the would-be condemnor to determine the suitability of the property for acquisition.

Section 1242 does not require any formalities such as notice to the property owner or a preliminary court order. Although the question appears never to have reached the appellate courts, presumably the condemnor could invoke the court's assistance in exercising the privilege by way of a writ of assistance or other appropriate process.

Over the years, the appellate courts have displayed some difficulty in justifying the privilege conferred by Section 1242. In early decisions, the privilege was justified as a means of obtaining the property descriptions and other data necessary for the condemnation proceeding¹

1. See San Francisco & San Joaquin Valley R. Co. v. Gould, 122 Cal. 601, 55 Pac. 411 (1898).

and of complying with the statutory admonition that any public improvement "be located in the manner which would be most compatible with the greatest public good and the least private injury."² These justifications and others are insufficient in any case in which the entry and activities are considered to be a taking or "damaging" of property within the meaning of Section 14 of Article I of the California Constitution. Even though the condemnor may contemplate the total restoration of the property or the payment of damages, no condemnation proceeding has been commenced and compensation has not been "first made to or paid into court for the owner" as required by that section.

This problem was dealt with definitively in the leading case of Jacobsen v. Superior Court.³ The proposed entry in Jacobsen involved the occupation of the owner's property for some two months by employees of a municipal water district, and the use of power machinery to make a number of test borings and evaluations of the soil to determine the suitability of the premises for use as a reservoir. The court held that the entry should be enjoined and that the privilege conferred by Section 1242 extends only to "such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as

2. See Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604 (1891). This requirement of proper location, as stated in Section 1242, is now considered to be one of the elements of "public necessity" that must be shown in the condemnation proceeding or, more typically, by the condemnor's resolution to condemn. See Code of Civil Procedure Section 1241(2) and Sparrow, Public Use and Necessity, in California Condemnation Practice (Cal. Cont. Ed. Bar 1960) 133, 150. This fragment of Section 1242 should therefore be removed to paragraph 2 of Section 1241.

3. 192 Cal. 319, 219 Pac. 986, 29 A.L.R. 1399 (1923).

would not, in the nature of things, seriously impinge on or impair the rights of the owner to the use and enjoyment of his property."

The holding in the Jacobsen case has been partially overcome by a special statutory procedure, provided in 1959, by enactment of Section 1242.5 of the Code of Civil Procedure. Section 1242.5 is limited to public entities that have the power to condemn land "for reservoir purposes." The section is also limited to cases in which the public entity "desires to survey and explore certain property to determine its suitability for such purposes." In these cases, if the public agency cannot obtain the consent of the property owner, the agency may petition the superior court for an order permitting an exploratory survey. The order, however, must be conditioned upon deposit with the court of cash security, in an amount fixed by the court, sufficient to compensate the owner for damage resulting from the entry, survey, and exploration, plus costs and attorney's fees incurred by the owner. Although the section does not explicitly so provide, Section 1242.5 seems to authorize recovery by the property owner for "any damage caused by the [public entity] while engaged in survey and exploration on his property."⁴

In addition to Sections 1242 and 1242.5 of the Code of Civil Procedure, many California statutes authorize public officials to enter private property to conduct inspections, investigations, examinations, or similar activities. Most of these statutes, of course, have nothing to do with the acquisition of property for public use or the location

4. The application and procedure of Section 1242.5 appears to have reached the appellate courts in only one instance. In Los Angeles v. Schweitzer, 200 Cal. App.2d 448, 19 Cal. Rptr. 429 (1962), the court held the order authorizing entry, survey, and exploration to be nonappealable. The decision, however, discusses the application of the section and the right of the property owner to recover damages.

or construction of public improvements. Moreover, most of them do not contemplate the kind of entry or type of investigatory activities that would, in any likelihood, cause appreciable damage to property or significant interference with the owner's use and possession. Typical provisions of this type are contained in the Agricultural Code, the Business and Professions Code, and the Health and Safety Code, and authorize the entry of public officers to inspect for health and safety menaces or for violations of regulatory legislation. These statutes were catalogued and considered by the Law Revision Commission in its study of governmental tort liability.⁵ At the other end of this spectrum of statutes, however, are provisions that seem to contemplate a substantial amount of activity upon the property to which entry is privileged. For example, special district laws, especially those creating or authorizing the creation of water districts, irrigation districts, and flood control districts, typically authorize the district ". . . to carry on technical and other investigations of all kinds, make measurements, collect data, and make analyses, studies, and inspections, and for such purposes to have the right of access through its authorized representatives to all properties within the district."⁶ These district laws also typically repeat the authorization conferred by Code of Civil Procedure Section 1242 to enter, survey, and examine property being considered for acquisition.

5. See Van Alstyne, A Study Relating to Sovereign Immunity, 5 California Law Revision Comm'n Reports 1, 110-119.

6. Most of the statutes are cited at page 11 of the study cited in Note 5.

The law applicable to any damages that may result from these official entries and investigatory activities was partially clarified by the governmental tort claims provisions added to the Government Code in 1963. Section 821.8 provides that:

A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law.

That section, however, also states that:

Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission.

The public entity or agency itself gains a parallel immunity through Government Code Section 815.2(b), which provides that:

Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

This statutory immunity of both the public officer and his employing public entity from tort liability, however, does not absolve the public entity from "inverse condemnation" liability for substantial damage. Statutes authorizing privileged trespasses on private property have been held valid,⁷ but their constitutionality has been predicated upon the courts' view that the interference with property rights that they authorize ordinarily is slight in extent, temporary in duration,

7. See *Irvine v. Citrus Pest Dist.* No. 2 of San Bernardino County, 62 Cal. App.2d 378, 144 P.2d 857 (1944); Annot., 29 A.L.R. 1409 (1924).

and de minimis as to the amount of actual damages.⁸ Thus, under existing law, while it is clear that the entry itself under Section 1242 of the Code of Civil Procedure or any of the other statutes authorizing entry for investigatory purposes is privileged and therefore non-tortious, it remains for the decisional law to declare the quantum of damage or harm that may result without giving rise to injunctive or other specific relief or to recovery in inverse condemnation.

In its continuing study of condemnation law and procedure and inverse condemnation liability, the Law Revision Commission has considered several alternatives to the existing statutory pattern that governs the entry upon private property for purposes of survey, exploration, and the like. In particular, the Commission has considered the suggestion that Section 1242.5 of the Code of Civil Procedure be used as a starting point for formulation of a more generalized legislative approach to the compensation of property owners who may incur substantial damage from privileged official entries upon their property.⁹ The Commission has recognized, however, that there are many types of entries and investigations that can be made, and should be made, without any significant interference with the property or the owner's rights. In these cases, to require the formality of a preliminary court order would be unduly burdensome, time consuming, and unrewarding, as well as constitutionally

8. See Jacobsen v. Superior Court, 192 Cal. 319, 219 Pac. 986 (1923), approved in this connection in People ex rel. Dept. of Pub. Works v. Ayon, 54 Cal.2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960), and Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597 (1947).

9. See Van Alstyne, Exploratory Surveys and Investigations (an unpublished study in inverse condemnation liability prepared for the California Law Revision Commission).

unnecessary. It would also be necessary to develop statutory criteria limiting invocation of the broadened procedure under this revision of Section 1242.5 to those cases in which its safeguards are needed, but dispensing with the procedure in other cases. The Commission has also taken notice of the view expressed by various public agencies that there is no need, in their experience, for a general statute based on Section 1242.5. The Commission has also taken into account the possibility that it may be undesirable public policy to extend in any way the authorization to enter upon and interfere with property before the commencement of formal condemnation proceedings.

The Commission has also considered an alternative suggestion that, in its recommended revision of the condemnation procedure statutes (Code of Civil Procedure Sections 1237-1268), Section 1242.5 be generalized to make its deposit-and-court-order system available whatever the character of the condemnor or the purpose of the contemplated acquisition. Unlike the previously mentioned alternative, this proposal would make the broadened section apply only to entry and investigation to determine the suitability of the property for acquisition for public use and not to any other entries or investigatory activities. Under this approach, however, it probably would be desirable to also retain the much simpler authorization now provided by Section 1242. It seems reasonable that condemnors should be permitted, without formalities, to enter, survey, examine, and make maps of property contemplated for public acquisition, so long as the entry involves no substantial damage to the property or interference with the rights of the owner.

Again, however, it would be necessary to delineate between the cases in which entry could be made under Section 1242 and those in which resort would have to be made to the procedure provided by the revised Section 1242.5. And, as noted in connection with the first mentioned alternative, the representatives of the public agencies report that they have had no significant difficulty in obtaining the consent of property owners for the great bulk of the necessary survey work accomplished by them.

RECOMMENDATION

The Commission has tentatively concluded that the most appropriate disposition of Sections 1242 and 1242.5 of the Code of Civil Procedure, of Government Code Section 821.8, and of the problem of inverse condemnation liability in connection with official entries would be as follows:

1. The authorization now contained in Section 1242 of the Code of Civil Procedure for a condemnor to enter upon and examine property that it contemplates acquiring should be continued in existence in any revision of California's condemnation procedure statutes. The archaic language of the section should be modernized and the requirement as to the location of public improvements should be moved to another appropriate place in the Code. The revision of the section should not undertake to specify the extent of the interference with property rights that is authorized by the section. The section should state, however, that as to any damages that may arise from the entry and activities under the section:

(a) The liability of a public entity is governed by the new section of the Government Code discussed below.

(b) That the liability of any condemnor other than a public entity is the same as that of a public entity under the new section of the Government Code discussed below.

2. Section 1242.5 of the Code of Civil Procedure should be retained without substantial change. However, an additional provision should be added to the section to specify that the liability of a public entity for any damages arising from an entry authorized by the section is determined by the new section of the Government Code discussed below.

3. A new Section 815.8 should be added to the Government Code to specify that, notwithstanding Section 821.8, in connection with any entry upon private property to conduct surveys, explorations, or similar activities, a public entity is liable for "actual damage" to property or for "substantial interference" with the owner's use or possession. The section should expressly state that, where the entry and activities are authorized by law, there is no liability for (1) the entry itself or for the superficial examination, testing, measurement, or marking of property; or (2) trivial injuries or inconsequential damages such as superficial disturbance of grass or other vegetation, or the taking of minor samples, or the placing of markers as is done in connection with aerial surveys; or (3) for transient, slight, temporary, interference with the owner's use and possession of the property that is reasonable under the circumstances of the

particular case. The section should not broaden or otherwise change any of the existing statutory authorizations to enter and to engage in investigatory activities. The effect of the section should be limited to stating explicitly and in convenient form the "rule of reason" that now prevails under decisional law as to liability for interference with property rights that goes beyond "innocuous entry" and "superficial examination." The section should not undertake to specify whether the liability it recognizes is "in inverse condemnation" or "in tort," as that distinction, if it should be of any consequence, can be made by the court in the particular case under the guidelines provided by existing decisional law.

RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following statutory provisions.

Government Code - The California Tort Claims Act of 1963

Section 815.8 (added)

815.8. (a) Notwithstanding Section 821.8, a public entity is liable for actual damage to property or for substantial interference with the owner's possession or use of property where such damage or interference arise from entry upon property by employees of the public entity to conduct surveys, map-making, explorations, examinations, tests, drillings, soundings, appraisals, or related activities.

(b) Where the entry and activities mentioned in subdivision (a) are expressly or impliedly authorized by law, the public entity is not liable for:

- (1) The entry upon, or superficial examination, testing, measurement, or marking of, property.
- (2) Trivial injuries to property or damages that are inconsequential in amount.
- (3) Interference with the possession or use of the property that is slight in extent, temporary in duration, and reasonable and necessary under the circumstances of the case.

Section 815.8 (added)

Comment. Section 815.8 is added to clarify the application of Division 3.6 (Sections 810-996.6) to claims for damages that may arise from entries upon property by public employees and their conducting of investigatory activities. In general, this section codifies the existing decisional law that gives content, as to these entries and activities, to the assurance of Section 14 of Article I of the California Constitution that compensation will be made for the "taking" or "damaging" of property. See Jacobsen v. Superior Court, 192 Cal. 319, 219 Pac. 986, 29 A.L.R. 1399 (1923).

This section does not authorize any entry upon property or the conducting of investigatory activities. Rather, the section provides a "rule of reason" to govern the liability of the public entity where such entries and activities are authorized by other statutory provisions. In addition, this section is not intended to delineate the scope of the activities that may be conducted under statutory provisions that authorize such entries, nor is the section intended to "cure," by providing for the recovery of damages, any constitutional infirmity that may inhere in any such statute.

This section does not characterize the liability it imposes as being "in tort" or "for inverse condemnation," and leaves the maintenance of that dichotomy, as to any cases in which it may be significant, to the decisional law. Similarly, as to those cases in which a condemnation proceeding eventually is filed to take the property, or a portion of it, this section does not affect the question whether the damages mentioned in this section may be recovered

by answer or cross complaint in the condemnation proceeding or must be recovered by separate action. See People ex rel. Dept. of Pub. Wks. v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967).

Section 821.8 exonerates a public employee from liability for an injury "arising out of his entry upon any property" where the entry is authorized by law. Subdivision (b) of Section 815.2 exonerates the public entity itself where its employee is immune from liability. Section 818 exonerates public entities from liability for exemplary or punitive damages in all cases. This section does not affect the operation of these other sections except insofar as the rule of liability provided by this section necessarily affects the interpretation of the phrase "injury arising out of . . . entry upon any property" in Section 821.8.

In imposing liability for "actual" damage to property and for "substantial" interference with possession and use of the property, this section provides only a general standard that must be applied with common sense to the facts of the particular case. The term "actual damage" is commonly used in similar statutory provisions in other states. See, e.g., Kans. Stat. Ann. § 68-2005 (1964); Mass. Laws Ann. c. 81, § 7F (1964); Ohio Rev. Code Ann. § 163.03 (Supp. 1966); Okla. Stat. Ann. tit. 69 §§ 46.1, 46.2 (Supp. 1966); Pa. Stat. Ann. tit. 26 § 1-409 (Supp. 1966). Judicial decisions from other states have also given sensible applications to the phrase. See, e.g., Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So.2d 546 (1962). A specific consequence of the use of the term "actual" is to preclude recovery of the purely "nominal" or

"constructive" damages that are presumed in tort law to flow from any intentional tort.

Use of the term "substantial interference" recognizes that any entry upon private property causes at least a minimal "interference" with the owner's use, possession, and enjoyment of that property. The very presence upon property of uninvited "guests" would be deemed by some property owners to be an interference with their property rights. The phrase "substantial," however, is intended to exclude liability for entries and activities that, to quote the leading California decision (Jacobsen v. Superior Court, supra), "would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property."

In subdivision (b), the three stated exclusions from liability merely clarify the terms "actual damage" and "substantial interference" in subdivision (a). The first exclusion provides an immunity for the entry itself, which might otherwise be deemed an actionable "trespass." It also provides an immunity for "superficial" examinations of either real or personal property. The term "superficial," for use in this connection, was coined by the court in the Jacobsen decision. The "marking" of property is sometimes both reasonable and necessary as in the case of the setting of surveyor's flags or in the placement of markers in aid of aerial surveys.

The second exclusion is for "trivial" injuries and "inconsequential" damages. It is intended to be ~~at~~ least as broad as the decisional law rule of "de minimis" damages. The term "trivial" has been used by the courts of other states in applying comparable statutory provisions

(see Onorato Bros. v. Massachusetts Turnpike Authority, supra) and has been applied to such "injuries" as the setting of surveyor's stakes and the suppression of grass or other vegetation.

The third exclusion requires the court, in determining whether an interference with the owner's use or possession of his property is compensable, to take into account the extent or pervasiveness of the disturbance of those privileges, the temporal duration of the interference, and the reasonableness and necessity of the disturbance under the facts of the case. Although it is impossible to provide any exact standard that would govern all cases or any significantly large grouping of cases, the mentioned factors are those that have been emphasized by the courts in the absence of statute. See Jacobsen v. Superior Court, supra.

Title 7 of Part 3 of the Code of Civil Procedure

Eminent Domain

Section 1242 (amended)

~~1242. In all cases where land is required for public use, the State, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of Section 1247. The State, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof.~~

1242. (a) In any case in which property may be taken for public use, agents or employees of the entity, agency, or person having the power of eminent domain may enter upon the property and conduct surveys, map-making, and examinations to determine the suitability of the property for acquisition for public use.

(b) The liability, if any, of a "public entity," as defined in Section 811.2 of the Government Code, for any damages that arise from the entry and activities mentioned in subdivision (a) is determined by Section 815.8 of the Government Code.

(c) Any person that has the power of eminent domain, other than a "public entity" as defined in Section 811.2 of the Government Code, shall be liable for any damages that arise from the entry and activities mentioned in subdivision (a) to the same extent that a public entity is liable for such damages under subdivisions (a) and (b) of Section 815.8 of the Government Code.

Section 1242.5 (amended)

[Retain entire existing section and
add at end as third paragraph]

The liability of the State, county, city, public district,
or other public agency for damages arising from an entry,
survey, or exploration authorized by this section, is determined
by Section 815.8 of the Government Code.